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International Arbitration News

April 2012

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Editor's Comments

Welcome to the third and new look edition of the Squire Sanders' International Arbitration Newsletter.

We must sadly start this edition with the announcement of the death of our dear colleague and friend, Iván Szász .

Iván had a long and distinguished legal career. Qualifing in Hungary in 1957, he had been a senior adviser in our Budapest office for the past 12 years.

Iván advised on numerous international arbitrations and as an arbitrator at international and national level. He was instrumental in drafting the UNCITRAL Rules, the Model Law on Arbitration and Hungarian arbitration law. He was on the panel of several permanent arbitration institutions and a former member of the Court of Arbitration of the ICC.

He was multi-lingual and a prolific writer on international trade law. He was decorated by the Hungarian State with an Order of Work and Order of Merits.

He was a much respected colleague and mentor for junior lawyers. He will be missed on a personal and professional level.

George von Mehren

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Global: ICC adopts revised Arbitration Rules

On 12 September 2011, the International Chamber of Commerce ("ICC") unveiled its much-anticipated revised Rules of Arbitration 2012 (the "ICC Rules"). The new ICC Rules replace the 1998 version and contain a number of significant amendments, including new provisions addressing multi-party and multi-contract arbitration and a new emergency procedure that allows parties to seek urgent interim relief before the constitution of the arbitral tribunal.

Created in 1923 in Paris, the International Court of Arbitration (the "Court") of the ICC is the world's leading centre for international commercial arbitration. The Court is not a "court" in the traditional sense but, rather, an arbitral institution that administers arbitrations under the ICC Rules. The Court has administered more than 17,000 cases in its almost 90-year history. In 2010 alone, it registered 800 new arbitrations, seated in more than 50 countries, and involving parties from nearly 140 countries.

The process to revise the ICC Rules began in 2008 and was undertaken by a small drafting committee, supported by a wider task force of more than 200 members in consultation with ICC national committees around the world and the ICC Commission on Arbitration. Approved by the ICC World Council in June 2011, the revised ICC Rules came into force on 1 January 2012 and will apply to ICC arbitrations commenced thereafter, unless the parties agree otherwise.

While the new Rules preserve the hallmark aspects of ICC arbitration – including the terms of reference and the ICC Court's scrutiny of awards – several revisions seek to increase the speed and reduce the cost of ICC arbitration. Key changes include:

- **Basis of the claim and amounts claimed.** Article 4(3) requires that a claimant must include in the request for arbitration the "basis upon which the claims are made" and "a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims."
- **Initial jurisdictional challenges**. Article 6(3)-(4) provides that the ICC secretary general will perform an initial screening function of initial jurisdictional objections and only those jurisdictional objections that have a significant chance of success will be referred to the ICC Court; the balance of the objections will be referred to the arbitral tribunal when constituted.
- **Joinder of parties**. Article 7 states that a party to ICC arbitration may request joinder of an additional party, provided that the request is made before the appointment of an arbitrator.
- **Multiple contracts**. Articles 8 and 9 include rules governing arbitrations involving claims between multiple parties and/or involving multiple contracts.
- **Consolidation of arbitrations**. Article 10 states that the Court may, at the request of a party, consolidate two or more arbitrations pending under the ICC Rules into a single arbitration, where: (i) the parties have agreed to consolidation; (ii) all of the claims in the arbitrations are made under the same arbitration agreement; or (iii) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.
- **Arbitrator Availability**. Article 11 requires a prospective arbitrator to sign a statement not only of independence, but also of impartiality and availability.

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- **Direct appointment**. Article 13(4) provides that, where a party does not nominate an arbitrator, the ICC Court can bypass the national committees and make the appointment directly if (i) one or more of the parties is a state or state entity; (ii) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no national committee or group; or (iii) the president of the Court certifies to the Court that circumstances exist which, in the president's opinion, make a direct appointment necessary and appropriate.
- **Confidentiality**. Article 22(3) states that upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
- **Case management conference**. Article 24 directs the arbitral tribunal to convene a case management conference to consult the parties on procedural measures when drawing up the terms of reference or as soon as possible thereafter.
- **Timeliness of award**. Article 27 requires that, as soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorised submissions concerning such matters, the arbitral tribunal shall inform the secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval.
- **Emergency arbitrator provision**. Article 29 permits an "emergency arbitrator" to issue interim or conservatory relief before the full constitution of the arbitral tribunal.
- **Basis for award of costs**. Article 37(5) expressly permits the arbitral tribunal, in awarding costs, to take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

