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International Arbitration News

June 2012

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Editor's Comments

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

The contents of this edition highlight the ever-evolving nature of arbitration from revision and amendment of rules, to judicial interpretation and ultimate enforcement of treaties across a variety of jurisdictions. We also focus on recent developments in Arbitration in Asia.

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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CIETAC Revises Arbitration Rules

On 3 February 2012, the China International Economic and Trade Arbitration Commission ("CIETAC") adopted a revised version of its Arbitration Rules (the "2012 Rules"), with effect from 1 May 2012. The 2012 Rules represent the seventh time that CIETAC has amended its Arbitration Rules since they were first published in 1956, the most recent revision coming in 2005. The latest revision is not a radical overhaul of the 2005 revision, but it does demonstrate CIETAC's commitment to keep in line with developments internationally in arbitration practice.

Headquartered in Beijing, CIETAC is one of the major permanent arbitration institutions in the world. Formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in 1956 under the China Council for the Promotion of International Trade and today is also known as the Arbitration Court of the China Chamber of International Commerce ("CCOIC").

In recent years, CIETAC has registered an increasing number of arbitrations—and particularly arbitrations with a foreign element. Motivated in part by this increase, and in view of recent amendments to other major arbitration rules (such as those of the International Chamber of Commerce ("ICC") and the United Nations Commission on International Trade Law ("UNCITRAL")), CIETAC established a working group in 2010 to update its Arbitration Rules.

The 2012 Arbitration Rules are the culmination of that effort. Key amendments to the CIETAC Arbitration Rules include:

- **Seat (Place) of the Arbitration**. Article 7(2) provides that, where the parties' agreement does not specify the seat of the arbitration, CIETAC has the power to seat the arbitration in any location having regard to the circumstances of the case. The default seat is no longer China, albeit this is applicable only to a foreign-related dispute.
- **Consolidation**. Article 17 states that CIETAC may consolidate two or more arbitrations into a single arbitration at the request of a party and with the agreement of all the other parties, or where CIETAC believes it necessary and all the parties have agreed.
- **Conservatory Measures**. Article 21 establishes new provisions regarding conservatory measures. Under the law of the People's Republic of China ("PRC"), preservation of property and preservation of evidence are conservatory measures that can only be granted by a Chinese court. The 2012 Rules thus allow a party to request conservatory relief pursuant to PRC law to CIETAC, which will then forward the request to a competent Chinese court for a ruling. For arbitrations seated outside of China, Article 21 authorizes the arbitral tribunal to award interim measures it deems necessary in accordance with the applicable law (generally the seat of the arbitration).
- **Multi-Party Appointment of Arbitrators**. Article 27(3) provides that, where there are two or more claimants and/or respondents in an arbitration case, if either side fails to appoint its arbitrator, then the Chairman of CIETAC will appoint all three. This provision is intended to eliminate unfairness that sometimes arose under the previous rules where the respondent lost its right to nominate an arbitrator while the claimant retained its right.
- **Conciliation (Mediation).** Having the arbitral tribunal mediate the dispute has always been a feature of arbitrations in China. Perhaps as a response to concerns of foreign parties on the impartiality of the arbitral tribunal if it were also to be involved in the conciliation process, Article 45(8) provides that CIETAC may assist the parties to conciliate their dispute in a manner and procedure it considers appropriate, if the parties so agree. The new rules, however, do not specify how CIETAC is to assist.

- **Summary procedure**. Article 54 makes the summary procedure set forth under Chapter IV of the 2012 Rules applicable to all disputes that are under RMB 2,000,000 (an increase from the previous threshold of RMB 500,000), unless the parties agree otherwise.
- **Language**. Article 71(1) provides that, where the parties' agreement does not specify the language of the arbitration, CIETAC has the power to determine which language will govern the arbitration, taking into account the nationality of the parties and the subject matter of the dispute. The default language is no longer the Chinese language. While this provides for flexibility, it may lead to uncertainty. Parties are advised to specify and agree on the language of arbitration in the arbitration agreement.

Notably, the 2012 Rules retain the provision, found in Article 47, stating that the arbitral tribunal shall render an award that is "fair and reasonable". Some commentators have interpreted this provision as granting to the tribunal the power of *amiable compositeurs* to disregard the applicable law and the parties' contract to reach an equitable result. By contrast, the ICC and UNCITRAL arbitration rules provide that a tribunal cannot decide a case as *amiable compositeurs* or *ex aequo et bono* unless both parties have expressly authorized the tribunal to do so.

