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International Arbitration Report

International Arbitration Experts Discuss The Most Significant Development In 2019

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Commentary

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on the most significant development in international arbitration in 2019. We would like to thank the following individuals for sharing their thoughts on this important issue:

- Peter McMaster, partner and head of the Dispute Resolution practice, Appleby, Grand Cayman, Cayman Islands
- David Lee, partner, Appleby, Grand Cayman, Cayman Islands
- Sebastian Said, partner, Appleby, Grand Cayman, Cayman Islands
- B. Ted Howes, partner, Mayer Brown, New York
- Lisa Houssiere, principal, McKool Smith, Houston
- Charlie Lightfoot, co-chair of International Arbitration Practices and managing partner, Jenner & Block, London
- Kimberly Taylor, senior vice president and chief legal and operating officer, JAMS, Irvine, Calif.

Mealey's: What development in 2019 do you believe was most significant and why?

McMaster, Lee and Said: The Cayman Islands has long been known as a judgment creditor friendly jurisdiction with an effective and reliable award enforcement regime. In the last year, we have seen an increase of Cayman enforcement cases which are part of wider multi-jurisdiction enforcement exercises. This has led to increased sophistication within the judiciary in

dealing with such exercises — including an understanding that enforcement efforts in one jurisdiction need to dovetail with efforts in others to be effective. Overall, there can be seen a clear willingness on the part of the judiciary to further multi-jurisdictional enforcement efforts, particularly where deliberate steps to avoid enforcement by the judgment debtor are apparent (see the recent case of ArcelorMittal USA LLC v. Essar Global Fund Limited and Essar Capital Limited (FSD 2 of 2019, Kawaley J, 29 March 2019, unreported). This trend is welcomed and will further the reputation of the Islands as a jurisdiction where high-value, hard-fought multi-jurisdictional enforcement exercises will produce results.

Howes: The most significant developments in international arbitration this year probably took place in Europe, in particular, the potential impact of the CJEU decision in Slovak Republic v. Achmea BV on intra-European BIT arbitrations. As an American practitioner, I wish to highlight a significant — and troubling — development in the judicial interpretation of 28 U.S.C. § 1782 (a), the statute that authorizes U.S. courts to order discovery “for use in a proceeding in a foreign or international tribunal.” Heretofore, the federal circuit courts of appeal, including the Second and Fifth circuits, have interpreted the word “tribunal” in Section 1782(a) to apply solely to “governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.” In September 2019, however, in Abdul Latif Jameel Transportation Company v. FedEx Corp., the Sixth Circuit held that the phrase “tribunal” also covers private commercial arbitration tribunals.

In practice, the Sixth Circuit's interpretation of Section 1782(a) means that parties to a private commercial arbitration abroad can try to use the U.S. courts to gain

broad U.S.-style discovery (including depositions) from parties located in the U.S., including American companies that are party to the arbitration, not to mention their U.S.-based officers and affiliates. If left unrectified, this ruling would create an uneven playing field for American parties to international arbitration, as American parties would not have the same opportunity to take equivalent discovery from their foreign-based adversaries. This ruling could also open international arbitration to the floodgates of U.S.-style discovery, a prospect that is ripe for abuse.

Keeping perspective, Section 1782(a) still affords the courts substantial discretion on whether to order discovery and only the Sixth Circuit has ruled this way to date. That said, I hope that the Supreme Court will step in to reject the Sixth Circuit's interpretation. If not, only Congress can fix the double standard resulting from the statute.

Houssiere: On Jan. 1, 2019, the International Chamber of Commerce's (ICC) "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" (the Note) entered into effect, providing parties and tribunals with additional practical guidance on ICC arbitrations. Perhaps most salient and controversial, paragraphs 40-46 of the Note provide that ICC awards made as of Jan. 1, 2019, may be published in their entirety two years after the date of notification of the final award. This is a significant shift from the previous ICC position in which the ICC published anonymized extracts of select awards and procedural orders three years after the close of proceedings. There is no provision in the Note allowing for published awards to be withdrawn from the ICC database, so the onus is on the parties to take a proactive approach to opt out of publication before it is too late. In that regard, parties may object to publication altogether, or require that any award be in all or part anonymized or pseudonymized.

