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International Arbitration News

March 2013

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Squire Sanders Ranked Among World's Top 30 International Arbitration Specialists

At the prestigious Global Arbitration Review (GAR) Awards Dinner held in February this year in Bogotá, Colombia, the annual rankings were unveiled with Squire Sanders named as one of the Top 30 International Arbitration Practices in the world.

The GAR 30 is based on a number of criteria, in particular the number of lawyers rated highly enough to gain entry to the Who's Who of Commercial Arbitration, the number of billable hours generated by international arbitration work, the number of merit hearings the firm undertakes and the value of the claims in those merit hearings. Squire Sanders is noted in the 6th annual edition of GAR 2013 for its track record in energy and construction matters, and has attracted plaudits for its gas price review work for clients such as Gas Natural and Edison SpA.

Squire Sanders' global chair of the International Dispute Resolution practice, George von Mehren, who accepted the award with fellow partner Stephen Anway (photographed below), commented: "Stephen and I are delighted that Squire Sanders has been included once again in the GAR 30. This reflects the calibre of cases and the sophistication of the work performed by our International Dispute Resolution team. We thank our clients and all the Squire Sanders lawyers who work in the area. This is a proud day for me." Stephen Anway added: "I am pleased that the international arbitration community has again recognized Squire Sanders as one of the top firms in this field."

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2012 marked another prestigious year for the Practice achieving success in two cases of note. Firstly, for an Italian energy company in a natural gas price review arbitration against a Qatari energy company following the deterioration of end-user prices in the European gas market. The ICC Arbitration tribunal ruled in favour of our client and awarded them around €450 million. Secondly, we acted for the Czech Republic in an UNCITRAL arbitration against German investor InterTrade Holding GmbH, under the Czech-German Bilateral Investment Treaty. Our client was accused of violating the Treaty by manipulating certain tender procedures concerning the Czech forestry sector and US$ 100 million in damages was sought against them. In a landmark decision, the tribunal rejected all of InterTrade's claims ruling that the acts of a state enterprise that conducted the tender were not attributable to the Czech Republic under public international law.

For more information about our practice please contact George von Mehren.

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Editor's Comments

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

In this edition, we look at the hot topic of funding from a French perspective; recent developments in Australia and will revisit the principles of confidentiality in arbitrations before the English Courts.

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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Third-party funding of arbitration in France

Introduction

Arbitration has gradually become the most favoured method of resolving international commercial disputes. However, the cost involved in arbitration proceedings can be detrimental for those less inclined to afford it or for those who are no longer willing to take such a financial risk. As a result, the flourish of third-party funding of litigation and arbitration proceedings is hardly surprising. It merely reflects the needs of a market and the risks parties are no longer willing to take.

Third-party funding provides a solution for those for whom the initiation of arbitration proceedings is contingent on the availability of funding. As a result, despite the cost involved, a party is more inclined to initiate arbitration proceedings knowing that it is not putting its company at risk.[1]

Third-party funding of international arbitration has been a growing phenomenon in many jurisdictions and has received increasing attention from the international arbitration and litigation communities. However, it has received limited attention in France, one of the major arbitration forums in the world, while it is well-developed in many other countries such as the United States, United Kingdom, Germany and Australia.

What is third-party funding?[2]

Third-party funding is an agreement by which a third-party to a dispute agrees to pay all or part of the costs associated with the proceedings. In exchange for the funds, the third-party receives a portion of the proceeds awarded by a decision in favour of the funded-party. As such, repayment of the third-party is contingent on the success of the funded-party in the dispute.

This financing method has proven profitable thus far for both the funded-party and the funder. Both share a common interest in succeeding in the proceedings and obtaining a favorable award. Because its impecuniosity no longer hinders the pursuit of a meritorious claim, the funded-party gains access to a justice it may otherwise have been unable to access, while the funder makes a profitable investment.

