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International Arbitration News

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Contents

Editor's Comments

Welcome to the fifth edition of the Squire Sanders' International Arbitration Newsletter.

In this edition, we look at types of international arbitration and in particular how important the choice of seat can be following the Petrochemical Industries decision in England and the Bharat decision in India.

I would also like to take this opportunity to welcome Cris Cureton who joins us in our Perth (Australia) office. Cris is a prominent lawyer in Australia's Northern Territory project and construction industry and one of the state's leading contentious lawyers. He brings with him expertise in construction and engineering litigation and arbitration in major project procurement and delivery.

For further information on our team please view our News Section on page 11.

We hope you find the topics of interest and if you would like to discuss any aspect further, please do not hesitate to contact any member of the team.

George von Mehren

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An Overview of Modern International Arbitration

Introduction

To most people (including most lawyers), the world of international arbitration is shrouded in a veil of mystery. The widely-held perception of our practice is the stuff that movies are made of — lawyers traveling around the world to exotic countries, meeting with officials from foreign governments and multi-national corporations, and representing them before international tribunals in high-stakes cases. In reality, our practice is much more sobering.

Instead, the real mystery surrounding international arbitration is more elementary: what is it? In generic terms, international arbitration is a method for resolving disputes arising from international commercial agreements and other international relationships. Like all arbitration, international arbitration is a creature of contract. It arises from an agreement between parties from different countries to submit their disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties. That agreement is usually struck in a dispute resolution clause in an international contract or treaty in which the parties agree to arbitrate future disputes.

Parties agree to resolve their disputes through international arbitration for a number of reasons. They include:

- Neutrality. International arbitration provides the parties a way to resolve their disputes without having to litigate in their counter-party's domestic courts, which may be viewed as less than neutral (and in extreme cases xenophobic), may take too long, and may require unnecessary formalities.

- Confidentiality. Unlike domestic litigation in many countries, international arbitration is — with limited exceptions — a confidential process in which trade secrets and other sensitive information can be shielded from the public and other interested third parties.

- Specialist Decision-Makers. International arbitration allows parties to hand-pick their decision makers, which is particularly important where the dispute involves technical issues that domestic courts are ill-equipped to handle.

- Finality. International arbitral awards generally cannot be appealed; in most circumstances, a losing party's only recourse is to seek vacatur (an order of a Court vacating or annulling) of the arbitral award based on a limited number of grounds in a court located in the place (seat) of the arbitration.

- Enforceability. International arbitral awards are, as a general rule, readily enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention."

This last point bears particular emphasis. Adopted by over 146 nations, the New York Convention requires signatory nations to give effect to international arbitration agreements and awards. This mechanism allows the prevailing party to take an international arbitral award to the jurisdiction where the counter-party has assets and to convert the award into a local court judgment. The court

judgment can then be taken to the sheriff (or the local equivalent) to seize the assets of the counter-party, liquidate them, and use the proceeds to satisfy the underlying arbitral award judgment.

Importantly, however, there is no comparable multilateral treaty requiring recognition and enforcement of foreign court judgments, (there are exceptions, such as court judgments obtained and enforced within the European Union). Thus, whereas courts are required to recognize and enforce foreign arbitral awards under the New York Convention, they are generally not required to recognize foreign court judgments. For that reason, international arbitral awards "travel" better than court judgments."

For all of these reasons, international arbitration is becoming the principal way for commercial parties to resolve their cross-border disputes. And as a consequence, it is becoming increasingly important for counsel advising international business clients to be familiar with international arbitration.

There are two main types of international arbitration today: commercial international arbitration, on the one hand, and investment treaty arbitration, on the other hand. The following sections provide a brief overview of both.

Commercial International Arbitration

Commercial international arbitration clauses are found in contracts between parties from different countries. The general rule of thumb is to keep such clauses simple, leaving to the parties the flexibility to custom-build a proceeding to meet the demands of a future dispute, whatever that may be. Precisely because counsel does not know which disputes will later arise, it is generally not advisable to graft onto the clause "bells" and "whistles" that may not suit the particular dispute that later arises.