Of these modifications, the emergency arbitrator provision is perhaps the most significant. Although there was a similar provision under the 1998 ICC Rules, parties were required to expressly adopt that procedure in their arbitration clause; if the arbitration clause was silent on the issue, the procedure did not apply. Under the revised ICC Rules, by contrast, the emergency arbitrator procedure applies by default. Appendix V to the ICC Rules sets forth the emergency arbitration procedures. Nevertheless, the new emergency arbitrator provision does not prevent the parties from seeking interim or conservatory relief from national courts prior to the constitution of the arbitral tribunal.

Although the vast majority of ICC cases are commercial disputes, the ICC also administers investment treaty arbitrations in which a foreign investor brings an arbitration claim against a State under a bilateral or multilateral investment treaty. In recognition of the growth of such cases, the revised ICC Rules dropped language that had described the ICC as a centre for resolving "business" disputes – thus recognising the applicability of the revised ICC Rules to both commercial and non-commercial (investment treaty) arbitration.

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Global: Amendments to the Code of Sports-related Arbitration

The Court of Arbitration for Sport ("**CAS**"), headquartered in Lausanne, Switzerland, is the international body created alongside the International Council of Arbitration for Sport ("**ICAS**") to resolve sports disputes by arbitration. To this end, the CAS maintains a list of arbitrators who sit to resolve arbitral and disciplinary proceedings either as a first instance, or appeal, panel. These proceedings are usually referred to the CAS through the incorporation of a valid and binding arbitration agreement in the rules of the international governing body of the dispute in question or the private contract between the relevant parties.

The CAS operates in accordance with the Code of Sports-related Arbitration (the "**Code**"). A number of amendments to the Code came into force on 1 January 2012, of which the most significant are set out below:

1. Increased flexibility in the process for appointing arbitrators to the CAS list

As is common in sports arbitration, the CAS operates a closed list of arbitrators. Each arbitrator is legally-qualified and has recognised competence in sports law and/or international arbitration, together with a good knowledge of sport in general.

The benefit of the closed list is that arbitrators can be appointed on the basis that they are held out as being experts in a particular sector. On the other hand, it has been suggested that a closed list reduces the breadth of choice as to who can be appointed.

Panels may consist of a single or three arbitrators. Where there are three arbitrators, each party to the arbitration nominates an arbitrator from the CAS list. The parties will usually nominate an arbitrator on the basis of the arbitrator's background and experience in a particular area of sports law. The third arbitrator, who takes the role of Chairman, is selected from the list by the CAS.

Prior to 1 January 2012, one facet of the closed list, was a strict set of procedures in place for the appointment of arbitrators to the list. Specifically, arbitrators were to be appointed in accordance with the following distribution:

- One fifth from persons proposed by the International Olympic Committee ("**IOC**");
- One fifth from persons proposed by International Federations ("**IF**");
- One fifth from persons proposed by National Olympic Committees ("**NOC**");
- One fifth from persons chosen with a view to safeguarding the interests of athletes; and
- One fifth from persons independent of the IOC, IFs and NOCs.

This specified distribution of arbitrators has been removed in its entirety from the new version of the Code. Arbitrators will now be appointed from persons "*whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs*" (Article S14 of the Code).

The logic behind this change appears to be increasing the flexibility of the arbitrator appointment process and allowing, where appropriate, discretion to be applied. Some commentators suggest that removing the specified appointment criteria improves the transparency of the process, whilst others are concerned that it obscures the process even further. Another concern is that whilst the list of appointed arbitrators is lengthy (at the time of writing it contains 264 arbitrators) and reflects a diverse range of geographical origins and legal experience, the reality is that a vast number of CAS cases are heard by a small number of arbitrators. Accordingly, anything the CAS can do to broaden the list of arbitrators likely to hear cases would seem to be beneficial.

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2. Appeals against decisions by national governing bodies will cost the parties

The CAS Code prescribes that the cost of arbitration proceedings shall be borne by the parties. Historically, there has been an exception to this rule in relation to disciplinary proceedings (in which an athlete might be liable to a sanction affecting his ability to perform his profession or sport). Until 1 January 2012, arbitration proceedings relating to an appeal against a disciplinary decision would, other than the standard court fee of 1000 CHF, be heard by the CAS free of charge.