Moreover, the 2012 Rules do not include all of the changes recently made to other major arbitration rules, such as the ICC and UNCITRAL arbitration rules, because of limitations under PRC law. For example, the 2012 Rules contain no provision for the appointment of emergency arbitrators.

Nevertheless, the 2012 Rules are a welcome development and have brought CIETAC arbitration more in line with modern international arbitration practice.

Contact

Stephen P. Anway
Partner, New York, USA
T +1.212.407.0146
E stephen.anway@squiresanders.com

Peter Chow
Partner, Hong Kong and Singapore
T +852 2103 0380
E peter.chow@squiresanders.com

News

We are delighted to announce that Stephen Anway shall be joining a panel of speakers on the Fundamentals of International Arbitration at the ICC's Young Arbitrators' Forum on Tuesday 17 July 2012 in Chicago, USA. The panel will discuss and compare practice in International Arbitration and US litigation, with a focus on discovery, class actions and the taking of evidence. For more information about the event and to register a place, please contact Alexandra Akerly (+1 212 703 5044 or e-mail: aay@iccwbo.org).

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Modification of Polish Civil Procedure and its possible impact on arbitration in Poland

On 16 September 2011, an important bill revising the Polish Code of Civil Procedure (the "Code") was adopted by the Polish Parliament. The amendment came into force on 3 May 2012 and considerably altered procedural, injunction and execution legislation. The major changes concern written submission and presentation of evidence and will apply to all proceedings initiated after the amendment enters into force.

Prior to adoption of the new bill, the Code stated that commercial disputes (proceedings between companies and/or individual businessmen) were regulated by separate provisions that required the claimant to make all declarations and to present or identify all evidence supporting the case in the complaint. The defendant then had to submit its comprehensive statement of defense within two weeks of service of the complaint. Belated declarations and evidence would only be admissible in exceptional cases.

This method of concentrated collation of evidence was criticized for excessive rigidity and formality. It was also argued that a two-week deadline for the preparation of a comprehensive statement of defense violated the principle of party equality. At the same time, in other types of civil proceedings, declarations and evidence could generally be made and presented at any time before the closure of the last hearing – a delay could only be grounds for an unfavorable decision regarding court charges if it was a result of unscrupulousness or evident misconduct.

The amendment abolished the separate procedure for commercial disputes. The statutory time limitation applicable to declarations and evidence was replaced by greater discretionary power of the judge. The Code as amended only requires the parties efficiently to make statements and present their evidence on a very general level – without culpable delay. On the other hand, the court may now instruct the defendant to file a response to the complaint within a set deadline and disregard belated submissions in all types of civil proceedings. The court may also instruct the parties to present all their statements, motions and evidence in pre-trial submissions. Statements and evidence which have been made or presented too late will be disregarded by the court, barring exceptional circumstances. The burden of proof that such exceptional circumstances have arisen shall fall on the delaying party.

Furthermore, from now on, in the course of proceedings all written submissions other than evidentiary motions shall require prior approval of the court. Briefs filed without such prior approval shall be disregarded by the court. It is also expected that the practice of pre-trial conference between the judge and the parties shall be expanded, as such conference is now obligatory.

New rules were introduced to increase efficiency of the civil courts: avoiding delays while giving the court a more active role in the proceedings. The discretional power of the judge seems more flexible than the statutory time limitation, which used to force the parties to present instantly all their evidence – including evidence only remotely related to the case – in fear of it being disregarded by the court at a later stage, when such evidence actually becomes relevant. On the other hand, the Code as amended requires the parties to make statements and present their evidence without culpable delay, which may have just the same effect as the abolished statutory time limitation.

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In general, it seems that Polish civil procedure will be brought closer to the model of arbitration proceedings. The true implications remain to be seen, however the amendment may result in making arbitration in Poland less attractive, mostly due to cost considerations. At the same the other factors making arbitration the preferred method of dispute resolution – such as confidentiality of proceedings and professionalism of the arbitrators – may still weigh against civil proceedings. As regards the former, it should be noted that the confidentiality of arbitration proceedings is not guaranteed by any statutory provisions of Polish law. Therefore the parties must take care to include either relevant provisions in the arbitration clause or agreement, or select an appropriate set of arbitration rules.

