



# ARBITRATION BULLETIN

2008 - Issue 1

### FOREWORD

I am particularly happy to have commenced my renewed association with Chambers to act as an arbitrator at the very time when the arbitration team are issuing this first Arbitration Law Bulletin.

For many years, whilst I was in practice, a number of people in Chambers acted as both arbitrators and as counsel in a wide range of arbitrations. It is particularly gratifying to have returned to find work has continued in that area of practice. Members of the team have been commissioned by Cambridge University Press to produce a text book entitled *Settlement of Investment Disputes under the Energy Charter Treaty*. The authors are **Thomas Roe** and **Matthew Happold**. **James Dingemans QC** is consulting editor. There is a growing volume of arbitration work arising out of contracts in connection with energy and resources and this book will serve as an invaluable guide in that area.

The extent of the developing depth of experience in Chambers fully justifies this new commitment to providing a regular bulletin on a variety of aspects of the law in this field. I look forward to being directly involved.

**Sir George Newman**

### IN THIS ISSUE

Particular areas of arbitration law and practice covered in this Bulletin include:

- interim and conservatory measures of relief in international arbitration;
- evaluations of the Sports Dispute Resolution Panel;
- an update on anti-suit injunctions;
- when defects in arbitrators' appointments render awards a nullity;
- 'Provisional application' under the Energy Charter Treaty;
- sources of law in international arbitration; and
- arbitration and the EC Judgments Regulation

We hope that you find this Bulletin interesting. As ever, we would welcome your feedback. If you would like to receive further copies, or to register to receive further issues, please contact Liz Heathfield, our Marketing Director.

**Tom Poole**, Editor

## INTERIM AND CONSERVATORY MEASURES IN INTERNATIONAL ARBITRATION

By Aidan Casey



Today, the availability of interim and conservatory measures of relief is vital to both the protection of the arbitral process and the enforcement of the final award. As such, four broad varieties of interim measures exist, those (a) to prevent irreparable harm; (b) to preserve evidence; (c) to facilitate the enforcement of the award; and (d) aimed at facilitating the production of evidence.

Modern arbitration laws, international conventions and institutional rules increasingly recognise that courts and arbitral tribunals possess concurrent jurisdiction to order provisional or protective measures (in a departure from the principle espoused in *McCreary & Tire & Rubber Co. v. CEAT S.p.A* 501 F 2d (3d Cir. 1974)). Indeed, the privity of arbitration agreements makes concurrent jurisdiction a necessity. Arbitrators will lack imperium and recourse to protective measures will, at times, necessarily lie with the court of the seat applying the *lex arbitri*.

However, to the busy practitioner, it is not always straightforward to determine when an application should be made directly to the competent court or, at least in the first instance, to

the arbitration tribunal. It is increasingly the case that the answer will rest upon two principal factors.

### (1) Institutional Rules

Despite many commonalities between the major institutional Rules, there remain substantive differences in the interim powers each grants to the tribunal.

The wording of Article 26 of the UNCITRAL Rules, for example, refers only to “measures ... necessary in respect of the subject-matter of the dispute”. Its narrow construction appears to prevent tribunals from making *any* provisional or conservatory measure properly required in the circumstances, and has been the subject of fierce debate in recent years. The wording, though, is not surprising when one considers that the UNCITRAL Rules themselves grew out of an expectation that arbitrations would concern international trade; hence the measures related to “the conservation of ... goods” in Article 26.

However, to emphasise the importance of choosing the most appropriate Rules, both the Model Law and the ICC Rules speak more generally. Article 17 of the Model Law refers more widely to “interim measure[s] of protection ... in respect of the subject-matter of the dispute”, whilst Article 23 of the ICC Rules allows the tribunal to “order any interim or conservatory measure it deems appropriate”.

But, even between the ICC Rules and the Model Law there exist differences. The ICC Rules do not

require that the measures concern “the subject-matter of the dispute”. Thus, provided that there is a sufficient connection with the arbitration, the arbitral tribunal’s authority may extend to other matters of an interim or conservatory nature.

