SQUIRE SANDERS HAMMONDS | LEGAL COUNSEL WORLDWIDE

# INTERNATIONAL ARBITRATION NEWSLETTER

## July 2011

**Inside:**



## Editors' Welcome

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

We are delighted to be able to relaunch our newsletter following the combination of Hammonds LLP and Squire, Sanders & Dempsey on 1 January 2011. Each edition of our newsletter will provide insight into international arbitration across many jurisdictions. We shall feature items of interest, as well as news and information from around the International Arbitration community.

Our International Dispute Resolution team specialises in arbitration, international litigation, advocacy, dispute prevention and mediation, for which we have received awards and market recognition. The Global Arbitration Review 100 (2011), a guide to the top international arbitration firms, lists us among its top 30 of leading IDR practices.

If you have any questions or comments on any of the matters covered, then please do not hesitate to contact either of us or any of the contributors.


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# ARBITRATION INSIGHT

## French: International Arbitration Law Reformed

### INTRODUCTION

French arbitration law has not been reformed since its inception in 1980/1981. The new law which came into force on 1 May 2011, (Decree n° 2011-48 dated 13 January 2011), includes some new provisions and also codifies rules established through French case law. The objectives of this reform are to assist and promote the use of alternative dispute resolution, to provide clarity to provisions which were considered to be open to interpretation and to sustain France's prominent role in international arbitration. Certain aspects will only apply to arbitration agreements entered into after 1 May 2011 and arbitration hearings and awards after this date.

The new law amends the rules for both domestic and international arbitration law and replaces Book IV of the French Civil Procedure Code ("CPC") in its entirety.

The main reforms for international arbitration are as follows:

### ARBITRATION AGREEMENTS AND CLAUSES

- In international arbitration, the elimination of any formal requirement for arbitration agreements (Article 1507 CPC). This was implicit under previous legislation, which permitted parties to waive the validity requirements of domestic arbitration agreements.
- In domestic law, whilst such written formality is still required, the agreement no longer has to stipulate the identity of, or how, the arbitrators are to be appointed. The new law also seeks to apply one regime regardless of whether an arbitration agreement is entered into before or after the dispute.
- the principle of autonomy of the arbitration clause previously established under case law has now been codified (Article 1447 CPC). Its validity is therefore independent of that of the main contract. It can be subject to a different law to that of the contract, and it is subject only to public policy (as opposed to domestic law).

### TRIBUNAL HEARINGS

To speed up the arbitration process, whilst ensuring the process is fair, all parties, including the arbitrator, must "act promptly and fairly in the conduct of the procedure" (Article 1464 CPC).

A party who knowingly and without a legitimate reason fails to object to an irregularity before the arbitral tribunal in a timely manner, shall be deemed to have waived its right to avail itself of the irregularity. This "estoppel" rule had previously been evoked in case law, but has now been codified.

In international arbitration, the arbitrator must ensure equal treatment of the parties and respect the adversarial principle, regardless of the applicable procedural law (Article 1510 CPC).

The arbitrators' powers during the hearing have been expanded both for domestic and international arbitration (codifying case law). They now have the express power to hear any person and to order disclosure of any documents "using methods to be determined by the arbitrator and if necessary, subject to penalties for non compliance" (Article 1467 CPC). They can also order any "appropriate" provisional or protective measures, and have the power to apply penalties if necessary (Article 1468 CPC).

### ARBITRAL AWARD AND APPLICATIONS TO SET ASIDE

For the most part, these provisions have stayed the same, but some have been redrafted for clarification.

Under Article 1522 CPC, parties to an arbitration agreement may agree at any time to waive the right to seek annulment of an award, and thus the award will

be final when it is handed down. However, parties cannot waive their right to appeal any decision granting leave to enforce the arbitral award in France or against enforcement orders. Therefore, it will still be possible to resist enforcement of an award before a French court if enforcement is sought in France.

In a departure from the previous law, an application to set aside no longer stays the enforcement of the award. Therefore, parties will be able to enforce an award while a challenge is still pending before French courts (Article 1526 CPC).

Also, the one-month time limit for filing an application to set aside now runs, as for domestic arbitration, from the date of notification of the award itself, and not from the date of service of the exequatur order (Article 1519 CPC).