Contact
Maciej Szwedowski
Senior Associate, Warsaw, Poland
T +48 22 395 5570
E maciej.szwedowski@squiresanders.com

Recent Developments in Arbitration in Asia

Singapore – International Arbitration (Amendment) Bill Introduced in Parliament

An International Arbitration (Amendment) Bill (the **"Arbitration Bill"**), as well as a Foreign Limitation Periods Bill (the **"Limitation Bill"**), were passed by the Singapore Parliament on 10 April 2012. This followed a round of public consultation on the Arbitration Bill by the Ministry of Law from 21 October 2011. The recent amendments ensure that Singapore remains an attractive place for arbitrating international disputes.

International Arbitration Act

Key amendments are:

- **Widening of definition of arbitration agreement in writing** – currently, arbitration agreements must be in writing. The Arbitration Bill widens the definition of writing to cover arbitration agreements recorded in any form (this would cover audio recordings according to the Ministry of Law), whether or not the arbitration agreement was concluded beforehand orally, by conduct or by other means. This is based on the 2006 amendments to the UNCITRAL Model Law. Hong Kong's section 19 of its Arbitration Ordinance (Cap. 609) is similar.
- **Providing for courts' power to review tribunals' decisions refusing jurisdiction** – currently, the Singapore courts may only review an arbitral tribunal's ruling on jurisdiction if such ruling is positive, namely, if the tribunal finds that it does have jurisdiction. The Arbitration Bill also gives the courts the power to review negative rulings on jurisdiction. This is a rare departure from the UNCITRAL Model Law. Hong Kong, on the other hand, follows the Model Law and its Arbitration Ordinance expressly provides that negative

jurisdictional rulings are not subject to appeal. Nevertheless the following countries allow review of negative jurisdictional rulings: Belgium, England, France, India, Italy, New Zealand, Sweden and Switzerland.[1]

- **Clarifying power to award interest** – arbitral tribunals' powers to award interest are clarified by the Arbitration Bill, which provides for express powers to award simple or compound interest at appropriate rates and with appropriate rests on sums and costs awarded. This is based on section 79 of the Hong Kong Arbitration Ordinance.
- **Facilitating emergency arbitrator procedure** – the Arbitration Bill facilitates arbitration rules providing for the appointment of an emergency arbitrator pending formal constitution of the arbitral tribunal where parties require urgent relief such as an interim injunction. An example of such rules is found in the 4th edition of the Rules of the Singapore International Arbitration Centre effective 1 July 2010. The Arbitration Bill amends the definitions of "arbitral tribunal" and "arbitral award" to ensure that emergency arbitrators appointed pursuant to arbitration rules agreed or adopted by the parties have the same status and powers as formally constituted tribunals and their orders are equally enforceable. There are no equivalent provisions in the Hong Kong Arbitration Ordinance.

Limitation Bill

The Limitation Bill clarifies that in actions or proceedings in Singapore, where the substantive law governing the dispute is a foreign law, this would also govern the limitation period applicable, not Singapore law. Currently, at common law, there is uncertainty as to whether the limitation period is to be determined by the governing or substantive law of the dispute or the law of the forum if the issue is to be characterised as a procedural issue.

The Limitation Bill provides for exceptions including where the application of the relevant foreign law would conflict with public policy including causing undue hardship to a party or potential party to the relevant proceedings.

People's Republic of China – New CIETAC Arbitration Rules

The China International Economic and Trade Arbitration Commission (CIETAC) has amended and refined its Arbitration Rules and the new arbitration rules will come into effect on 1 May 2012. Please see article above for a discussion on the amendments.

Hong Kong – Consultation on Amending HKIAC Administered Arbitration Rules

The Hong Kong International Arbitration Centre (HKIAC) recently issued a Consultation Paper setting out areas in which it was considering making revisions to its Administered Arbitration Rules (the **"HKIAC Rules"**), which first came into force on 1 September 2008. Views from users were invited to be provided by 28 February 2012, after which the HKIAC will hold a series of further consultations before making a final decision on the form and timing of any amendment to the HKIAC Rules.

The HKIAC is not contemplating a wholesale revision of the HKIAC Rules. However, certain modifications are considered to be useful, in particular, in light of 3 years' experience in usage of the HKIAC Rules.

Some of the areas in which revisions are being considered include:

[1] See the Singapore Law Reform Committee's Report on the Right to Judicial Review of Negative Jurisdictional Rulings of January 2011.