## (2) Lex Arbitri

In any case, even where institutional Rules are adopted, the mandatory laws of the seat will apply. These laws customarily delineate the powers of the tribunal and the competent court. The English Arbitration Act 1996, for instance, acknowledges at s.38 the tribunal’s ability to bind only parties appearing before it, but nevertheless allows it this power. It further supports the tribunal’s position at s.44, by outlining when a court will intervene, limiting involvement to “the extent that the arbitral tribunal ... has no power or is unable for the time being to act effectively”.

Whilst most practitioners will appreciate the enlightened approach of the 1996 Act, the same cannot be said for the mandatory laws of all countries. For example, under Article 818 of the Italian Code of Civil Procedure, “[t]he arbitrators may not grant attachment or other interim measures of protection”. Elsewhere in Europe, the Greek (Article 685) and Austrian (Article 589) Codes of Civil Procedure are similarly outmoded. Indeed, the same was true for Switzerland as recently as 1989.

Where applications to the competent court are unavoidable, a further issue to consider is the domestic pressures (often political) which are

exerted upon local courts. The effect of this pressure is no more pronounced than in cases where one of the parties is a state entity appearing before its local court. The facts of a line of cases, including *Himpurna California Energy Ltd. v. PLN* (25 Y.B. COM. ARB. 13 (2000)), are indicative of the problems foreign parties can encounter in appearing before some local courts.

## Conclusion

Given the importance of interim and conservatory measures, it seems clear that parties and those advising them must be aware of the impact of their choices (a propos institutional Rules, place of arbitration and applicable law) on (1) the powers that the tribunal will have to order protective measures prior to rendering a final award; and (2) the extent to which the arbitral process will be insulated from external “supervision”.

## KEEPING SPORT ON TRACK

*By Rupert Butler*



Since sport stopped being just about recreation and became big business, there has been tension between Corinthian casuals and hard-nosed capitalists, but the challenge of providing effective dispute resolution outside the courts has

been answered by the Sports Dispute Resolution Panel (“SDRP”).

Disputes not only detract from the enjoyment of those participating in sport, but when they result in litigation they drain valuable, often limited, resources from both athletes and National Governing Bodies (“NGBs”). Those few sports that can cash-in on lucrative broadcasting rights remain wealthy but the majority are run on shoestrings. The case of British 400m runner, Diane Modahl, was not only a painful episode but a watershed in British sport as she embarked on a topsy-turvy journey that ended in failure in 1999 when the House of Lords dismissed her claim for compensation from the British Athletics Federation after she successfully cleared her name as a cheat following unreliable tests on a urine sample. The experience nearly finished off both sides financially.

So not entirely by coincidence, opening for business in 1999 and established by the principal sports bodies representing athletes, governing bodies and sponsors, the SDRP was set up to provide an independent, simple and effective mechanism for everyone in sport to resolve their disputes fairly and speedily, without recourse to litigation. It handles disputes in over 50 sports and its members include the British Athletes Commission, the British Olympic Association, and the British Paralympic Association. Originally aimed at resolving disputes in UK sport, increasingly it is being retained by overseas organisations creating a global benchmark.

The range of disputes handled by SDRP is breathtakingly wide and embraces issues of selection, eligibility, discipline, doping, commercial rights, service contracts, and child protection. It is a top-to-toe service from performance athletes down to the grass roots.

SDRP approaches its work from both ends, by reducing the incidence of disputes through the application of best practice as well as through effective mediation and arbitration. NGB’s are encouraged to adopt the SDRP’s model clauses in their athlete agreements and commercial contracts to provide procedures that offer fair, affordable, timely and effective dispute resolution. For instance: the British Olympic Association provides for SDRP arbitration or mediation in its commercial contracts and separately uses SDRP to appoint an independent Chairperson to its Doping Bye-Law Appeals Panel and to provide the administration for that Panel; while the Football Association uses the SDRP to appoint independent legally qualified chairmen to all FA Appeal Boards.

This route to best practice, being adopted by many NGBs, is creating a body of precedents – the best method of avoiding fights is to predict, with reasonable precision, their outcome. SDRP’s database of decisions, to which those subscribing can refer, will help to manage the risk of continued participation in a dispute.

SDRP maintains impressive Panels of Arbitrators and Mediators who have expertise and experience in resolving disputes and in the subjects of the conflicts that come before them,

currently standing at over 200 members, as well as a full-time Secretariat.