**COURT INTERVENTION**

The new provisions allow for judicial intervention to support the arbitration process to ensure its effectiveness (the "*juge d'appui*"). The support judge is now competent in relation to:

(a) Constitution and composition of the tribunal;

(b) Incapacity, removal, resignation and refusal of an arbitrator,

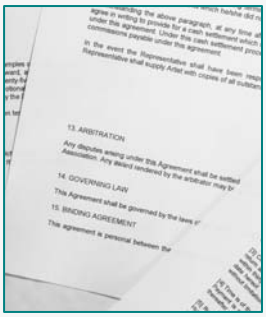
provided the parties have failed to reach an agreement and no institution is in charge of the administration of the arbitration.

Finally, Article 1505 CPC confers on the support judge in an international arbitration (President of the Paris Court of First Instance) the power to intervene if a party is exposed to the risk of a denial of justice irrespective of whether the applicant has a connection to France. Therefore, even in matters that have no relationship to France, an application can be made to a French judge.

The reforms appears to be a refinement rather than a modification of existing French arbitration law, but do assist to codify and simplify existing practices, and now provides a uniform text to which practitioners can refer.

*Antoine Adeline, Partner, Paris*

## POLAND: New PIL Provisions Governing Arbitration Agreements Come Into Force



A new act on private international law (conflict of laws) rules came into force in Poland in May 2011. The new law (the "**PIL Act**") replaced the previous Polish law of 1965, which had been enacted at a time when Poland's economic and social ties with other countries were rather limited and had long been considered to be an outdated piece of legislation. The new act significantly remodels the established system of conflict of laws rules, as well as introducing new regulations concerning areas of law which had until now been left unregulated from the PIL perspective. One area covered by the new law relates to the conflict of laws status of an arbitration agreement (**umowa o arbitraż**), whereby the parties submit a (potential or existing) dispute to resolution in arbitration proceedings.

The conflict of law rules relating to arbitration agreements are set out in Chapter 8 (Articles 39 – 40) of the PIL Act.

"***Chapter 8 – Arbitration agreement***

**Article 39**. *1. The arbitration agreement shall be governed by the law selected by the parties.*

*2. If no such law is selected, the arbitration agreement shall be governed by the law of the state in which the agreed place of arbitration is located, in accordance with the agreement of the parties. In the absence of such an agreement as to the place of arbitration, the arbitration agreement shall be governed by the proper law governing the legal relationship, which the dispute pertains to. However, it is sufficient for the arbitration agreement to be effective under the law of the state in which the arbitration proceedings are under way or in which the arbitration tribunal has issued its award.*

**Article 40** *The form of the arbitration agreement shall be governed by the law of the state of the place of arbitration. However it is sufficient for the form of the arbitration agreement to be in conformity with the law of the state which governs the arbitration agreement*."

The PIL Act now expressly allows the parties to an arbitration agreement to select the law which is to govern it. Until now the issue of whether an agreement of this type can be subject to a separate legal system has been the subject of much speculation and had been considered controversial, both in Poland and in numerous other countries. Note for instance, under German law arbitration agreements are regarded as falling under the *lex fori* of the court with jurisdiction over the recognition or enforcement of the arbitration award issued on the basis of the relevant agreement. A similar solution was sometimes adopted in Poland, following the German example.

Secondly, the PIL Act expressly indicates which legal system is to apply in the absence of a choice of law, pointing to the law of the agreed place of arbitration (*lex loci arbitri*) or (if no such place has been agreed) to the law governing the legal relationship which is the object of the dispute (which is in turn selected based on the relevant connecting factor). At the same time it is sufficient that the agreement meet the requirements of the law of the state in which the arbitration proceedings are taking place (whether or not this is the agreed place of arbitration) or in which the award had been issued (depending on the stage in the proceeding). The form of arbitration agreement is always governed by *lex loci arbitri*, except where it meets the (more liberal) requirements of the *lex contractu* selected for the arbitration agreement.

However, the introduction of the new provisions may lead to a possible conflict with the Polish insolvency rules (Article 142 of the Insolvency and Restructuring Act of 2003 (the "***IR Act***")). Pursuant to the above regulations an arbitration clause or an arbitration agreement expires automatically as of the date of the announcement of the insolvency of a party thereto, and any ongoing arbitration proceedings are likewise automatically terminated. The introduction of Article 39 of the PIL Act may allow the parties to circumvent the application of Article 142 of the IR Act if the parties select to submit the arbitration agreement to a legal system other than Polish. While a Polish court with jurisdiction over the insolvency proceedings might believe that the above Article 142 is subject to mandatory application, irrespective of the choice of law, the relevant arbitral tribunal would most likely not consider itself bound by this and would refuse to terminate the ongoing proceedings. The actual effect of the new Article 39 on the practice of Polish courts (including in particular insolvency court) remains to be seen.