This issue highlights another advantage of international arbitration over domestic litigation: international arbitration presents the parties with a clean slate on which to write their process. Many lawyers seem to believe that there is only one procedure that should be followed in international arbitration (which, invariably, is the procedure they have used in the past). Most international arbitration rules, however, leave tremendous flexibility to the parties to determine the procedure of the arbitration. If the dispute resolution clause is drafted broadly, then the parties can look at each case anew and ask themselves: How much process do we really need to resolve this dispute?

Consistent with these principles, an international arbitration clause generally should contain the following items—but not much more:

- The arbitration institution that will administer the arbitration and/or the rules that will govern the arbitration;
- The seat (place) of the arbitration;
- The number of arbitrators;
- The language of the arbitration;
- The governing substantive law (if not specified elsewhere in the agreement); and
- Certain optional provisions, such as clauses concerning discovery, confidentiality, and interim relief.

Looking at the first four of these points in a little more detail. Each is briefly summarized below:

1. An international arbitration clause should specify the arbitration institution that will administer

the arbitration and/or the arbitration rules that will govern it. The leading institution for international commercial arbitration is the Court of Arbitration of the International Chamber of Commerce ("ICC"). Created in 1923 in Paris, the Court of Arbitration is not a "court" in the traditional sense but, rather, an arbitral institution that administers arbitrations under the ICC Arbitration Rules. Although based in Paris, the ICC has offices around the world (including New York). ICC arbitrations are often "seated" in jurisdictions other than Paris.

In addition to the ICC, there are numerous other commonly-used institutions that administer international commercial arbitration, including: the International Centre for Dispute Resolution ("ICDR"), which is the international arm of the American Arbitration Association ("AAA"); the London Court of International Arbitration ("LCIA"); the Stockholm Chamber of Commerce ("SCC"); the Vienna International Arbitration Centre ("VIAC"); the China International Economic and Trade Arbitration Commission ("CIETAC"); and the Hong Kong International Arbitration Centre ("HKIAC").

Alternatively, parties can agree to conduct their arbitrations under a set of arbitration rules but not under the purview of an institution or administering body. These are referred to as "ad hoc" arbitrations. The arbitration rules of the United Nations Commission on International Trade ("UNCITRAL") are the most common rules used in ad hoc international arbitration.

2. The parties should specify in their international arbitration clause the place (seat) of the arbitration. The place of the arbitration is the legal system to which the parties subject the arbitration. Although international arbitration is largely independent of local courts, if recourse is needed to a court regarding the conduct of the arbitration or the award, such recourse generally can be only obtained in a court in the place of the arbitration and according to its local arbitration law.

   The place of arbitration should be a jurisdiction with a predictable, neutral legal system that favors arbitration, as this is where the losing party can seek to vacate the award. Counsel should avoid the situation where, after years of fighting for an award, the losing party can seek vacatur in a court system where there is no predictable arbitration law and the court may vacate the award simply because it disagrees with the merits of the decision. The key in selecting a place of arbitration is the predictability that the local courts will uphold any arbitral award. For that reason, New York, London, Paris, The Hague, Stockholm, and Geneva are the most commonly-selected places of international arbitration.

3. Parties should consider specifying the number of arbitrators in their arbitration clause. It should be one or three, depending on the expected value of the dispute. In the alternative, the parties can remain silent on the number if the arbitral rules specified in the dispute resolution clause provide a default rule.

4. The parties should specify the language of the arbitration. English is the most common.

For most other matters, the arbitral rules that you select will fill in the gaps. Where the arbitral rules are silent on an issue of procedure, the issue is largely left to the discretion of the arbitral tribunal. Discovery (or disclosure) is one such example. Most international arbitral rules do not contain specific rules on discovery. Tribunals therefore often look to the convention in international arbitration concerning discovery, which are generally reflected in the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"). The IBA Rules — which can be expressly adopted by the parties in their international arbitration clause or after the disputes arises — recognize that expansive documentary discovery is generally inappropriate in international arbitration and impose basic requirements concerning document requests (they do not expressly contemplate depositions).