Depending on the jurisdiction involved, a party may resort to a diverse panel of funders. The funder may be (i) the client's law firm (where authorized), (ii) an insurance company, (iii) a bank, or (iv) an outside (financial) institution, either specialized in third-party funding, or financing arbitration on a case-by-case basis alongside other traditional financial investments.

Some examples of international arbitration' funders are: Juridica Capital Management[3], La Française AM International[4], Litigation Risk Strategies Group (Crédit Suisse)[5], Juris Capital LLC[6], Burford Capital Limited[7], Foris AG[8], etc.

These specialized institutions carry out a high-profile scrutiny of the cases purporting to benefit from the funding. They carefully weigh the chances of success and only proceed with the financing if they

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1 François-Xavier Train, "Impécuniosité et accès à la justice dans l'arbitrage international à propos de l'arrêt de la Cour d'appel de Paris du 17 novembre 2011 dans l'affaire LP c/ Pirelli", (2012) 2 Revue de l'Arbitrage, pp. 267 – 305; R. Harfouche, J. Searby, "Third-Party Funding: Incentives and Outcomes", Global Arbitration Review, 2013; Global Arbitration review, "Costs and third-party funding in international arbitration", 27 April 2010, Volume 5, Issue 2.

2 For a complete analysis see Lisa Bench Nieuwveld, Victoria Shannon (Eds), *Third-party funding in international arbitration*, Kluwer arbitration, 2012.

3 http://www.juridica.co.uk/claim.php.

4 http://www.lafrancaise-am.com/en.

5 http://www.parabellumcap.com/about.html.

6 http://www.juriscapitalcorp.com.

7 http://www.burfordcapital.com/litigation-finance.

8 http://portal.foris.de.

consider they will have a chance of success and a sufficient rate of return on their investment. Depending on the result of this analysis, they proceed with the funding or reject it. Should the proceedings turn out to be unsuccessful for the funded-party, the third-party funder of the arbitration proceedings is in principle not entitled to compensation. As a result, the funder loses the invested funds and bears the financial risks alone.

Third-party funding of arbitration in France[9]

Theoretically, there is nothing that prohibits resorting to third-party funding in France. However, it is not used in practice. This can be explained by (i) the low cost of legal actions in France compared to other countries; (ii) the prohibition of punitive damages; (iii) the widespread availability of legal aid or insurance in France; or the (iv) the prohibition of pure contingency fee arrangements (*quota litis* pacts).

There is only one reported case where French courts were asked to consider the validity of a third-party funding agreement in an international arbitration. In 2006, the Versailles Court of Appeal[10] was asked to enforce a funding agreement between an Australian company specialized in waste treatment, which had initiated arbitration proceedings against another company as a result of the failure of a construction project. The Australian company had concluded a financing contract « *to secure the financing of litigation costs in exchange for an interest in the proceeds* » with a German financing company, Foris AG.

When the arbitral tribunal rejected the claims of the Australian company, the latter turned to Foris AG for the payment of costs. The third-party funder, Foris AG, refused to honor the agreement. Notwithstanding that the Court of Appeal denied the jurisdiction of French courts over the dispute, it acknowledged that the financing contract in question was *sui generis* and unknown in EU countries apart for those countries of Germanic culture. However, although the Court was unable determine the nature of this contract, it did not declare it void.[11]

The main limitations to third-party funding in France originate out of the conflict between the practice itself and a French lawyer's ethical rules.

First, in France pure contingency fee arrangements between a lawyer and his client are strictly prohibited; that is, French law prohibits any determination of fees depending solely on the result of proceedings.[12] The fee structure must therefore entail the payment of the lawyer's fees, or at least part of them, for the actual service rendered irrespective of the result of the proceedings.

In addition, under the French National Bar Association rules, a lawyer may only receive payment from his client or the client's agent.[13] Therefore, in practice, third-party funders would have to provide the money to the client, who would then pay the lawyer's fees directly.

When considering entering into a funding arrangement, the funded-party may be required to provide documentation and information to ascertain its chances of success. Such information may be comprised of privileged information. However, in France, the lawyer's duty of professional secrecy cannot be lifted and is of public order.[14] Therefore, under French law, the client would be the only one that could provide privileged information to the third-party funder.