*Maciej Szwedowski, Senior Associate, Warsaw*
*Tomasz Kamiński, Law Clerk, Warsaw*

## News

Squire Sanders launches Guide to London Arbitration. For your free copy please contact katie.nunn@ssd.com

LCIA European Users' Council Symposium - 9-11 September 2011, UK

Unveiling of new ICC Rules – 12-13 September 2011, Paris

IBA Conference - October/November 2011, Dubai

## GERMANY: US discovery in a German lawsuit?

The US court system provides the most complex, all-encompassing and thorough discovery processes of any jurisdiction in the world. The overwhelming majority of other nations' courts either completely prohibit the parties of civil court proceedings from excursions into the wealth of documents that are in the opponent's possession or such expeditions are strictly limited. Instead of allowing requests, which can often be for millions of documents, courts outside of the U.S. grant requests only if they are relevant and if the requests specifically indentify those documents the party wishes to see. Broad US-style requests are generally rejected. This key difference between legal systems has driven international litigation strategies for decades.

However, nothing is more reliable than change. This year, the Seventh Circuit Court of Appeals in Chicago in the case of *Heraeus Kulzer GmbH v. Biomet Inc*[1] introduced a new option into the landscape of international dispute resolution. The Seventh Circuit's new opinion has opened the door for parties litigating in non-US courts to use the U.S. federal court system for the purposes of obtaining discovery that is otherwise not available in courts outside the US.

The case started about two years ago in a German court when German based Heraeus filed a complaint against US headquartered Biomet for theft of trade secrets relating to medical device technology. At the same time as commencing in Germany, Heraeus made a tactical move into the US court system. Using 28 U.S.C. §1782, Heraeus petitioned the U.S. District Court for the Northern District of Indiana to conduct discovery of documents relating to the trade secrets which were expected to be in Biomet's possession in the US. Heraeus was able to lodge such suit at the US court as Biomet's corporate headquarters is located in Indiana, USA.

Biomet tried everything to stay out of discovery proceedings and argued, inter alia, that Heraeus could not properly invoke 28 U.S.C. §1782 because it was attempting to (i) harass Biomet, (ii) obtain discovery that would be unacceptable under the rules of the originating German court, (iii) bypass German law inappropriately and (iv) misuse discovery principles in order to impose an undue burden on Biomet. The U.S. District Court did not grant the requested opening of discovery procedures, but Heraeus appealed the decision. In its judgment, the Seventh Circuit Court of Appeals applied 28 U.S.C. §1782 differently and overturned the District Court's view on the basis of unreasonableness. As a consequence, Heraeus was finally granted discovery in accordance with the US Federal Rules of Civil Procedure.

The impact of the Seventh Circuit's judgment on international dispute resolution could become significant. Armed with this case law, the option of seeking discovery in the US in order to gain additional evidence has the potential to become a sharp sword for any party involved in a cross-border lawsuit. The prospect of looking out for the "smoking gun" piece of evidence and/or to force the other party into a costly US discovery is very appealing, both from the standpoint of settlement negotiations or from a more general litigation strategy point of view.

The counter-argument in invoking 28 U.S.C. §1782, is that there is a requirement for the party in receipt of the discovery request to be residing in the US. In many cases this is a weak argument. In a more and more globalised world, it would be unusual if a commercial enterprise of a certain size would not (from a legal standpoint) reside one way or another (via subsidiaries, sister corporations, affiliates etc.) in the largest economy worldwide.

*Horst Daniel, Partner, Frankfurt*

[1] No.09-2858 (7th Circuit. Jan, 24 2011)

## UK: Unnamed Witnesses in Arbitral Proceedings

### INTRODUCTION

The use of an unnamed witness in arbitral proceedings is less common than it is in, say, criminal proceedings, but that said, it is not unheard of. This article considers the legal and moral issues which become relevant in circumstances where unnamed witnesses are relied upon in arbitral proceedings.