Parties can either refer a dispute to the SDRP if provided for in their contract, or through regulations, or by asking the SDRP to take the case as a free-standing reference. On adoption the SDRP can provide advice and assistance to the parties jointly, manage and conduct appeals, and appoint experts or tribunals to hear and determine arbitrations.

To manage referrals, the SDRP has produced its own comprehensive arbitration and mediation procedures. The arbitral procedure is derived from and defers to the Arbitration Act 1996 and embraces the relevant parts of the CPR's case management powers. At the same time, the rules acknowledge that the SDRP procedure may not always be suitable and so they leave the parties with the flexibility to agree their own arbitral process as the case demands.

It is hard to measure the success of the SDRP. The increasing number of disputes referred could reflect a tendency towards sport becoming increasingly contentious off the pitch, or it could reflect that the disputes have always been there, but, until the SDRP there was no effective redress. Either way, the SDRP is keeping sport out of court and that has got to be good for the game.

## ANTI-SUIT INJUNCTIONS: AN EXCEPTIONAL JURISDICTION

By Paul Letman



The latest chapter in *The Republic of Kazakhstan v. Istil Group Inc*, before Tomlinson J, provides interesting further guidance on the proper ambit of judicial restraint of the conduct of international arbitration. Despite the judge's misgivings that the application did not relate to matters within the scope of Part I of the Arbitration Act 1996 ("the 1996 Act"), so that pursuant to s.1(c) the Court may have had no jurisdiction to intervene, the application proceeded on the basis of the concession that, notwithstanding s.1(c), the court retains a residual jurisdiction under s.37(1) of the Supreme Court Act 1981 to intervene by injunction in arbitration proceedings where "it appears to the court to be just and convenient to do so".

It is suggested that the concession was rightly made, not least, as the judge noted, in the light of the Court of Appeal decision in *Albon* [2007] EWCA Civ 1124 (upholding the decision below to grant an anti-suit injunction ("ASI") pending the English Court's decision on the authenticity of the arbitration agreement). Further, it was rightly made on the basis that this is a jurisdiction to be exercised sparingly with due regard to the principles and provisions of the 1996 Act. Indeed reference was made to Judge Stephen

Schwebel's warning (see his address "ASIs in International Arbitration" – Juris Publishing 2003) that for a Court to interfere by injunction with international arbitration proceedings may be in violation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and wrong in principle save perhaps in exceptional circumstances and where that constituted the "optimum procedure".

The ASI was sought here to prevent pursuit of arbitration proceedings against ROK, where a final award in London against ROK had been set aside by David Steele J. The background to that final award is, to say the least, complex. But it is helpful to grasp something of that complexity.

MC entered 3 contracts to purchase rolled steel with a Kazakh organisation S and a Kazakh company O. The contracts contained London Arbitration clauses. MC and its successor Istil contended that S and O acted as agents for K the owners of the steel mill. No steel was ever delivered. ROK passed a decree suspending K's liabilities and subsequently K was privatised allegedly on terms that ROK would discharge the debts and liabilities of K.

French court proceedings directly against ROK failed because it was decided that ROK, not being a party to contracts or the arbitration agreements, was entitled to state immunity. M commenced arbitration proceedings in London. Despite the French decision the arbitrators decided they did have jurisdiction. Their Partial Award to this effect, however, was issued in the name of M, which had by then ceased to exist by

reason of its merger with Istil. By a final award the arbitrators decided their partial award was a nullity because of the merger, but deciding anew that they had jurisdiction, they went on to award Istil some US\$6m plus interest and costs. ROK commenced proceedings (which in due course were to come before Tomlinson J) under s.67 of the 1996 Act to set aside the Final Award. Steele J decided in their favour. It was part of his decision that Istil could not short circuit ROK's jurisdictional challenge to the Final Award by relying on the Partial Award and complaining that the tribunal had exceeded its powers in revisiting that earlier award, because Istil were out of time to make any s.68 challenge.