Under the new Code, appeals against disciplinary decisions rendered by IFs will remain free of charge. However, where a party is appealing a disciplinary decision of an NF, the costs of the arbitration will now be payable and an advance of these costs must be paid by the parties in equal shares.

The rationale behind this rule change appears to be to prevent spurious appeals being made against decisions of NFs, without having regard to the cost consequences. On the face of it, the change may not seem overly onerous. The reality, however, is that the rule represents a serious financial burden on individual athletes. Before raising any appeal, athletes must first find funds to pay for legal representation and now they will also be faced with the prospect of paying the costs of the arbitration. Moreover, where an athlete wishes to appeal against a disciplinary decision of an NF, and that NF chooses not to pay its share of the advance costs, the athlete will be required to pay advance costs for both himself and the NF. If the athlete cannot afford to pay both these costs, the CAS shall deem the appeal withdrawn. The new rule may therefore act to perpetuate the inequality of arms that can exist in disciplinary proceedings between athletes and sports governing bodies.

Given these circumstances, it may be that the CAS should consider providing a hardship fund or waiver of the arbitration costs to impecunious athletes. Whatever the answer, it is clear that a safeguard is required to ensure that athletes retain access to justice.

3. Removal of the CAS Consultation Proceedings

Prior to 1 January 2012, sports bodies (including IFs, national governing bodies etc) could ask the CAS to provide an advisory opinion on any sports-related legal issue. Whilst ostensibly a useful tool, the opinions provided by the CAS were non-binding and this mechanism was rarely used. Further, the procedure was undermined in circumstances where a non-binding opinion differed from the result of arbitration proceedings on the same issue. A recent and high profile example of this can be seen in the dispute over Rule 45 of the Olympic Charter which prevents athletes, who have served a ban of more than six months for an anti-doping rule violation, from competing in the Olympics. A non-binding opinion of the CAS supported Rule 45; the decision delivered in the subsequent arbitration (CAS 2011/0/2422 *USOCV10C*) was that the Rule was invalid and unenforceable. The removal of this procedure removes with it conflict and uncertainty of this kind.

Other changes include amendments to the procedural rules to make the arbitration proceedings "quicker and more efficient", together with explicit provisions relating to the CAS ruling on its own jurisdiction and the applicability of Swiss Private International Law.

The new version of the Code can be found at: CAS Code 2012.

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Global: International approaches to the independence and impartiality of arbitrators

The IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") were developed to respond to a need for more uniformity in the standards applied in arbitration issues. In particular, the Guidelines provide guidance on when arbitrators should disclose issues which may cast doubt upon their impartiality and/or independence. However, the IBA Guidelines will only lead to uniformity if they are implemented universally and, as the cases explored in this article show, the application of the IBA Guidelines has not, as yet, been as wide spread as the International Bar Association may have hoped for.

Commentators cite England as an example of a country in which the application of the Guidelines could be problematic given that, in England, a test for determining whether or not bias exists has already been "*crystallised*[1]" and it is this test which should be used by the courts to determine any issues arising in relation to independence and/or impartiality. Indeed, there are only two reported cases under English Law which have made reference to the IBA Guidelines and in both of these cases the submissions (which were made in reliance upon the IBA Guidelines) were not accepted by the judges.

The English courts have a well-established body of case law in relation to the issue of apparent bias and under present law they are bound by the ratio in *Porter v Magill*[2]. *Porter v Magill* established that the correct test is whether all of the circumstances of the case, as ascertained by the court, would lead a "*fair minded and informed observer*" to conclude that there was a "*real possibility*" of bias. This test has been used by the English courts for over a decade and, as it comes from a decision of the House of Lords, it will remain binding upon the lower courts until it is overturned by a decision of the new Supreme Court[3]. It is perhaps unsurprising that the IBA Guidelines have not played a central role in English decisions. However, it would be unfair to say that the English courts have disregarded the Guidelines completely: they have considered them but simply decided not to rely on them in the decision-making process.