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Investment Treaty Arbitration

Investment treaty arbitration clauses are found in treaties between two countries ("Bilateral Investment Treaties" or "BITs") or investment treaties between more than two countries ("Multi-Lateral Investment Treaties"). The purpose of investment treaties is to encourage and protect foreign investment by creating mutually favorable conditions for investments by nationals of each signatory State in the territory of the other signatory State. The theory behind these treaties is that, by creating mutually favorable conditions for foreign investment, the signatory States will stimulate business initiatives and foster their economic development while, at the same time, securing protection for their own investors' foreign investments.

Investment treaties seek to encourage and protect foreign investment by according foreign investors two categories of rights. First, they grant foreign investors rights based on two "contingent" (or relative) standards: (i) national treatment, which assures non-discrimination or no-less-favorable treatment than the citizens or companies of the host State; and (ii) most-favored nation ("MFN") treatment, which assures treatment no-less-favorable than the treatment of aliens or companies from other States.

Second, investment treaties accord foreign investors "non-contingent" (or non-relative) rights, based on what are called "absolute" standards because their meaning is not dependent on differential treatment. Non-contingent (absolute) standards are intended to protect the rights of foreign nationals regardless of whether the host State provides the same rights to its own or a third State's nationals. States to investment treaties typically undertake to provide the following non-contingent protections to investors of the other signatory State:

a) Fair and equitable treatment;

b) Full protection and security;

c) Non-impairment by discriminatory measures; and

d) Protection against unlawful expropriation without compensation.

In the dispute resolution clauses of these treaties, the contracting States often agree that, if the host State fails to provide one or more of these protections to a foreign investment protected under the treaty, the protected investor of the other State can initiate an international arbitration against the host State. Once seized of the matter, the arbitral tribunal will determine if the host State violated the investment treaty and, if so, can order the host State to pay damages to the investor. In this way, the signatory States make a standing offer to arbitrate disputes with an investor, and the investor "accepts" that standing offer by initiating arbitration. Thus, investment treaty arbitration, like all arbitration, is based on the consent of the parties.

Many investment treaties give the investor the option of choosing one of several types of international arbitration. The three most common are (i) arbitration administered by the International Centre for Settlement of Investment Disputes ("ICSID") in Washington D.C., which is a division of the World Bank and specializes in investment disputes involving respondent States, (ii) arbitration administered under the UNCITRAL Arbitration Rules, and (iii) arbitration administered by the SCC Arbitration Rules. The Energy Charter Treaty, for example, gives qualifying investors all three options.

This article has aimed to provide a brief overview of modern international arbitration. If you would like to discuss any aspect, please do not hesitate to contact Stephen Anway.

Contact

Stephen P. Anway
Partner, New York, USA
T +1 212 407 0146
E stephen.anway@squiresanders.com

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Arbitration Appeals: English High Court decision on 'failure to deal with an issue'

One of the reasons that international parties choose arbitration in England is finality. The Arbitration Act 1996 provides very limited grounds for appeal and these are often restricted further by the parties' agreement or by their choice of arbitral rules. Once the parties have chosen arbitration, the English courts are generally reluctant to interfere; whether during the arbitration or after an award has been made.

For the winner, the benefits are obvious. But for both parties, there is often some commercial sense in having disputes resolved comparatively quickly, rather than have the uncertainty and expense of consecutive appeals to higher courts (which in some jurisdictions can entail full re-trials) hampering the parties' abilities to 'move on'. That is not to say, however, that the parties are stuck with whatever the arbitrator decides, no matter how bizarre or irrational. Arbitrators can make mistakes and sometimes there will be real grounds to appeal. In those cases the courts will intervene.

The 1996 Act permits an award to be challenged (ie, appealed) on the basis of:

- the arbitrators' lack of substantive jurisdiction (s.67);
- a serious irregularity affecting the arbitrators, the proceedings or the award (s.68); or
- a point of law (s.69).