However, thereafter with the Final Award set aside Istil asserted that this left in place the earlier Partial Award, and they invited the arbitrators to reconvene and make a further substantive award based on the evidence already heard. Istil pursued this line of argument before Tomlinson J, contending that neither David Steele J nor the Court of Appeal (who were troubled on the challenge to Steele J's refusal to grant permission from his own decision), had been concerned with the effect of setting aside the Final Award upon the Partial Award. Unsurprisingly, it might be said, Tomlinson J did not agree. He held, rightly it would appear, that the status of the Partial Award had been central to the debate before Steele J and that it was implicit in his approach that Istil had lost the right to rely upon that first award.

In the light of the above Tomlinson J considered whether he should interfere in the proposed

arbitral process or leave matters to the arbitrators. His judgment does not purport to formulate a general definition of the circumstances in which the court will restrain a party from pursuing arbitration proceedings, save to say that they will be rare. Nonetheless, it is instructive to note how Tomlinson J drew on the notion of optimum procedure identified by Judge Schwebel. Should the arbitrators be troubled again given the supervisory court had already decided they were without jurisdiction, or should ROK be put to yet further costs which they may, as with previous costs, have grave difficulty recovering?

On the basis that it would “at the very least be oppressive, vexatious and in consequence unconscionable” to allow pursuit of the arbitration proceedings Tomlinson J decided that it would be just and convenient and the optimum procedure to grant the ASI sought. Although this presents a high threshold in terms of what is “just and convenient”, it is plainly consistent with the policy of the 1996 Act and the established approach of the Courts in supporting party autonomy and the arbitral process whilst saving it from abuse. Whilst recognising the unusual complexities of the case, therefore, the decision should be noted as a useful addition to the jurisprudence in this area.

## ARBITRATORS’ APPOINTMENTS - THE SUMUKAN REMINDER

*By Tom Poole*



When will the departure from an agreed procedure for appointing arbitrators render an appointment void and leave the arbitral tribunal lacking substantive jurisdiction for the purposes of s.67 of the Arbitration Act 1996 (“the 1996 Act”)?

This question was recently answered by the Court of Appeal in ***Sumukan Ltd. v. The Commonwealth Secretariat (No. 2)*** [2007] EWCA Civ 1148, in what is an important reminder to arbitration practitioners to ensure that arbitration tribunals are properly constituted and challenges to their constitution are taken at the first opportunity.

### Facts

The Commonwealth Secretariat (“ComSec”) entered into a contract for services with Sumukan. This contract contained an arbitration clause, which referred disputes to the Commonwealth Secretariat Arbitral Tribunal (“CSAT”) for settlement by arbitration in accordance with CSAT’s statute (“the CSAT statute”), an internal statute that, amongst other things, made provision for the appointment of tribunal members following consultation with Commonwealth Governments.

A dispute arose and was referred to arbitration by CSAT. The dispute was resolved in ComSec's favour. As well as challenging the arbitration award under ss.68 and 69 of the 1996 Act, Sumukan applied to the Commercial Court under s.67 of the 1996 Act claiming that one of the arbitrators was not validly appointed under the CSAT statute, as there had been a failure to consult with Commonwealth Governments on his appointment, and that non-compliance rendered that arbitrator's participation unlawful and the award a nullity.

The application, attacking the substantive jurisdiction of the arbitrator under s.67 of the 1996 Act, and attacking the award on the basis of irregularity under s.68 of the 1996 Act, came before Toulson J who dismissed them. In short, His Lordship said that Sumukan was bound by the contract it made.

The key issues on the appeal were (1) whether any non-compliance with the CSAT statute affected the substantive jurisdiction under s.67 of the panel that sat and made its award; and (2) if so, whether any failures were cured, or could with reasonable diligence have been discovered by the claimant so as to preclude reliance on them by virtue of s.73 of the 1996 Act.

The Court of Appeal held (Waller LJ, Sir Anthony Clarke MR and Sedley LJ delivering concurring judgments) that the non-compliance with the CSAT statute in the appointment of the President of the tribunal was sufficient to render his participation unlawful and the award a nullity.

## Analysis

Until *Sumukan (No 2)* it has been unclear what degree of non-compliance with an agreed procedure for appointing arbitrators would render an appointment void. It was suggested in *Finzel, Berry & Co v. Eastcheap Dried Fruit Co* [1962] 2 Lloyd's Rep 11 that unless the court was able to construe the disregarded provisions of the procedure in question as mere surplusage, any non-compliance would be sufficient to nullify the award. This was nothing more than the court applying the traditional test for deciding whether there has been a valid reference to arbitration, namely considering whether the contractual provision in question was mandatory or directory, as in the Australian case of *Presbyterian Church (NSW) Property Trust v. Rodean Construction Pty Ltd* [1982] 2 NSWLR 398.