The approach of the UK Courts to impartiality and the IBA Guidelines

Until earlier this year, *ASM Shipping Ltd v TMMI Ltd of England*[4] was the only English case to refer to the IBA Guidelines. In that case, the arbitrator had previously been instructed by the Respondent as leading counsel in an arbitration between different parties but with the same principal witness. In the earlier case, the party for whom the arbitrator had been acting as counsel had made serious allegations against the witness. The appellant argued that this would have affected the arbitrator's ability to act impartially and applied for the arbitral award made by him to be set aside as a result.

In assessing the case, both parties agreed that the test for apparent bias would be that stated in *Porter v Magill*, i.e. what a fair minded and informed observer would conclude having considered the facts. Morison J. concluded that, in his view, "*the independent observer would share the feeling of discomfort expressed by [the principal witness] and would have concluded that there was a real possibility that the tribunal was biased*" as a result of the arbitrator having previously acted as

[1] Singhal, Shivani (2008) - Independence and Impartiality of Arbitrators, [2008] Int.A.L.R.
[2] [2001] UKHL 67
[3] On 1 October 2009, the Supreme Court for the UK replaced the House of Lords as the final court of appeal for UK cases
[4] [2005] EWHC 2238 (Comm)

counsel against the appellant's main witness[5]. Thus the test in *Porter v Magill* was satisfied.

Morison J. then went on to explain why he had rejected the respondent's argument that there could not have been a conflict of interest because the facts alleged did not fall within the IBA Guidelines' Red List. He confirmed that the issue in question was not "*whether what happened fell within the Red List or not*", rather it was whether the test in *Porter v Magill* was satisfied. He then highlighted that the IBA Guidelines were indeed only guidelines, which ought to be "*applied with robust common sense and without pedantic and unduly formulaic interpretation*".

This approach was confirmed last year in the case of *A & Ors v B and X*[6]. In this case, the appellant was applying to have the arbitrator removed and his award set aside because shortly before completing and issuing the award, the arbitrator had disclosed that he had been instructed as counsel for the respondent's solicitors in an ongoing matter. This matter was wholly unconnected with the arbitration. The application was ultimately refused on the basis that the fair-minded and informed observer would not consider that there was a real possibility of bias merely because an arbitrator had acted as counsel for one of the parties in the past.

In making his decision, Flaux J., also referred to the test for impartiality set out in *Porter v Magill* and, just as in *ASM Shipping*, he was quick to dismiss submissions which were made in reliance on the IBA Guidelines as opposed to established English case law. Indeed, Flaux J. pointed out that the Introduction to the Guidelines "*makes it clear that the Guidelines are not intended to override national law*". Accordingly, he explained that if there was no apparent or unconscious bias once the common law test for bias had been applied, nothing written in the Guidelines could alter that conclusion[7]. Accordingly, it seems that the Guidelines will only be used in the English court if what they say happens to compliment, as opposed to contradict, the precedent cases.

Other approaches to the IBA Guidelines

In contrast to the English courts, the courts of other jurisdictions, as well as the International Centre for Settlement of Investment Disputes ("ICSID"), provide examples of cases in which strong reliance has been placed on the guidance provided in the IBA Guidelines.

In the 2009 ICSID decision, *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador,*[8] a challenge to an arbitration award was upheld on the basis of Standards 1 and 2 of the IBA Guidelines alone[9]. However, the parties had expressly agreed that any challenge to arbitrators would be resolved according to the Guidelines. It was, therefore, entirely appropriate for the tribunal to base its decision of the provisions set out therein.

Further support for the IBA Guidelines comes from another decision of the ICSID, *Alpha Projecktholding GmbH v Ukraine*[10]. Indeed, such close regard was paid to the IBA Guidelines in that case, that critics have said that the case established the Guidelines as "*an international law standard for disclosure by arbitrators*".

The case involved an application for the disqualification of an arbitrator on the grounds that he had studied at Harvard Law School at the same time as counsel for the respondent and the pair had remained friends. It was ultimately decided that this fact did not cast doubt over the impartiality and independence of the arbitrator to the extent that he should be disqualified. In making its decision, the Tribunal referred to the IBA Guidelines and noted that attending university with counsel for one of the parties in an arbitration was not listed on the IBA Red or Orange list and was not, therefore,

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[5] At paragraph 39 of the judgment
[6] [2011] EWHC 2345 (Comm)
[7] At paragraph 73 of the judgment
[8] ICSID Case No ARB/08/6; PCA Case No IR-2009/1
[9] Mallett, Daisy and Allen, Natalie (2011). Party Instigated Arbitrator Challenges: A Practical Guide. Arbitration, Chartered Institute of Arbitrators, 77 Issue 1
[10] ICSID Case No ARB/07/16

something which ought to have been disclosed by the arbitrator.