The third of these grounds is often excluded, either by agreement or by the institutional rules governing the arbitration (see, *e.g.*, Art. 26.9 LCIA Rules, and Art. 34.6 ICC Rules). In contrast, the first two grounds are mandatory (s.4(1) and Schedule 1 of the 1996 Act). Even so, it is probably fair to say that appeals on the basis of the arbitrators' lack of jurisdiction are less common once a *substantive* award has been made because this right of appeal may be lost if jurisdiction is not challenged promptly. Often this means at an earlier stage of the arbitration. As such, it is the second ground – a serious irregularity – which is most often invoked in appeals against *substantive* awards. This might also be explained on the basis that s.68 appears on its face to be quite broad and it is usually possible to couch almost any kind of complaint in terms which, *at least superficially*, fall within its scope.

Needless to say, however, challenging an award under s.68 and doing so successfully are two quite different things. The section defines a list of nine circumstances which can constitute a "*serious irregularity*" (s.68(2)) and each has generated its own body of case law.

A very recent case before the English High Court have provided some helpful clarification about what will and what will not be sufficient in an appeal under one of these sub-sections, namely: "*failure by the tribunal to deal with all the issues that were put to it,*" (s.68(2)(d)).

Petrochemical Industries Company (K.S.C.) v The Dow Chemical Company[1] was an appeal, from the award in a US$ multi-billion arbitration before a panel of arbitrators, comprising the former head of chambers at one of the leading English arbitration sets, a former Judge of the Iran-US Claims Tribunal in the Hague and a former English Law Lord.

[1] 2012] EWHC 2739 (Comm)

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The Arbitration and the Award

The arbitration concerned the liability of the Claimant, Petrochemical Industries Company (K.S.C.) ("PIC") for losses suffered by the Defendant, The Dow Chemical Company ("Dow"), as a result of the withdrawal of the former from a US$ 7.5 billion corporate transaction. The tribunal awarded US$ 2.05 billion in damages for consequential losses incurred by Dow in re-financing another, separate corporate acquisition. PIC contended that Dow was not properly entitled to recover such losses because they were too remote from the alleged breach of contract; ie, being neither losses arising naturally in the usual course of things, nor in the reasonable contemplation of the parties as a result of special circumstances known to both of them (respectively, the first and second limbs of the test in the well-known case of *Hadley v Baxendale*).[2] PIC had further argued that even if such losses did fall within the scope of either of the limbs of *Hadley v Baxendale*, they still ought not to be recoverable because there was specific evidence that PIC had not assumed responsibility for this type of loss. It was this latter argument which gave rise to the appeal. PIC claimed that although the tribunal had addressed the '*Hadley v Baxendale* question', it had neglected to take into account PIC's arguments and evidence regarding 'assumption of responsibility'. As such, PIC contended that there was a serious irregularity affecting the tribunal, because it had "*fail[ed]… to deal with all the issues that were put to it*" and, as a result, PIC had suffered substantial injustice (s.68(2)(d) of the 1996 Act). Accordingly PIC sought an order that part of the award be remitted back to the tribunal for reconsideration.

The High Court's Judgment

The English High Court judge disagreed. In reaching his conclusion, he provided some helpful commentary on the court's approach to an appeal under s. 69(2)(d). He framed the test in three parts, with a fourth question which would have to be answered if the first three parts were satisfied, as follows:

> "*i) Whether the assumption of responsibility question was an **'issue'**…*
>
> *ii) If so, whether it was **'put to'** the Tribunal.*
>
> *iii) Whether the Tribunal failed to **'deal with'** it.*
>
> *If the answer to all these specific issues is 'yes', a further issue arises: whether the failure has caused or will cause PIC substantial injustice.*"

An 'issue'

First of all, the judge noted that the authorities draw a distinction between 'issues' and 'arguments', 'points' or 'lines of reasoning'. The former satisfy the test, while the latter do not and this distinction reflects a concern in the authorities, "*to maintain the "high threshold" that has been said to be required for establishing a serious irregularity.*" He went on to say that trying to identify a universal definition of an 'issue' was an "*impossible task*" and rejected three possible "*yardsticks*" proposed by Dow, instead, preferring to adopt a more holistic approach. He accepted that the 'assumption of responsibility' question was an 'issue' within the meaning of the sub-section, noting that it was "*not simply a way of presenting the question of foreseeability, and not simply an argument in support of a contention that losses were not within the First Limb or the Second Limb of Hadley v Baxendale.*" He also took into account that:

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[2] *Hadley v Baxendale* [1854] EWHC Exch J70

- The whole of Dow's claim could have depended on how the 'assumption of responsibility' question was resolved;
- Treating the 'assumption of responsibility' question as an 'issue' best accorded with what he considered to be, "*the ordinary and natural meaning of the word*"; and
- Assuming the question was put to the tribunal, "*fairness demanded that [it]… be 'dealt with' and not ignored or overlooked.*"

Being 'put'

Based on the content of PIC's written memorials, filed in the arbitration – the second of which contained a section titled "*PIC did not assume responsibility for Dow's losses,*" the judge concluded that the 'issue' had indeed been 'put' to the tribunal. He rejected the argument that PIC had withdrawn the issue simply because, in oral argument, the parties' counsel had at times referred to it as part of the wider question of 'foreseeability' and whether the losses fell within either limb of *Hadley v Baxendale*.

'Dealing with' it

Finally, the judge confirmed that in order to determine whether an issue has been 'dealt with', the court must look to the award. In so doing:

- The court should not necessarily look for the tribunal to have, "*set out each step by which they reach their conclusion or deal with each point made by a party…*"[3]
- A tribunal has not failed to deal with an issue which it decides without giving reasons and nor is it, "*required to deal with each issue seriatim: it can sometimes deal with a number of issues in a composite disposal of them.*"
- The approach of the court is to read the award in a "*reasonable and commercial way expecting… that there will be no substantial fault that can be found with it.*" This may involve taking account of the parties' submissions during the arbitration and awards "*are not to be interpreted in a vacuum*."[4]

Within this framework, he accepted PIC's submission that certain evidence relevant to the 'assumption of responsibility' question was "*nowhere referred to in the award…*" Nevertheless, he did not agree that the tribunal had failed to deal with that issue. Rather, he considered that it was dealt with "*admittedly succinctly, in the first sentence of paragraph 146 of the award,*" which simply stated.

The Judge summarised PIC's case as really amounting to two complaints – either that the tribunal had conflated the 'foreseeability' question and the 'assumption of responsibility' question, or that it had not explained why it had not given much weight to PIC's evidence on this point. But, on the principles stated earlier in his judgment, neither could it properly be considered to, "*…amount to a complaint of a 'serious irregularity' within section 68.*"

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[3] *Hussman (Europe) Ltd v Al Ameen Development & Trade Co. and ors.* [2000] 2 Lloyds Rep. 83, ¶ 56

[4] *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, per Bingham J at 14F

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Comment

Having concluded that paragraph 146 of the award, was sufficient to show that the tribunal had 'dealt with' the 'assumption of responsibility question', the Judge did not need to decide whether PIC had been caused substantial injustice. Nevertheless, he observed that, "*if the Tribunal… had entirely ignored the assumption of responsibility question,* ***PIC would have been caused substantial injustice****…*" By doing so, he seems to have made clear that the appeal only failed this one element of the s.68(2)(d) test.

This raises an intriguing question about how close PIC in fact came to succeeding. At the very least, it is surprising that an issue upon which, "*almost the whole of Dow's claim could have depended,*" should only receive only a single line's attention in the award – and even then not an explicit mention.

It is perhaps understandable, therefore, that the judge sought to emphasise that he could and would have reached the same conclusion on a different basis. He said that if, "*the first sentence of paragraph 146 of the award is directed to the [assumption of responsibility] question but… fell short of 'dealing with'…, then I would conclude that no substantial injustice was or will be caused: the first sentence would still have 'cast the die'.*" However, this reasoning might be criticised:

- First, it seems to conflate two distinct matters without any explanation – namely: (i) whether, qualitatively, the award indicates that the 'issue' was addressed at all; and (ii) what quantitative standard of attention is necessary for an issue to be said to have been properly 'dealt with'; and
- Second, the judge seems to have thought that the tribunal had already made up its mind, so that even if the 'assumption of responsibility question' was only 'addressed' but not 'dealt with', PIC would not have suffered any substantial injustice. This is directly at odds with a sentence appearing just a few lines earlier in the judgment ("…*PIC would have been caused substantial injustice…*"). Further, the argument is somewhat circular, since it requires an assumption that the tribunal would have reached the same conclusion in any event, in order to justify the conclusion that the 'issue' which was not 'dealt with' would not have made any difference.