It was argued in *Sumukan (No 2)* that this traditional test should be rejected and instead the court should simply look at the purpose of the provision that has not been complied with, as in another Australian case *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 194 CLR 355, which was followed by the House of Lords in *R v Soneji and another* [2006] 1 AC 340, albeit this was in the context of public law and not arbitration.

Following *Sumukan (No 2)* it seems that questions of surplusage are unlikely to arise. Instead the court will ask itself what were the intentions of the parties when entering into the arbitration agreement. In other words, would the

parties have intended that an award would be declared a nullity if one or both of them failed to comply with a contractual provision relating to the appointment of arbitrators. It is suggested that if the contractual provision in question protects, even to a small degree, the independence of the arbitration panel, it is likely that a failure to comply with such a provision will result in a finding that the arbitral tribunal lacks substantive jurisdiction.

What was interesting in *Sumukan (No 2)* was that the Court of Appeal rejected the argument that the doctrine of de facto authority applied in arbitration to prevent the unsatisfactory situation where an arbitration goes ahead with the costs incurred and the party who loses only takes a point on jurisdiction once they have lost. Their Lordships held that it is s.73 of the 1996 Act that assists in that situation, if it applies, and not an appeal to a de facto principle, which is a remedy of last resort to escape from the ordinary consequences of a defective or non-existent judicial appointment, adopted by the common law in the interests of legal certainty.

It can be seen, therefore, that adherence to an agreed procedure for appointing arbitrators is crucial, as non-compliance can be fatal and will only be saved by s.73 of the 1996 Act.

## SOURCES OF LAW IN INTERNATIONAL ARBITRATIONS

By James Dingemans QC



The decision of the Court of Appeal in *C v. D* [2007] EWCA Civ 1282 provides a timely reminder of the importance of identifying the sources of law in all international commercial arbitrations.

*Black-Clawson v. Papierwerke* [1981] 2 Lloyd's Rep 446 is probably the most important judicial analysis of the sources of law in international arbitrations. Mustill J identified three sources of law: the first was the law governing the agreement; the second was the law governing the agreement to arbitrate and the performance of that agreement; and the third was the law of the place where the reference to arbitration is conducted.

The first source of law (the law governing the agreement) will be the law that determines the merits of the dispute, for example: would a certain step amount to a repudiation of the contract; what terms will be implied into the contract; how are damages to be assessed. Very often the source of this law will be by way of express agreement in the contract. Sometimes it may be pursuant to international conventions establishing the system of arbitration, see for example the Convention on the Settlement of

Investment Disputes between States and Nationals of other States (“the ICSID Convention”).

The second source of law (the law governing the agreement to arbitrate and the performance of that agreement) is a separable and separate agreement in English law, see *Harbour Assurance v. Kansa General International Insurance* [1993] QB 701. Lord Mustill has noted that the law governing the agreement to arbitrate, and the law of the place where the reference to arbitration is conducted, is frequently the same.

The third source is the law governing the seat of the arbitration. It is trite law that each arbitration has to have a seat. So an arbitration to take place in London will be governed by the provisions of the laws of arbitration in England and Wales, and in particular the provisions of the Arbitration Act 1996. These provisions will govern what assistance (if any) can be obtained from the local Courts in relation to procedural matters, and what challenges (if any) will be entertained to any arbitration award.

There are two other “sources of law” that need to be considered in most international arbitrations. The procedural rules of any arbitration provider specified in the underlying contract or adopted by agreement after the dispute has arisen are important. Well known arbitration providers include for example: the International Chamber of Commerce (“ICC”); the London Court of International Arbitration (“LCIA”); and the International Centre for the Settlement of

Investment Disputes. These arbitration providers have made and published rules governing issues of procedure. The importance of these rules is part illustrated by the fact that books have been published dealing with the respective rules, see for example International Chamber of Commerce Arbitration, Third Edition, Craig, Park & Paulsson, or the ICSID Convention, a Commentary, Schreuer (although, as the name suggests, the latter book deals with substantive rights arising under the ICSID Convention as well as procedural rules).