This change is the result of the ICC's commitment to disseminate information about arbitrations to facilitate global commerce and the development of a uniform body of international law. The ICC has recognized that "[t]ransparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism." Indeed, access to published awards would enable parties to have more certainty and clarity about how certain procedural

and substantive legal issues are resolved in arbitrations conducted under the auspices of the ICC. By publishing awards, arbitrators' work would become more visible, which in turn would allow more informed arbitrator selection decisions and bolster arbitration users' confidence in the arbitral process.

While the ICC's focus on transparency is laudable, transparency must be weighed against the parties' expectations of having their disputes remain confidential. Consequently, parties wishing to maintain confidentiality of an arbitral proceeding should expressly include a confidentiality provision as part of their arbitration agreement, or failing that, opt out of publication.

Lightfoot: On Oct. 24, 2019, the European Commission announced that EU Member States had reached agreement on a plurilateral treaty for the termination of intra-EU bilateral investment treaties (BITs). The announcement came 19 months after the CJEU handed down its decision in *Achmea* and nine months after Member States issued declarations stating their intention to terminate all intra-EU BITs by the end of 2019.

The draft treaty (which was endorsed by all but a "*small minority*" of Member States) provides that all intra-EU BITs currently in force are "*terminated*," as are their sunset clauses (and sunset clauses in previously terminated intra-EU BITs) which "*shall not produce legal effects*."

Whilst the treaty will not impact proceedings finally concluded before the *Achmea* decision of March 2018 (where the award was executed prior to that date, or set-aside or similar proceedings have been exhausted), it will affect pending proceedings initiated prior to March 2018 and proceedings initiated on/after March 2018.

For investors engaged in pending proceedings initiated prior to March 2018, the treaty will provide for a settlement procedure to be overseen by an "*impartial facilitator*" (provided certain conditions are met). Alternatively, investors may be able to bring their claims before domestic courts. Investors who initiated proceedings on/after March 2018 will not have the same protections; the draft treaty simply states that arbitration clauses in intra-EU BITs "*shall not serve as legal basis*" for such proceedings.

According to its recitals, the treaty will not apply to intra-EU disputes under the Energy Charter Treaty (ECT), which is to be dealt with “*at a later stage.*”

Following the treaty’s entry into force, intra-EU BIT arbitrations will be a thing of the past and the landscape of EU investment treaty arbitration will alter significantly. We may see, for example, more investors attempting to bring their claims under the auspices of the ECT (whilst they still can).

Taylor: While arbitration has long been used as a dispute resolution mechanism worldwide, it wasn’t until the early 1920s that countries around the world began to create laws requiring enforcement of arbitrators’ awards. In 1925, the United States Congress enacted the Federal Arbitration Act, a strong endorsement of arbitration and recognition of its benefits. Approximately 30 years later, in 1958, the United Nations adopted the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which was later added to the Federal Arbitration Act.

The New York Convention provides a reliable framework to resolve international disputes by arbitration as well as the ability to enforce an arbitration award across jurisdictions. At the time of its adoption, only 10 countries agreed to join. In the ensuing years, arbitration has become a regular method of dispute resolution for domestic and cross-border business conflicts among parties residing in the 160 countries that are now signatories to the New York Convention.

Mediation—which provides parties greater control over the outcome, has the opportunity to preserve relationships, maintains confidentiality and provides efficiency and cost savings—has long been a favored method of dispute resolution in the United States and other countries, but its usefulness to resolve cross-border disputes has been questioned because of uncertainty regarding whether mediated settlement agreements can be enforced in foreign jurisdictions.

Recognizing the benefits of mediation to resolve cross-border disputes, the United Nations Commission on International Trade Law (UNCITRAL) convened its Working Group II approximately five years ago to consider the creation of an instrument similar to the New York Convention that would ensure that these cross-border mediated settlements are enforceable across jurisdictions. In December 2018, the United Nations General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention.

The Singapore Convention, which allows a party seeking to enforce a settlement agreement to apply directly to the courts for enforcement without the need for a new action, is a natural complement to the New York Convention. It remains to be seen which countries beyond the current 51 will sign on to the Singapore Convention, but it has the potential to create the same kind of paradigm shift that resulted from the New York Convention. ■

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