We might speculate that the judge could have been influenced in his decision by his opinion on the substantive question (*i.e.*, whether 'assumption of responsibility' had a role to play in the recoverability of consequential losses this case). Similarly, where the question is one which appears to have been so fundamental to the outcome of the case, it is difficult to imagine that a tribunal of this calibre could have overlooked it completely.

In view of the sums at stake, it will be interesting to see whether PIC now takes the case to the Court of Appeal.

Contact

Duncan Saunders
Associate, London, UK
T + 44 (0)207 655 1360
E duncan.saunders@squiresanders.com

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News

Squire Sander launches "A Practical Guide to Managing and Resolving Disputes in China". This handy guide written by Peter Chow explains how to manage and resolve disputes with Chinese business partners and, where possible, to avoid them altogether. To download a copy please click here.

Maria Lokajova, an associate in our Prague office, has been elected as co-chair of the Young International Council for Commercial Arbitration. For further information click here.

George von Mehren speaks at the inaugral Kluwer Law, "Korea: International Arbitration Summit and the New Hub of Asia" (December 2012), on International Arbitration in the Energy Industry; Korean and beyond.

India: Greater certainty in future arbitrations following Bharat decision

International commentators and parties to international arbitration involving India have largely welcomed the Indian Supreme Court's decision, in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc ("Bharat")* (2012). The Court considered a number of consolidated appeals concerning the extent to which domestic Indian arbitration legislation has a role to play in international arbitrations conducted outside India. It has comprehensively overhauled and restated the law in this area, so as to make it more *pro*-arbitration and more consistent with the approach of other well-developed national systems of law in this area.

The Bharat appeals are of special significance, following the Supreme Court's decision, some 10 years ago, in *Bhatia International v Bulk Trading SA* (2002) ("*Bhatia*"), which held that the Indian courts could supervise arbitrations and grant interim relief in arbitrations conducted outside India. This, in itself, exposed parties to the risk of unwelcome court interference in arbitrations which they were conducting elsewhere in the world. However, in *Venture Global Engineering v Satyam Computer Services Ltd* (2008), the Indian courts went further still. Following *Bhatia*, they held that the Indian courts' supervisory role extended to allowing it to entertain appeals of international arbitral awards rendered outside India. The practical consequence of these two decisions was that a party seeking to enforce an award in India, would face a double hurdle; first in overcoming an appeal against the award in the Indian courts, and then again, in fighting off a challenge to the enforcement proceedings under the New York Convention.

In particular, the Supreme Court confirmed that the Arbitration and Conciliation Act 1996 adopted the territorial principle of UNCITRAL Model Law. Therefore the effects of Part 1 of the Act –

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which contains the provisions relating to interim orders and appeals at issue in *Bhatia* and *Venture* – are restricted to arbitrations taking place in India. Arbitrations outside India are not covered by Part I of the Act because they lack the necessary territorial link. This is consistent with the approach of other countries who have adopted the UNCITRAL Model Law as well as other countries with a markedly *pro*-arbitration culture, such as England and Switzerland. It is in stark contrast, however, to the previous rule of the Indian courts (ie following *Bhatia*) that – somewhat artificially, in the case of any dispute which does not have a direct connection with India – the effects of Part 1 of the Act could only be excluded if the parties had expressly agreed it.

The Supreme Court then went on to discuss and confirm various further points, including:

(i) that Indian law does not recognised de-localized arbitration;

(ii) that by choosing a seat of arbitration outside India the parties have chosen the laws of the seat to govern their arbitration; and

(iii) that annulment action under the New York Convention can only be brought (except in very unusual circumstances) in the courts of the seat of arbitration.

In summary the decision in *Bharat* means that foreign awards will now only be subject to the jurisdiction of Indian courts when they are sought to be enforced there. However, due to the very extensive nature of the changes, they will only take effect in respect of arbitration agreements concluded after 6 September 2012.