- **Application of the HKIAC Rules** – the current Article 1.1(b) of the HKIAC Rules provides that the same shall govern arbitrations where an agreement to arbitrate provides for arbitration "administered by the HKIAC" or words to the same effect. The HKIAC is seeking views as to whether this is sufficiently clear.
- **Representation of parties** – the current Article 5.8 of the HKIAC Rules provides that parties may be represented or assisted by persons of their choice. The HKIAC is seeking views as to whether the distinction between representation and assistance is helpful and whether provisions should be added requiring parties to produce proof of their designated representatives and allowing arbitral tribunals to exclude representatives whose conduct threatens to disrupt the fair and expeditious conduct of arbitration.
- **Independence of arbitrators** – the current Article 11.3 of the HKIAC Rules simply provides that arbitrators must disclose without delay any circumstance likely to give rise to justifiable doubts as to their impartiality or independence. The HKIAC is seeking views as to whether arbitrators should be required to sign a document to this effect.
- **Arbitral procedure** – the current Article 14 of the HKIAC Rules contains provisions regarding procedures for the conduct of an arbitration and specifically, Article 14.1 provides that an arbitral tribunal must adopt suitable procedures in order to avoid unnecessary delay or expense provided such procedures ensure equal treatment of the parties and affords each party a reasonable opportunity to be heard and to present its case. The HKIAC is seeking views as to whether they should add further provisions with more emphasis on time and cost effectiveness and efficiency.
- **Joinder** – the current Article 14.6 of the HKIAC Rules provides that an arbitral tribunal may join a third party to the proceedings upon the application of a party and provided that such third party has consented to the joinder in writing. The HKIAC is seeking views as to whether wider powers to join parties and also to consolidate proceedings should be provided for.
- **Plea that arbitral tribunal does not have jurisdiction** – the current Article 20.3 of the HKIAC Rules provides that a plea of no jurisdiction must be raised in the Answer to the Notice of Arbitration if possible but in any event no later than in the Statement of Defence. The HKIAC is seeking views as to whether it should be clarified and thus expressly provided that if a plea of no jurisdiction is not made by the Statement of Defence, such a plea is treated as irrevocably waived.
- **Discovery** – the current Article 23.3 of the HKIAC Rules provides that at any time during the arbitral proceedings, the tribunal may require a party to produce documents or other evidence. The HKIAC is seeking views as to whether this is sufficient and whether more detailed provisions should be laid out.
- **Interim measures** – the current Article 24 of the HKIAC Rules provides simply that an arbitral tribunal may order any interim measure it deems necessary or appropriate. The HKIAC is seeking views as to whether this should be brought in line with sections 36 and 37 of the Arbitration Ordinance (Cap. 609), which provides for more detailed guidance on the ordering of interim measures. The HKIAC is also seeking views as to whether express provision should be made in the HKIAC Rules for the ordering of security for costs, which is contained in any event in section 56(1)(a) of the Arbitration Ordinance. In addition, the HKIAC is seeking views as to whether an emergency arbitrator procedure (available under the 2012 ICC Arbitration Rules and given legislative effect in Singapore) should be introduced to allow a party to apply to the HKIAC for appointment of an emergency arbitrator to consider applications for interim relief.
- **Expedited procedure** – the current Article 38 of the HKIAC Rules provides for an expedited procedure (essentially documentary evidence only unless otherwise decided

by arbitral tribunal) where the amount in dispute does not exceed US$250,000. The HKIAC is seeking views as to whether this threshold amount should be increased.

India – People's Republic of China (PRC), Hong Kong and Macau Awards Now Enforceable in India

On 19 March 2012, the Government of India declared the PRC, including Hong Kong and Macau, to be a territory to which the New York Convention applies and to be notified in the official Gazette of India.

What this means is that the Indian courts will now recognise and enforce arbitral awards made in the PRC, Hong Kong and Macau.

The PRC and India have long been signatories to the New York Convention. However, the Indian Arbitration and Conciliation Act requires a country to be notified in the official Gazette of India before the Indian courts can recognise and enforce awards made in such a country. In fact, of the 146 New York Convention countries, only about 46 have been notified in the official Gazette of India. Singapore has, until the recent notification, been enjoying an advantage over Hong Kong in that arbitral awards in Singapore has long been enforceable in India.

This is a step welcomed by the arbitral community in the PRC, Hong Kong and Macau.