The Tribunal explained that it had placed reliance on the Guidelines on the basis that the Guidelines applied the UNCITRAL justifiable doubts test which was the same as the test set out in the ICSID's own Arbitration Rules. This begs the question as to whether or not the ICSID would have been as willing to apply the Guidelines if the tests and theories set out therein were contradictory to the provisions of the ICSID Arbitration Rules. Indeed, in other ICSID cases, such as *Participaciones Inversiones Portuarias SARL v Gabonese Republic*[11], ICSID had not been persuaded by the Guidelines and its approach was more similar to that of the English courts.

In the *Gabonese Republic* case, the applicant challenged the appointment of an arbitrator on the basis that he had been the president of the Tribunal in an earlier case in which an award had been made against him. In its submissions, the applicant argued that this was something which fell within the Orange List of the IBA Guidelines and it would therefore be justifiable to disqualify the arbitrator as a result. The Tribunal was unconvinced by this argument and in handing down its judgment reminded the parties that "*the IBA Guidelines are of indicative value only, even though they may sometimes provide useful indications*".

The same view was taken in *Tidewater Inc & Ors v Venezuela*[12]. In this case, the claimant applied to have the arbitrator disqualified on the grounds that she had failed to disclose that she had been appointed by the respondent on a number of occasions in the past. The application was ultimately unsuccessful as the judge held that a failure to disclose previous appointments was not in itself sufficiently serious to warrant the disqualification of an arbitrator, especially as this non-disclosure was based on an honest exercise of judgment. Interestingly, the arbitrator argued that her appointments by Venezuela were in the public domain and that the claimant should, therefore, have been aware of them, regardless of whether or not specific reference had been made to them during the disclosure process. The tribunal did not find favour in this argument and stated that the arbitrator was the person best-placed to provide information about her past appointments and should, therefore, have disclosed all of her appointments, regardless of the fact that they were in the public domain. To have concluded otherwise would put to great a burden on the parties to investigate arbitrators.

Comments such as these seem to suggest that there is a heavier burden on the arbitrator than the parties in the disclosure process. However, the fact remains that the non-disclosure was not sufficient to merit disqualification which has lead critics to argue that, despite the ICSID's comments, parties should, in practice, continue to carry out their own due diligence into the previous appointments of arbitrators. This is wise, given that in the *Ukraine* case the ICSID took an entirely different approach and stated that the parties should be assumed to have carried out at least basic internet research into the opposing parties, their counsel and the arbitrators at and early stage in proceedings.

It would be unfair to suggest that the ICSID will always apply the IBA Guidelines. This is manifestly not the case: the ICSID will use the Guidelines as an indicative tool but will not give them undue authority where there are established legal provisions in place.

A similar approach has also been taken in other national courts. Indeed, in a recent case heard in the Court of Appeal of Madrid (case number 506/2011), the Court was unwilling to pay too close regard to the IBA Guidelines where the national law was sufficiently clear in relation to the concept of impartiality and independence.

In that case, the Court annulled an award rendered under the Spanish Court of Arbitration on the grounds that the arbitrator was not independent and impartial. Both parties alluded to the IBA Guidelines in their submissions. Commenting on the relevance of the Guidelines to the case, the

[11] ICSID Case No ARB/08/17
[12] ICSID Case No ARB/10/5

Court noted that the Guidelines could be of use but that Spain's own legal system, the doctrines of its Constitutional Court and its own national Arbitration rules were so clear on the topic of independence and impartiality that they had adequate means to determine the issues in question without having to refer to the IBA Guidelines. The criteria set out in the Guidelines did not, therefore, influence the Court's final decision.