There are no laws or rules that question the validity of third-party funding arrangements or prohibit a lawyer from representing a party benefiting from such funding in international arbitrations provided

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9 Lisa Bench Nieuwveld, Victoria Shannon (Eds), *Third-party funding in international arbitration*, Kluwer arbitration, 2012; P. Pinsolle, "Le financement de l'arbitrage par les tiers", (2011) 2 Revue de l'arbitrage, pp 385-414 ; M. de Fontmichel, "Les sociétés de financement de procès dans le paysage juridique français", (2012) Revue des sociétés, p 279 ; Global Arbitration review, "Third Part Funding – Case notes on third-party", 1 February 2008, Volume 3, Issue 1.

10 CA Versailles, 1 June 2006, No 05/01038.

11 CA Versailles, 1 June 2006, No 05/01038.

12 Law n° 71-1130 of 31 December 1971, Article 10 ; and French National Bar Association rules, Article 11.3.

13 French National Bar Association rules, Article 11.3.

14 French National Bar Association rules, Article 2.

that French ethical rules are complied with. This is, of course, assuming that the contract was duly formed and that it does not contravene French public policy.

It is noteworthy that these ethical rules are only applicable to French lawyers. Foreign lawyers representing a client in international arbitration proceedings in France would not be subject to such rules and regulations.

Concerns irrespective of the jurisdiction

Because it is still a growing practice, third-party funding raises a number of other issues irrespective of the jurisdiction where it is used and which remain unresolved. Its potential benefits and risks have received increasing attention from the arbitration community.

One of the main concerns is the possible waiver of rights in relation to privileged documents or information (including lawyer-client privilege) when the client discloses privileged documents and information to the third-party funder, either during the due diligence scrutiny phase where the funder determines whether or not to fund the arbitration proceedings, or during the course of the proceedings.[15] Although specific confidentiality agreements are generally concluded to that respect, it is a risk the funded-parties should consider when they decide whether or not to resort to third-party funding.

In addition, potential conflicts of interest may arise, mainly due to the control the funder may directly or indirectly exert, or try to exert, over the proceedings. Indeed, by funding the entire proceedings, the funder gains an interest in the result of the proceedings. There is a non-negligible risk that, if the structure of the agreement is not stringent enough, the funder will attempt to prioritize its own interests ahead of the client's.

In principle, the funder does not acquire the rights and obligations of the funded-party, but because of its financial input, the funder may claim certain control rights over the proceedings. This in itself calls for the implementation of specific regulation and special care.

Another question which remains unresolved is whether the existence of a funding agreement should be disclosed to the arbitral tribunal or to the opposing party.

Conclusion

Third-party funding is still a developing institution, and even more so in France. However, under the current legal framework, the development and success of arbitration in France could enliven a possible avenue for third-party funding in France.

Although many risks and contingencies are entailed in the process, including that the legal system could become a mere instrument for financial speculation, this mechanism also provides adequate solutions for impecunious parties with meritorious claims and for parties wishing to preserve the financial health of their companies. So long as sufficient regulatory restraints and risk analyses are duly carried out before entering into funding agreements, third-party funding will continue to flourish.

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[15] See E. Bertrand, “The Brave New World of Arbitration : Third-Party Funding”, (2011) 3 ASA Bulletin, pp 607-6015; Lisa Bench Nieuwveld, Victoria Shannon (Eds), *Third-party funding in international arbitration*, Kluwer arbitration, 2012; Kantor, “Third-Party Funding in International Arbitration: An Essay About New Developments”, (2009) 24(1) ICSID Review 65.

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Recent developments in International Dispute Resolution in Australia

In the November 2011 edition of this newsletter, we outlined Australia's new approach to enforcement of awards. Since that time, there have been a number of further developments in Australian law which shows how international arbitration agreements and awards will be treated in Australia. This article explores some of those legal developments, and their relevance to those involved in an international arbitration with an Australian connection.