It is sometimes said that there is a further source of law, which is the law of the jurisdiction in which enforcement of any award will be sought. It is certainly important to have a full understanding of where and how any enforcement is likely to take place, and what the relevant local laws provide. However it has always seemed to me to be an overstatement to suggest that this could become a source of law in the arbitration.

In any event the decision in *C v. D* illustrates the distinct importance of maintaining a clear demarcation in relation to each separate source of law. *C v. D* was a case involving a dispute between insured and insurer about whether the insurer was liable to indemnify the insured in respect of certain claims which had been paid by the insured. The insurance policy contained the “Bermuda form”. The Bermuda form requires the parties to arbitrate in London, but provides that the proper law of the insurance contract is the law of New York. Academic commentaries have suggested that the reason for the choice of

London as the centre for arbitration was dissatisfaction with the Court system in the United States. A suggested reason for the provision of the law of New York as the proper law of the insurance contract was disenchantment with aspects of the law of insurance in England.

In **C v. D** arbitration proceedings were commenced in London once the insurer had refused to make payments under the policy. Certain preliminary issues relating to the insurer's defence were identified to be heard. Following a hearing a partial award was issued by the arbitral tribunal holding that the insurers had failed in their defences. The insurers were dissatisfied and contended that the arbitral tribunal, while purporting to apply the laws of New York, had in fact manifestly disregarded New York law. Requests were made to the tribunal to withdraw the award. Two clerical amendments were made but the tribunal otherwise refused amendment, on the basis that it had no jurisdiction to do so.

The insurers threatened to apply to the Federal Courts in the United States to vacate the award on the basis that the arbitrators had manifestly disregarded the laws of New York (manifest disregard of the law is a permissible ground of challenge ("vacatur") to arbitration awards in the US). The insured sought and obtained an anti-suit injunction to restrain the insurers from bringing those proceedings in the United States. The Judge granted the injunction and the Court of Appeal dismissed the appeal.

The Court of Appeal made it plain that agreement that the seat of the arbitration was

London was conclusive as to the law governing the remedies for seeking to attack the award. Arguments suggesting that there could exist a right to challenge the award in England and Wales, at the same time as rights to challenge the award under the laws in New York were rejected as without foundation and a recipe for confusion. If it was necessary to do so, Longmore LJ would have held that the law of the arbitration agreement itself was English law, see paragraph 28. **C v. D** is a reminder of the importance of choosing an appropriate seat for an arbitration.

## **"PROVISIONAL APPLICATION" UNDER THE ENERGY CHARTER TREATY**

*By Thomas Roe*



The Energy Charter Treaty ("ECT") confers extensive protections on foreign investors in the energy sector. But its drafting is far from transparent. Indeed, the principal legal adviser to the original ECT negotiations has called it "untidy" and "user-unfriendly" (CS Bamberger, paper given at "Investment Protection and the ECT", Washington DC, 18th May 2007).

Unsurprisingly, therefore, much of the small but growing volume of ECT case law is concerned with questions of jurisdiction. One such is the effect of "provisional application". Article 44 provides that the Treaty "shall enter into force"

for a State after the deposit by that State of an instrument of ratification. But under Article 45(1), every signatory (unless it expressly declared otherwise):

“agrees to apply this Treaty provisionally pending its entry into force for such signatory ... to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”.

“Provisional application” is not new in State treaty practice. However, it assumes particular significance under the ECT because—as foreign investors are increasingly coming to appreciate—Article 26 provides for the submission to arbitration of disputes between investors and States where the investor alleges a breach of Treaty. Given that Russia continues to apply the ECT only “provisionally”, the issue is one of great practical as well as academic interest. It arose recently in *Kardassopoulos v. Georgia*, a decision of an ICSID tribunal (Yves Fortier QC, Prof Orrego Vicuña and the late Sir Arthur Watts QC) given on 6th July 2007.