More striking than the Court's disregard of the IBA Guidelines is perhaps the uncompromising approach which it took to the arbitrator's lack of disclosure. The challenge centred upon the fact that the managing partner of the law firm acting for one of the parties had once acted as an intern for the arbitrator over 30 years earlier. The arbitrator had subsequently dedicated a book to the managing partner and had developed friendships with a number of employees from the same law firm. None of these facts were disclosed until the arbitrator was specifically questioned about them, something which the Court considered cast doubt over his independence and impartiality. Indeed, the Court held that "*the mere existence of reasons that can cast doubts on the impartiality of the arbitrator should be enough for him to resign*" and found the fact that he had not disclosed . This is a much stricter approach than has been taken by other courts in relation to disclosure and certainly suggests that the responsibility for disclosure lies firmly with the arbitrator as opposed to the parties.

The reason that this decision is so striking is that, in the same year, the Court of Appeal of Madrid suggested that it is the parties, and not the arbitrator, who should take responsibility if there is a lack of transparency in the disclosure process (case number 338/2011).

Lessons to be learned

Commentators have said that, in spite of the introduction of the IBA Guidelines, there "*is still much discussion over what constitutes full disclosure*" and indeed these very different decisions illustrate that this is most definitely the case. The divergent approaches which are being taken by courts all over the world evidence the fact that decisions are being made on a case by case basis. Indeed, it is not even clear whether a heavier burden will be placed on the parties or the arbitrators. The lesson to be taken from this is surely that all parties in arbitrations should ensure that they protect their own position as much as possible; the parties should carry out a high level of due diligence and arbitrators should ensure that they make full and frank disclosure.

In relation to the relevance of the IBA Guidelines, it is clear that courts recognise that the Guidelines are of useful indicative value. However, it is equally clear that the Guidelines will not play a part in the decision-making process unless the relevant national legislation or Arbitral Rules are unclear or the parties to a dispute have expressly agreed to be bound by them. This seems like the correct approach to take; indeed, as Flaux J explained, it is stated in the Guidelines themselves that they were never intended to override national law.

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Spain: Current Issues on Arbitration and Insolvency in Spain

The question of which law is applicable to the insolvency of a party in an international commercial arbitration is a topical issue, particularly in the current financial crisis. Whether it be a desire to initiate arbitration; an arbitration that is already underway or where an award is to be enforced, the situation may arise where one party is, or will be, declared insolvent.

The declaration of insolvency implies the intervention of an authority, other than the governing body of a company, that may (or may not) decide to comply with an arbitration agreement or to seek a stay of arbitration proceedings in progress. It would also determine the enforcement of the Award against a party that has been declared insolvent.

The issue becomes more complicated when the laws governing the insolvency proceedings are those of the country where insolvency has been declared, which will not necessarily coincide with those of the arbitration or the place of arbitration. In that situation, we must determine which is the law that will help us to make the right decision to solve the issues above.

As regards to the validity of the arbitration clause, some countries such as Spain, provide that on insolvency, agreements to arbitrate will have no effect during the pending insolvency proceedings. This means that once insolvency is declared it will not be possible to initiate arbitration against a person declared insolvent under Spanish Law.

It is clear that in these cases the applicable law is the law of the country where the insolvency has been declared. It will be these laws that will determine whether the receiver/liquidator may or may not appear at the arbitration or be liable for the arbitration costs.

Where a party to arbitration has been declared insolvent, the question then arises as to whether the procedure can continue, or, conversely, must be stayed. For example, in the case of Spain, a declaration of bankruptcy does not suspend the arbitration proceedings, which will continue until the award is made. However, the U.S. Bankruptcy Code provides for the automatic suspension of the arbitration. Also, according to the 1997 UNCITRAL Model Law on Cross Border Insolvency, the arbitration procedure must be stopped.

In these cases the collision is clear between the law of the insolvency and the law of the arbitration. EC Regulation 1346/2000 on Insolvency Proceedings states that for pending arbitration proceedings the applicable law is that of the place of arbitration.

Finally, regarding enforcement of the Award, the principle of Equality of Creditors that governs all Insolvency proceedings must be taken into account. This principle could be considered as public policy, so that, according to the New York Convention, an award should not be enforced contrary to public policy, i.e. establishing a loan repayment that violates this principle.

The decision rendered in the Elektrim / Vivendi proceedings is a good example of the situations discussed above. In this case, two arbitration courts reached different decisions in London and Geneva. Elektrim was declared bankrupt in Poland. The decisions were appealed. The High Court ruled that the law of the place of arbitration should be applicable and therefore the procedure should be suspended, according to English law.