Brief refresher on the Australian international arbitration regime

In Australia, international arbitration is regulated by the *International Arbitration Act 1974* (Cth) (**IAA**), which was enacted to give effect to the 1958 New York Convention (**Convention**). The IAA was amended in 1989 to enact the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), and again in 2010 to adopt many of the 2006 revisions of the Model Law.

2012 Developments

Jurisdiction to enforce "non-foreign" international awards

The IAA is clear in conferring jurisdiction on various Australian Courts to enforce 'foreign' international arbitration awards – namely awards which the New York Convention applies that are made in a country other than Australia. However, peculiarly the IAA does not expressly provide any Australian Court with jurisdiction to enforce international arbitration awards made within Australia (non-foreign international awards).

The absence of an express conferral of jurisdiction is significant to those who have Australia as the seat of arbitration, and who also wish to enforce the award in Australia. While it seems obvious that such an award must be enforceable in Australia, it creates a risk that proceedings commenced to enforce the award will be challenged on the basis that the particular Court does not have jurisdiction.

Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (2012) 201 FCR 209 (**Castel**) has now reduced that risk, at least if the proceedings are commenced in the Federal Court of Australia. In Castel a single judge of the Federal Court found that the Federal Court did have jurisdiction, on the basis that it was a competent court under Articles 35 and 36 of the Model Law.

Unfortunately, the uncertainty remains for the Supreme Courts of each State. While the Court of Appeal of Western Australia acknowledged the issue in *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2012] WASCA 50 (**Rizhao**), it did not need to determine it.

Until the position is clarified (either through further case law or legislative amendment), in order to avoid a jurisdictional dispute it may be desirable for persons seeking to enforce 'non-foreign' international awards in Australia to commence the enforcement proceedings in the Federal Court rather than a state Supreme Court.

Retrospective effect of amendment to section 21 of the IAA

The 2010 amendments to the IAA included an amendment to s21 to prevent parties to an international arbitration agreement from 'opting out' of the Model Law in favour of the state specific

domestic *Commercial Arbitration Act*(s) where the arbitration is held in Australia. One area of uncertainty regarding this amendment has been whether it has retrospective effect. This issue is of relevance both to arbitrations commenced before 6 July 2010 but not yet completed (which may now be uncommon), and also to arbitrations commenced after 6 July 2010 but pursuant to arbitration agreements entered into before 6 July 2010 (which will still be common).

The Western Australian Court of Appeal recently provided some clarification in Rizhao, holding that the amendments do not apply to arbitration proceedings commenced before 6 July 2010.

Unfortunately, however, this clarification is only in relation to the more uncommon scenario, and despite two recent decisions considering the application of s21 to arbitrations commenced after 6 July 2010 but pursuant to arbitration agreements entered into before 6 July 2010, the position for such a scenario remains unclear. In Castel a single Judge in the Federal Court of Australia found that the amendments do apply regardless of when the arbitration agreement was entered into. While not needing to decide the issue, it was also considered in Rizhao. Two justices suggested, while stating that it was not necessary to express a concluded view, that s21 may not operate retrospectively in such a scenario. However, the third member of the Court suggested that he saw no impediment.

In light of the current uncertainty, parties to arbitration agreements entered into before 6 July 2010 should be aware that the effectiveness of an election in the arbitration agreement to opt out of the Model Law is open to challenge.

Application of proportionate liability legislation to arbitrations

When an arbitration concerns a claim for economic loss or damage to property arising from a failure to take reasonable care (whether founded in contract, tort or otherwise), and there is the possibility that multiple wrongdoers being responsible for that damage, a question arises as to what effect this has on the conduct of the arbitration and any award of damages.

Each of the Australian States has a statutory regime of proportionate liability, which requires courts to apportion liability amongst multiple wrongdoers in such claims (**Apportionment Legislation**). However the recent decision in *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 (**Woods**) raises significant doubt whether this requirement applies to international arbitrations.