### THE RULES

The biggest issue in relation to the use of an unnamed witness is whether such use is contrary to a defendant's right to a fair hearing. The right to know the identity of an accuser has long been held to be a fundamental element of a fair hearing in jurisdictions across the world.

The IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**") provide at Article 4(5) that if a party wishes to rely on witness evidence, a witness statement should be provided and should contain the following:

(a) the full name and address of the witness;

(b) an explanation of that witness' relationship with the parties; and

(c) a description of that witness' background, qualifications, training and experience, if they are relevant to the dispute.

### MORAL ISSUES

One of the reasons the IBA Rules require the identity and description of a witness to be revealed in proceedings is to allow the party opposing the statement, and the arbitrator, the opportunity to assess the credibility of the witness and the basis on which the witness makes his comments. It has been suggested that depriving a defendant the opportunity to cross-examine those giving evidence against him, puts him at an immediate disadvantage and effectively denies that defendant the right to a fair hearing, contrary to Article 6 of the European Convention on Human Rights (the "**EC Convention**").

There are a number of cases which outline the importance of being able to confront an adverse witness. In *R v Hughes*[2] , Judge Richardson observed that "*any notion of a fair trial…must include the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue*".

In *S v Leepile and Others*[3] , Judge Ackerman observed a number of difficulties with allowing a witness to remain anonymous: "*legal representatives* [could not carry out investigations] *into the witness' background to ascertain whether he has a general reputation for untruthfulness*". Judge Ackerman went on to say that "*it would make it more difficult to establish that the witness was not at places on the occasions mentioned by him" and that "it would further heighten the witness' sense of impregnability and increase the temptation to falsify or exaggerate*".

Parties who argue in favour of using anonymised witnesses in proceedings have suggested that in certain circumstances, an analogy can be drawn with criminal proceedings, the rules for which commonly provide that the anonymity of a witness may be preserved if the participation of that witness may expose him to a serious danger threatening his life, or another serious inconvenience.

And there lies the conflict: does a defendant's right to a fair hearing outweigh a witness' right to be free from danger? And how exactly is a "serious danger' or a 'serious inconvenience' to be interpreted?

### EXCEPTIONAL CIRCUMSTANCES

Whilst the IBA Rules do not explicitly provide for circumstances in which a witness may be protected, case law has shown that, whether in criminal, litigious

[2] [1986] 2 NZLR
[3] (5) 1986 4 SA 187

or arbitral proceedings, this will only be permitted in exceptional circumstances.

In *Visser v the Netherlands*[4] the European Court of Human Rights ("ECHR") was asked to consider whether the use of an unnamed witness was in breach of Article 6(1) and (3)(d) of the EC Convention or whether such use was justified in the circumstances. The ECHR applied strict criteria for allowing the evidence, determining that the threat to the witness should be serious and real enough to justify the severe restriction on the defendant's right to be heard. These criteria now form the basis upon which the issue of witness anonymity is considered across many different jurisdictions.

In the Court of Arbitration for Sport decision, *Pobeda*[5] , the arbitration panel allowed the introduction of statements made by unnamed witnesses on the basis that the witnesses had been "*exposed to threats, insults, pressure and intimidation",* and therefore had *"good reasons to remain anonymous*". In Pobeda, the lives and personal safety of the witnesses and their families were at risk. Compare this to a situation where the consequences to a witness of being named in proceedings are that he is subject to intense media scrutiny, adverse consequences on his reputation and potential negative effects in his employment. Whilst these consequences may be considered by the witness to be a 'serious inconvenience', they are speculative, at best, and certainly not to be classified as a 'serious danger'. Accordingly, in the interests of justice preservation, there needs to be a real danger or a threat of danger in order for witness anonymity to take precedence over a defendant's right to a fair hearing.

**CONCLUSION**

It is quite clear that there is a place for unnamed witnesses in criminal, litigious and arbitral proceedings. That said, the benefits of keeping a witness anonymous should be carefully weighed against the need to preserve a defendant's right to a fair trial. Only in exceptional circumstances, where there is a real and actual threat to the witness' well-being, and not simply a threat to a witness' reputation or credibility, should the identity of that witness be kept anonymous. A defendant's right to a fair hearing will, in almost all circumstances, prevail.

*Victoria Clark, Senior Associate, London*

## Spotlight: Saudi Arabia

Squire Sanders Partners, Dale Stephenson Paul Oxnard and Carol Welu consider the practical issues of arbitrating in Saudi Arabia. To read the full article, first published in Financier Worldwide please click here.