However, Polish law states that not only should the arbitration be suspended, but that the arbitration agreement must be considered as void.

By contrast, the Swiss Supreme Court ruled that the applicable law should be the law of the country where the insolvency was declared, thus deciding the termination of arbitration. The Swiss Supreme Court's decision has been strongly criticised in legal literature.

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News

Squire Sanders welcomes international disputes specialist Peter Chow to its Hong Kong and new Singapore office.

Peter was a partner in Bryan Cave's Hong Kong office, where he led the firm's International Arbitration and Dispute Resolution practice in Asia. He handles disputes related to energy and resources, infrastructure and construction projects, international trade, maritime and general commercial matters. He has advised major US, European and Asian corporations, including Chinese state-owned enterprises. Peter is a chartered arbitrator and qualified to practice in England, Australia and Hong Kong. Apart from extensive arbitration experience in Asia, he has experience in matters involving Africa, the Middle East and Russia. Prior to joining Bryan Cave, Peter practiced at Baker & McKenzie in Hong Kong and Mallesons in Hong Kong and Melbourne.

Commenting on the appointment, George von Mehren, head of Squire Sanders' International Dispute Resolution practice, said: "International arbitration activity is growing in both Hong Kong and Singapore and indeed Singapore is an arbitration center for Asia Pacific region and globally. Peter Chow's standing and experience will significantly enhance our IDR practice, and together with the recent launch in Perth, our combined Asia Pacific IDR practice is now in a different league".

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Editor Profiles

George M. von Mehren leads the firm's International Dispute Resolution Practice Group, ranked by The American Lawyer's 2011 Arbitration Scorecard as a top arbitration practice globally. The 2009 edition of the publication also recognized one of George's recent arbitration victories, in which the client benefited by more than US$1 billion, as the second largest arbitration award by dollar amount in the world during the prior two years. The 2007 Arbitration Scorecard recognised another of George's victories as among the five largest arbitration awards in the prior five years. With more than 30 years of experience in complex adversarial proceedings, George spends 100 percent of his time representing clients in international arbitrations and providing strategic advice for litigation in courts outside the US. He has an established record of working effectively with counsel from around the world.

Paul Oxnard has over 20 years of experience dealing with high value commercial litigation, and international and domestic arbitration matters. He has been instrumental in developing the firm's market-leading Alternative Dispute Resolution practice in the UK. Paul has particular experience in relation to disputes in the heavy engineering, energy (particularly nuclear and gas) and telecoms sectors and white collar fraud, injunctive work (obtaining, enforcing and resisting general, freezing, and search and seizure injunctions). He also specialises in EU public procurement regulations related issues. Paul is recognised in Chambers Global 2011 within the dispute resolution category.

Contributor Profiles

Stephen P. Anway a member of the New York and Ohio Bars, is a partner in the Squire Sanders international arbitration group, ranked by The Global Arbitration Review and The American Lawyer's Arbitration Scorecard as one of the top arbitration practices in the world. Stephen acts as counsel in investment treaty arbitrations and commercial arbitrations under the ICSID, ICC, and UNCITRAL Arbitration Rules. He also represents clients in US courts in cases with an international law element, including cases concerning the recognition and enforcement of international arbitral awards. In addition to contentious matters, he advises governments on various issues of public international law and is a frequent lecturer on investment treaty and commercial arbitration matters.

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Contributor Profiles

Fernando Gonzalez leads the International Dispute Resolution practice in Madrid. Fernando has more than 25 years of litigation experience in commercial and IP law. He represents clients around the world in international arbitration proceedings. He also has experience in the areas of fraud and insolvency. Fernando is listed as the Spanish representative of Fraudnet, a network of lawyers integrated in the International Chamber of Commerce. He is a member of the board of a renowned American University in Spain. He has also served on IBA and INTA committees.