In Woods, the Supreme Court of Western Australia (**WASC**) held that the Apportionment Legislation in Western Australia (the *Civil Liability Act 2002*) did not automatically apply to a domestic arbitration under the *Commercial Arbitration Act 1985* (WA). The basis for this determination was that the Apportionment Legislation specifically refers to "courts", an "action for damages" and in making "judgments". Further, unlike most courts, an arbitrator can only decide issues between parties to the arbitration agreement and cannot join concurrent wrongdoers as parties to the arbitration. While the decision arose in the context of domestic arbitrations, it is likely that the same reasoning will be applied to international arbitrations.

Significantly, although the Court in Woods considered the Apportionment Legislation did not automatically apply by its own force, it did suggest that it could apply by virtue of a term of arbitration agreement (either express or implied). While at first blush the possibility of an implied term may seem to overcome the practical effect of the technical finding in Woods, the position is not clear cut. It is not uncommon that the arbitration agreement is contained in very brief contractual clause, most of the terms of the arbitration agreement are implied and there is little assistance offered by the text of the arbitration agreement in determining implied terms. Further, the precise 'term' which must be implied in order to give the Apportionment Legislation effect will need to be carefully considered (albeit the Court in Woods provided some preliminary views). As a result of Woods, parties to current arbitration agreements with a choice of Australian law cannot assume proportionate liability will apply, and will need to engage in a careful analysis of their arbitration agreement to determine the position.

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Parties entering into new arbitration agreements with a choice of Australian law should consider whether they want the Apportionment Legislation to apply, and make express provision either way. If the Apportionment Legislation does apply, but the concurrent wrongdoer is not a party to the arbitration agreement, the claimant may be required to commence court proceedings to recover the remaining portion of its loss. This carries the clear risk that the court's findings on liability and quantum of damages could be different to those of the arbitration.

Enforcement of foreign awards where no assets in Australia

On occasion a party to an arbitration award may see benefit in seeking to enforce a 'foreign' award in Australia even though the party it is being enforced against has no assets in Australia (for example, for the purpose of winding up an Australian company).

The right of an award creditor to seek enforcement of their award in Australia where there are no Australian assets was challenged in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535. However, the Federal Court of Australia confirmed that an award debtor does not need to have assets in Australia before an Australian Court will enforce the award.

Invalidity of arbitration agreements in charter-party contracts

Under the *Carriage of Goods by Sea Act 1991* (Cth), any provision in a "sea carriage document" that purports to limit the jurisdiction of an Australian court is invalid, unless it provides for arbitration in Australia.

In *Dampskibsselskabert Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696, the Federal Court of Australia refused to enforce an arbitration award made in London pursuant to an arbitration clause in a voyage charterparty on the basis that the arbitration agreement was invalid. The Court considered the voyage charterparty to be a "sea carriage document" (contrary to previous authority from the Supreme Court of South Australia).

As a result, there is a significant risk that an arbitration clause in a voyage charterparty will be considered invalid under Australian law if the seat of arbitration is not Australia.

Public policy grounds for setting aside or declining to enforce arbitral awards

The public policy ground for refusing to enforce or setting aside arbitral awards under the IAA, and in particular the "natural justice" ground, was recently considered by the Federal Court in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 (**Castel No 2**).

Consistent with the position taken in the United States and Hong Kong, the Court stated that "public policy" ought to be construed narrowly, and encompassing only those that elements which are fundamental to Australian notions of fairness and justice. However, the Court also found that, in relation to natural justice, the wording of s19(b) of the IAA is such that "any" breach of natural justice will be contrary to public policy, and that there did not need to be an assessment of degree to which that breach offends fundamental notions of fairness and justice.

The Court in Castel No.2 expressed some concern that this decision that "any" breach of natural justice was sufficient would be inconsistent with the international interpretation of "public policy". However, we do not consider that to necessarily be the case. Instead, Castel No.2 merely confirms that Australia considers an award to be contrary to fundamental notions of fairness and justice if there has not been a fair hearing or if there is a reasonable apprehension of bias (these being the natural justice requirements in Australia). It should be kept in mind that whether there has been a fair hearing is not determined by a set of arbitrary rules, but rather is considered in the context of the specific facts and circumstances which exist in each instance.