Considerably simplified, the facts were that the claimant, a Greek national, had in the early 1990s entered into a joint venture with a Georgian state oil company to build a refinery and associated pipelines there. On 17th December 1994 both Georgia and Greece signed the ECT, neither State electing to opt out of the effect of Article 45(1). Subsequently, over a period ending in 1996 or 1997, Georgia passed various decrees and entered into exclusive agreements with persons other than the claimant.

On the claimant’s case the effect of these was to accomplish the unlawful expropriation, without compensation, of his investment. The ECT entered into force (in the sense of being ratified) as regards both Greece and Georgia in April 1998.

Thus the question starkly raised was whether Georgia could be liable for alleged breach of the ECT in respect of acts occurring between signature and ratification. This (along with other issues not discussed here) was dealt with as a preliminary issue.

The tribunal began its analysis with the definition of “Investment” under the ECT. Only “Investments” as defined are protected. Article 1(6) provides that this term:

“includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the Investment and that for the Contracting Party in the Area of which the Investment is made”.

This later date is then defined as the “Effective Date” and the Article provides that the ECT only applies to “matters affecting ... Investments after the Effective Date”.

The meaning of “Effective Date” thus became crucial. If it meant 17th December 1994, when Georgia and Greece signed the ECT, then the claimant’s investments were “Investments” under the Treaty from that date, the matters complained of in 1996/7 all occurred after the Effective Date and therefore (subject to other jurisdictional

points) the claimant was entitled to a hearing on the merits. If “Effective Date” meant 16th April 1998, when the ECT “enter[ed] into force” under Article 44, then the claimant’s investments were not “Investments”, the things he complained of all happened before the Effective Date and he had no claim.

Since the “Effective Date” is defined in Article 1(6) by reference to the “entry into force” of the Treaty, the question boiled down to whether in this context “entry into force” meant entry into force in the sense of what happens after deposit of instruments of ratification under Article 44, or provisional application under Article 45(1).

Georgia argued that “entry into force” must mean the former since otherwise “the act of ratification and the entry into force of the ECT would have no purpose, because the obligation to perform would not then be dependent on ratification and/or the ECT’s entry into force”. Georgia, therefore, submitted that provisional application “must be aspirational in nature”. The tribunal dismissed this argument at once: provisional application is a course to which each signatory “agrees” in Article 45(1): it is thus a matter of legal obligation, not “aspiration”. Nevertheless it had to be admitted that the ordinary meaning of Article 44 showed that “entry into force” meant ratification, not signature (and of course the “ordinary meaning” is the starting point for the interpretation of any treaty: see Article 31(1) of the Vienna Convention). How was this to be squared with the notion of provisional application?

The tribunal considered whether there was a rule of customary international law as to the meaning of provisional application. They concluded not, but nevertheless found enough State practice “to generate a generally accepted understanding of what is meant by [the] notion ... Where what is in issue is, as in the present case, the provisional application of the whole treaty, then such provisional application *imports the application of all of its provisions as if they were already in force*, even though the treaty’s proper or definitive entry into force has not occurred” (emphasis added). Thus the tribunal found it necessary to read the words of Article 1(6) other than in their “strictly literal form”. If “entry into force” in that article meant only “definitive entry into force” under Article 44, this would “strike at the heart of the clearly intended provisional application regime”. Thus “entry into force” for the purposes of Article 1(6) had to be deemed to have occurred on signature, not on later ratification. The “Effective Date” was 17th December 1994 and the claim had to be considered on its merits.

It was in the writer’s respectful view sensible of the tribunal to deal with the question of provisional application in this purposive way. In so far as there is emerging what has been called “a common law of investment protection” (McLachlan et al, *International Investment Arbitration*, OUP 2007, 1.50), this decision provides a better guide to how it should evolve than the statement in the (much criticised) decision in *Petrobart Ltd v. The Kyrgyz Republic* (29th March 2005) that “... in principle, on matters of this kind, a rather formal approach based on the wording of the Treaty is appropriate”.

## DIVORCED FROM REALITY?

By Sarah Crowther



In February of this year, in the case of ***West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA*** [2007] UKHL 4, the House of Lords referred the following question to the ECJ:

“Is it consistent with EC Regulation 44/2001 [“the Judgments Regulation”] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?”

This article reviews the comments of the House of Lords in ***West Tankers*** in support of its view that the appropriate answer is “yes” and considers the potential impact if the ECJ answered the above question “no”.