Christian Hausmann is a dual national (German, French), and a law graduate in France (Strasbourg) and in the US (New York University). He was admitted to the Paris Bar in 1987 and since then has been involved in corporate finance and international dispute resolution, specializing in particular in industrial and construction transactions and disputes. This latter area has brought significant experience in arbitration and ADR. He is listed as an arbitrator with the French National Committee of the International Arbitration Court of the ICC and major arbitrations centres in the world. In parallel, he taught as an associate Professor at the University of Strasbourg and thereafter at Cergy-Pontoise University. He is a member of various trade associations and institutions (FEEF, ASA, CMAP, IAI, DIS, AFA, CIETAC, ANM, and the HK Chamber of Commerce). Over the last 20 years, he has conducted more than 50 international arbitrations.

Stephen Sampson Heads our Sports Law Group based in our London office. A commercial, litigation and arbitration lawyer, his expertise covers commercial, regulatory and contentious work for clients in the sports, media, advertising and marketing services sectors. He has extensive experience before sports tribunals and the Court of Arbitration for Sport and is recognised by the legal directories as a leading practitioner within the sports law and brand management sectors.

Stacey Shevill is an associate in the Sports Law Group based in our London office. Stacey specialises in contentious and regulatory sports law issues. In particular, Stacey regularly assists in high profile disciplinary and anti-doping proceedings brought before sports governing bodies and the Court of Arbitration for Sport. Stacey also advises clients in the media, entertainment, advertising and marketing sectors, acting in commercial litigation, international arbitration and alternative dispute resolution matters.

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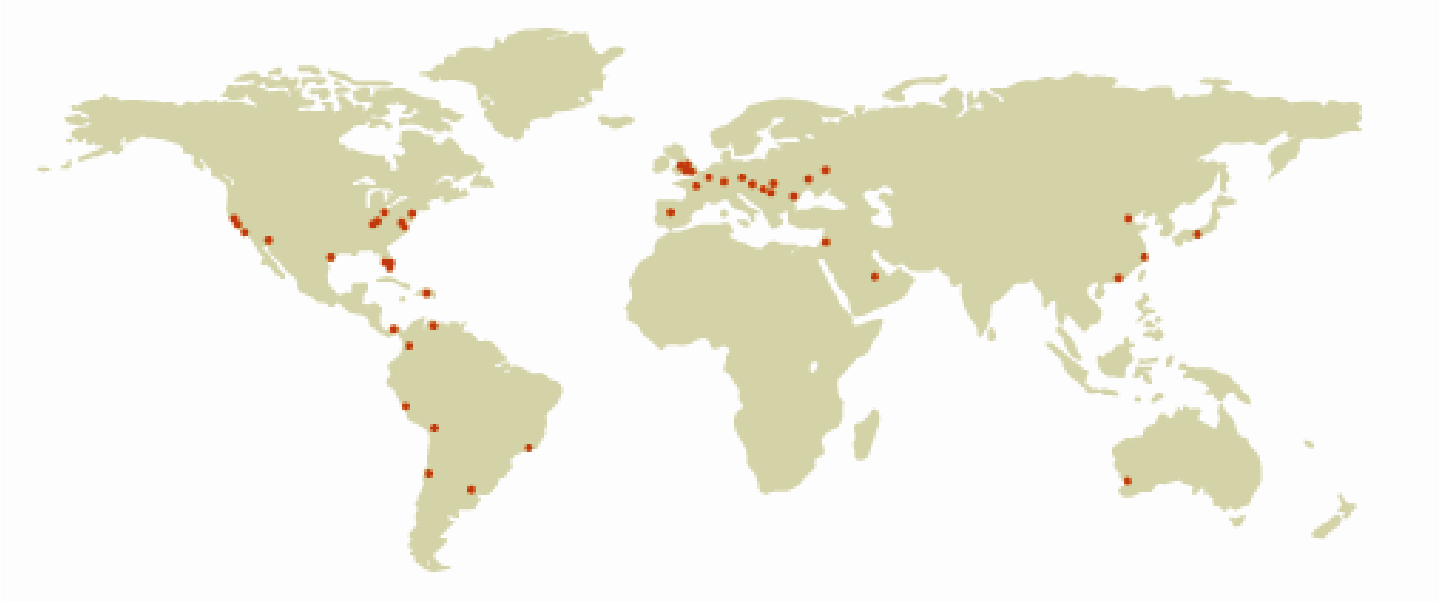

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- Columbus
- Houston
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- Miami
- New York
- Northern Virginia
- Palo Alto
- Phoenix
- San Francisco
- Tampa
- Washington DC
- West Palm Beach

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- Rio de Janeiro
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