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In any event, as the Court emphasised, even if a breach of natural justice is established and renders the award contrary to public policy, the Courts retain a discretion to refuse to set aside the award, or to enforce the award.

Constitutional challenge to the IAA

Significantly, the enforcement provisions of the IAA were the subject of a recent constitutional challenge. TCL Air Conditioner (Zhongshan) Co Ltd (a party to Castel and Castel No.2 referred to above) commenced proceedings in the High Court of Australia, contending that the limited scope for resisting enforcement of international arbitration awards interferes with the exercise of the judicial power conferred on courts by the Constitution and results in arbitral tribunals impermissibly being conferred powers that are reserved for the federal courts.

On 13 March 2013, the High Court unanimously rejected these contentions. The High Court held that the arbitral tribunal's authority is not limited by Article 28 of the Model Law or an implied term to a correct application of the chosen law, and the enforcement of an award does not signify endorsement of its legal content. Further, the High Court drew a distinction between arbitration which is founded on mutual voluntary agreement between the parties to submit to the arbitral authority and the judicial power of the Commonwealth which applies independently of consent. As a consequence, the High Court held that the Federal Court's role in the enforcement of international arbitral awards under the IAA and the Model Law is not incompatible with the integrity of the Federal Court and does not involve any impermissible delegation of federal judicial power.

The High Court's decision is an important endorsement of the current framework for the enforcement of international arbitral awards in Australia under the IAA and parties to an international arbitration can proceed with the knowledge that enforcement of international arbitral awards remains available in Australia in line the with international standards.

Concluding comments

The law in Australia regarding recognition of arbitration agreements and enforcement of arbitral awards continues to develop as arbitration becomes more common. While some additional certainty is developing in some areas, uncertainty is becoming apparent in others where the legislation is being tested. It is hoped that the areas of uncertainty will continue to be reduced through both legislative amendment and the development of case law. In light of the recent decision of the High Court, it is evident that 2013 will be an exciting year for international arbitrations in Australia.

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Confidentiality in Arbitration: The English Law Perspective

One of the primary advantages of arbitration over litigation is that arbitration proceedings are confidential and conducted in private. This makes arbitration popular with parties who wish to keep the terms of their dispute outside of the public domain. However, under English law, there are a limited number of exceptions to this general rule of confidentiality. The recent case of *Westwood*[16] provided an interesting insight into these exceptions and the circumstances in which the English courts will waive the confidentiality of arbitration proceedings.

In this case, Westwood time chartered a vessel from Universal who had in turn chartered the vessel from its owners. Westwood later sub-chartered the vessel back to Universal. Following a drop in the market, Westwood brought claims against Universal for breaches of the main charter and of the sub-charter. The case went to arbitration in London, following which Universal went into liquidation in Germany.

On 5 September 2012, Westwood and Weyerhaeuser (the Claimants) issued a claim in the English Commercial Court in which they alleged that a number of companies and individuals were parties to an unlawful means conspiracy, the aim of which was to damage the claimants. In particular, the claimants alleged that a number of these parties were aware of an unlawful backdated agreement which sought to waive any rights Universal had against the head owner of the vessel in the future, thus barring any potential claim under the head charter.

As such, the claimants brought an application in which they sought permission to rely on documents which were referred to in the initial arbitration between Westwood and Universal. The claimants sought to make three principal arguments that the confidentiality of these documents had been waived, namely that: (1) the documents were referred to at a creditor's meeting; (2) the documents were referred to in a judgment of the court regarding the enforcement of the award; and (3) that one of the exceptions to confidentiality recognised in the case of *Emmett v Michael Wilson* [2008] Bus LR 1361 applied.

In considering this application, Mr Justice Flaux considered that neither of the first two grounds suggested by the claimants were sufficient to waive confidentiality. However, he considered *Emmett* and found that disclosure of the documents was appropriate under two of the exceptions set out in that case.