Questions of competing jurisdiction between the courts of different Member States are governed by the Judgments Regulation. However, at article 1(d), the Judgments Regulation provides an express exclusion for “arbitration”. Arbitration is not defined, but in the past has enjoyed a wide definition. For example, in ***Marc Rich & Co AG v. Societa Italiana PA (The Atlantic Emperor)*** [1992] 1 Lloyd’s Rep 342, it was held by the ECJ to exclude not only

arbitration disputes, but also preliminary questions such as the existence or validity of an arbitration agreement.

In ***West Tankers*** itself, C was the owner of a ship which it had chartered to E at a time when the ship came into collision with a jetty in Syracuse. The charterparty agreement was the source of the arbitration agreement which provided for arbitration pursuant to English law with its seat in London.

E claimed in respect of the accident pursuant to its contract of insurance with D. E also started arbitration proceedings against C in respect of its various uninsured losses. C denied liability for the collision. Then, D, having paid out to E to the full extent of the insured loss started proceedings against C in the relevant Italian courts for an indemnity. This claim was pleaded by reference to article 1916 of the Italian Civil Code and was described by Lord Hoffmann as a “delictual claim for subrogation”. Clearly article 5(3) of the Judgments Regulation gave the Italian court jurisdiction to hear the matter.

In response, C commenced proceedings against D in the High Court for a declaration that the Italian proceedings were in breach of the arbitration agreement and for an anti-suit injunction restraining their continuance. The remedy was granted by Colman J at first instance following the decision of the Court of Appeal in ***Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd (The Hari Bhum)*** [2005] 1 Lloyd’s Rep 67. Having done so, Colman J

granted D permission to launch a leapfrog appeal.

Before the House of Lords, D argued that following the decisions in **Gasser GmbH v. MISAT Srl** (Case C-116/02) [2003] ECR I-14693 and **Turner v. Grovit** (Case C-159/02) [2004] ECR I-3565 the court had no power to issue an injunction restraining proceedings commenced in the court of another Member State but must wait for that other court to decline jurisdiction.

**Gasser** and **Turner v. Grovit** both concerned contractual exclusive jurisdiction clauses enforceable within Article 23 of the Judgments Regulation. Did the reasoning in those cases apply to agreements by the parties to arbitrate and if so, was the claim by insurer D, which was not a party to the charterparty covered by the arbitration exception?

Lord Hoffmann concluded that the delictual subrogation claim had as its subject matter, “arbitration” and that following decisions such as **The Atlantic Emperor** were properly considered as falling outside the scope of the Judgments Regulation. The rationale is that where the purpose of proceedings is to protect the binding agreement of the parties to have their disputes resolved by arbitration, then they are necessary adjuncts to the agreement to arbitrate.

Lord Hoffman carefully differentiated between cases concerning an agreement to choose the jurisdiction of one court as opposed to others under Article 23 from arbitration agreements, which he described as being agreements, “not to invoke” the jurisdiction of the courts at all. Cases

such as **Gasser** and **Turner v. Grovit** were therefore easily distinguishable because they were decided pursuant to principles and policy underlying the Judgments Regulation.

He described those who argued that all anti-suit injunctions were in conflict with the Judgments Regulation (because they interfere with jurisdiction as determined pursuant to its terms) as *Lebensfremd* (divorced from reality).

What would be the effect of a ‘*Lebensfremd*’ decision by the ECJ? Such an outcome is not impossible, as traditionally only London has been a significant seat of international arbitration within Europe, and the jurisprudence with respect to anti-suit injunctions does not have such a venerable heritage. Indeed, in the course of their speeches, Lords Hoffmann and Mance felt constrained to reiterate not only the legislative but also the policy reasons for permitting anti-suit injunctions in arbitration agreement cases.

It is suggested that such a course would make London-based arbitration commercially less attractive, exposing parties to the classic, “Italian torpedo” attack whereby proceedings are hopelessly stalled for months or years by commencement in a Court jurisdiction where summary justice is lengthy and complicated to obtain. Those whose interests are genuinely best served by discreet, commercial and informal decision-making will be quick to seek other seats where these objectives are better met. The outcome in the ECJ is keenly anticipated.



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