Contact
Duncan Saunders
Associate, London, UK
T + 44 (0)207 655 1360
E duncan.saunders@squiresanders.com

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The New Spanish Law of Mediation

The new Spanish Mediation Act came into force in March this year. Spanish Legislation has incorporated the EU Directive (2008/52/EC) of May 21st 2008, which establishes the general rules applicable to mediating civil and commercial matters in Spain except consumer, employment and public administration mediations or those involving criminal issues. The Act is applicable in cross-border mediation when at least one of the parties is based in Spain and the mediation takes place in Spain.

The new Act also states the general principle that any mediation is voluntary. If there is a mediation clause in a contract, parties must attempt to mediate in good faith, but none of the parties are obliged to continue with the mediation or to reach a settlement.

Other general principles are that both parties must be on an equal footing in the mediation proceedings; the proceedings and all documents exchanged by the parties will be confidential; and, in the event that a mediation does take place, parties cannot instigate other legal proceedings or start other alternative measures on the same matter whilst the mediation is underway.

To initiate a mediation, the Act states that the mediation can be brought by both parties jointly or just by one of the parties, provided this has been previously agreed.

To start the process the, parties must submit a request to the mediator agreed or appointed by them, and the submission must include the place of the mediation and the language of the proceedings.

The mediator will call the parties to a meeting to inform them about the proceedings. If both parties agree to go ahead, the mediator will take the minutes of the meeting, at which the following should be identified: the parties, the mediator, the object of the conflict, the course of action, the maximum length of the proceedings, the formal declaration from the parties that they voluntarily submit their conflict to mediation, as well as the place and language of the proceedings.

From that initial meeting the mediator will schedule as many meetings as necessary to resolve the conflict. If, finally, there is a settlement, it will bind the parties. Any of the parties can incorporate the settlement into a “Public Deed”, and the Public Deed shall be enforceable via the Courts.

If during the mediation, one of the parties asks for the mediation to terminate, or the maximum period fixed by the parties has been exceeded, or the mediator considers that if is impossible to reach settlement, then, the mediator will declare the proceedings concluded. The costs of the mediation will be shared between parties, even when it has been impossible to reach an agreement.

The new Act also specifics the qualifications that mediators must have. They have to pass specific courses including knowledge of law, psychology, communication and negotiation skills and ethics.

Finally, the Act establishes how foreign mediation settlement agreements can be enforced in Spain. If the settlement is enforceable in the foreign country because a Public Authority with functions similar to the Spanish Authorities has endorsed it as enforceable, then, the settlement will be enforceable in Spain without any further intervention. Otherwise, the settlement can only be enforceable in Spain if both parties jointly incorporate the settlement in to a Public Deed notarised by a Spanish Notary.

Contact
Jesus Carrasco
Partner, Madrid, Spain
T + +34 91 426 4859
E jesus.carrasco@squiresanders.com

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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 2012 within the dispute resolution category.

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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.

Jesús Carrasco is a partner in our Madrid office and a member of our international dispute resolution and litigation practices. His particular expertise covers arbitration and litigation including cross-border litigation, construction and property matters, intellectual property, sports and bankruptcy proceedings. He also advises construction companies and developers in pre-contentious issues, and has experience in distribution and agency contract disputes.

Duncan Saunders' practice encompasses a broad spectrum of commercial, corporate, financial services, energy and banking disputes; both international and domestic. Duncan has experience of representing for parties in disputes involving litigation in the English High Court, international arbitration, and mediation. He has acted for a diverse range of clients including leading energy industry conglomerates, hedge funds, banks, public-private partnership concessionaires, pension schemes and football clubs, both in the UK and in matters spanning several overseas jurisdictions.

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- Santiago+
- Santo Domingo

Europe & Middle East

- Beirut+
- Berlin
- Birmingham
- Bratislava
- Brussels
- Bucharest+
- Budapest
- Frankfurt
- Kyiv
- Leeds
- London
- Madrid
- Manchester
- Moscow
- Paris
- Prague
- Riyadh
- Warsaw

Asia Pacific

- Beijing
- Hong Kong
- Perth
- Seoul
- Shanghai
- Singapore
- Sydney
- Tokyo

+ Independent network firm