In *Emmett*, the Court of Appeal stated that there could be four principal exceptions to the general rule of confidentiality: (1) where there is consent to the waiver; (2) where there is an order of the court; (3) where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and (4) where the interests of justice require disclosure, including on the grounds of public interest.

Mr Justice Flaux found that neither of the first two *Emmett* exceptions applied, but ruled that both of the second two exceptions did; in short, the disclosure of the document was found to be reasonably necessary in order to protect the claimants' legitimate interests and/or to protect the interests of justice. It was found that the claimants had an arguable claim which could not be properly pursued in

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16 *(1) Westwood Shipping Lines Inc (2) Weyerhaeuser NR Company v (1) Universal Schiffahrtsgesellschaft MBH (2) Michael Bremen* [2010] EWHC 3837 (Comm)

court unless they had access to the arbitration documents and, consequently, there was a legitimate interest in permitting reference to the material. Further, Mr Justice Flaux ruled that the interests of justice required disclosure because, where there is an arguable case of unlawful actions before the court, it should not permit the confidentiality of arbitration to stifle the ability to bring to light the defendants' wrongdoing.

This case shows that the general rule of confidentiality in arbitral proceedings is not absolute. In most cases, the general rule will remain valid and the confidentiality of the parties' dispute will be unaffected. However, parties should be aware that the English courts will not permit confidentiality to become an obstruction to the deliverance of justice.

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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.

Antoine Adeline is a partner within the international dispute resolution practice of the Paris office. He is a French and Canadian national, has lived and practiced in England for five years and brings more than 20 years' experience to Squire Sanders, as a trial advocate and litigation and arbitration lawyer in a highly international environment. His particular focus is on arbitration, cross border disputes, alternative dispute resolution, particularly mediation, and corporate insolvency. Although he has particular experience in areas such as construction, software and various manufacturing industries, he represents a diverse range of businesses from public, multinationals and household names through to larger SMEs.

Graeme Slattery represents clients in resolving a wide range of disputes. His experience includes representation in disputes over international oil fields, mining and exploration agreements, major construction projects, managed investment schemes, employment matters, directors' duties, disclosure obligations and oppression actions. His practice encompasses a variety of industry sectors including energy and resources, real estate and commercial property, financial services, technology, construction, transportation and logistics, infrastructure and government.

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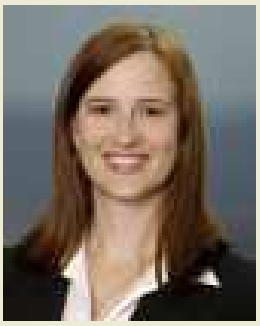
Contributor Profiles

Rebecca Heath represents clients in a wide range of disputes. Her experience includes representation in disputes over mining and exploration agreements, construction projects, property developments, joint ventures, managed investment schemes, employment matters and directors' duties, as well as various other types of contractual and statutory rights, obligations and liabilities. She has acted for clients in a wide variety of industry sectors including energy and resources, real estate and commercial property, financial services, technology, sports, entertainment, construction, infrastructure and government.



Scott Meacock is an associate in the Litigation department, advises on corporate and commercial disputes and has acted for clients in a variety of industry sectors, including energy and resources, commercial property, financial services and intellectual property and technology. Scott's experience includes providing strategic advice and representation in disputes over joint ventures, contracts for the sale of commercial property, enforcement of securities and construction projects. Scott has appeared in the Magistrates Court of Western Australia, the District Court of Western Australia and the Supreme Court of Western Australia, and has also participated in pre-trial and mediation conferences.

Lloyd Thomas is an associate in the Litigation department and is part of the Sports Law Group based in our London office. Lloyd provides a range of contentious and regulatory advice to a number of leading sports clubs, individuals and National Governing Bodies on a variety of issues. As part of such advice, Lloyd regularly assists in proceedings brought before the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport. Lloyd also provides clients with advice on commercial litigation and has experience of High Court litigation as well as alternative dispute resolution.

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