[4] (no. 26668/95) ECHR 108 (14 February 2002)
[5] CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v/ UEFAI

## SPAIN: Law of Arbitration – Recent Reform

The Arbitration Act, which follows the UNCITRAL Model Law, was a breakthrough in the regulation of arbitration in Spain when it was first introduced.

However, in order to expedite the enforcement of both national and international awards it required some reform. This new Reform supports Spain's ambition to attract international arbitration and reinforces the role of arbitral institutions. A brief summary of the main changes is provided below:

- The Reform has reallocated certain judicial functions, for example, those relating to the action for annulment of an award and the exequatur of foreign arbitral awards are now attributed to the Superior Courts of Justice, but keeping the jurisdiction of the Courts of First Instance for the enforcement of national awards.
- The Act recognises arbitration in disputes arising in limited liability companies, ordering a legal majority of the shareholders to introduce a clause providing for arbitration in the company's constitution/bylaws. It has also been established that a submission to arbitration for the challenge of shareholders' agreements requires the appointment of an arbitrator(s) by an arbitral institution.
- The Reform also allows the appointment as Arbitrators of persons with legal expertise in arbitration, but not necessarily lawyers. Witnesses and experts, and any third parties involved in the arbitration proceedings, may use their own "mother tongue", notwithstanding the language agreed by the parties.
- There are also specific references to the formalities required in the Award and a remedy to redress any excess of the Award where the Arbitrators have awarded on matters not submitted to arbitration or for matters which cannot be arbitrated.
- With respect to any action for annulment, the Reform establishes that the Award can be always enforced even when an action for annulment or a revision request has been submitted. It also provides that the annulment proceedings shall be dealt as proceedings for small claims matters ("juicios verbales").
- The Reform also allows for injunctive relief to those who are party to an arbitration agreement even before the arbitration proceedings are initiated.
- Finally, the Reform provides that in certain cases, the parties may initiate arbitration even if one of the parties is declared insolvent.

*Fernando Gonzalez, Partner, Madrid - Spain*

## *Contributor Profiles*

### Editorial Team

**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 Oxnard is recommended in Legal 500, 2010 for his 'tenacious approach, attention to detail, and drafting skills'. Paul is also recognised in Chambers Global 2011 within the dispute resolution category.

**Antoine Adeline** is a French and Canadian national. He has lived and practised in England for 5 years. He is a partner within the International Dispute Resolution Practice Group in the Paris office. He brings to the firm more than 20 years' experience as a trial advocate, litigation and arbitration lawyer in a highly international environment. His particular focus is on arbitration, cross border disputes, Alternative Dispute Resolution (Mediation) and corporate insolvency. Although he has particular experience in such areas as construction, software and various manufacturing industries, he represents a diverse range of businesses from public, multi-nationals and household names through to the larger SME.

**George M. von Mehren** leads the firm's International Dispute Resolution Practice Group, ranked by The American Lawyer's 2009 Arbitration Scorecard as a top arbitration practice globally. 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 recognized 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 a wide range of States.

**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.

**Maciej Szwedowski** focuses his practice on litigation and arbitration, as well as on energy law, insolvency and corporate issues. He represents corporate clients in court and arbitration proceedings, including in relation to disputes arising as part of construction and development projects and in securities-related litigation. He has acted on behalf of directors of several companies in management liability proceedings in Poland.

**Horst Daniel** heads the International Dispute Resolution practice in the firm's Frankfurt office. For over 20 years he has focused on high profile national and international dispute resolution, regularly representing national and international companies at German and EU courts or in arbitration proceedings. His particular expertise is in unfair competition, IP, antitrust and product liability matters. He has further developed a specialized practice area for temporary and permanent injunctions in cases of urgency.

**Victoria Clark** is a senior associate in our International Dispute Resolution practice based in our London office. She has extensive national and international dispute resolution experience including mediation, arbitration and litigation. Victoria represents clients across a wide range of industry sectors and her practice includes fraud recovery, regulatory investigations and enforcement action in the banking and financial services sector. Victoria's particular area of expertise is the conduct of large-scale, high value commercial disputes both in the courts and in national and international arbitration and she is experienced in conducting arbitrations under the auspices of the ICC and LCIA as well as ad hoc arbitrations.

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