Contact

Peter Chow
Partner, Hong Kong and Singapore
T +852 2103 0380
E peter.chow@squiresanders.com

Felicia Cheng
Associate, Hong Kong
T +852 2103 0387
E felicia.cheng@squiresanders.com

One Contract; Three Laws

In the recent case of *Sulamérica Cia Nacional de Seguros, S.A. and ors. v Enesa Engenharia, S.A. and ors.* [2012] EWCA Civ 638, the English Court of Appeal has provided useful clarification regarding a tricky, but not uncommon, issue arising in relation to international contracts: namely, the interrelationship between the different systems of law governing different parts of a contract and its effect on the parties chosen method(s) for resolving disputes.

The case serves as a useful reminder that dispute resolution clauses should not be a mere afterthought. They can have a real impact on how a contract does or does not function at a critical time; when something has gone wrong in the parties' relationship. Careful consideration and drafting are needed to avoid potentially unpleasant surprises.

The dispute

The background to the case is relatively complex, involving insurance and reinsurance arrangements for a hydroelectric project in Brazil. However, its history may be briefly summarised as follows.

In November 2011, the insurer, Sulamérica, started arbitration against Enesa in England, pursuant to 3 policies of insurance. Enesa responded by starting court proceedings in Brazil, seeking to establish that arbitration had not been validly commenced and that the dispute should

instead be fought out in the Brazilian national courts. Sulamérica retaliated by asking the English Commercial Court to restrain Enesa from continuing the proceedings in Brazil, to allow the arbitration to continue. The Commercial Court found in Sulamérica's favour and Enesa appealed.

The insurance policies in question contained a number of potentially confusing clauses regarding choice of law and dispute resolution. First, the policies stated that they were subject to Brazilian law and the exclusive jurisdiction of the Brazilian courts. Second, they provided that the parties would attempt to mediate any differences or disputes arising in connection with the policies. Third and finally, they stated that, where mediation failed, disputes concerning amounts to be paid out under the policies would be subject to arbitration in London, England.

The question

One of the questions put to the Court of Appeal was: which country's law governs the clause providing for disputes to be referred to arbitration? Enesa contended that if Brazilian law governed the clause, then it could not be enforced without Enesa's express consent. In other words, if Enesa was right, then Sulamérica would have to litigate in Brazil.

The Court's approach

The Court of Appeal surveyed the previous case law and noted that, while the applicable principles were readily identified, there was some inconsistency in the way those principles had been applied in the previous cases, and that there was no existing authority binding upon the court.

As such, the court's starting point was to acknowledge that there are potentially three different systems of law applicable to a contract which contains an arbitration clause:

1 First, the law governing the parties' obligations under the contract (i.e. the substantive law).

2 Second, the law of the place where the parties have decided the arbitration shall have its seat (sometimes termed the 'curial law'). The curial law is relevant to determining the matters such as the procedure to be followed in the arbitration (to the extent an overriding set of arbitral rules has not also been chosen) and the powers and identity of the national court which has jurisdiction to supervise and support the arbitral process.

3 Finally, and perhaps less often considered, there is the law governing the arbitration clause itself. This is the law which deals with, for example, the formal requirements for the validity of the clause. Crucially, it need not necessarily be the same as either of the substantive law or the curial law. As the court noted, this flows from the separable nature of an arbitration clause which, where necessary, stands on its own to bind the parties to their chosen method of dispute resolution, even where their dispute is as to the very existence or validity of the containing contract.

In this case, the substantive law (Brazilian) of the policies and the curial law of an arbitration (English – the seat of arbitration being London) were both specified. The question therefore was how to determine the third – the law governing the arbitration clause.

In this regard, the English common law rules for determining the proper law of any contract were applicable. They require the court to give effect to the parties' choice of law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection.

Enesa argued that either there was an implied choice of Brazilian law to govern the arbitration clause (as the law which the parties had chosen to govern the rest of their contractual relationship) or alternatively that the choice of substantive law gave a strong (Enesa contended, decisive) indication of the system of law with which the arbitration clause had its closest and most real

connection. Sulamérica, on the other hand, relied on authorities which suggested that where the curial law is not the same as the substantive law (i.e. where arbitrations are to be held in a neutral foreign jurisdiction), the curial law gives the best indication of the system of law with which the arbitration clause has its closest and most real connection.

The Court of Appeal accepted Enesa's proposition that, "*in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate*". However, relying on the earlier case of *XL Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530, it also recognised that there may be other factors which point to a different conclusion including, "*the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract*".

On that basis, the court found unanimously in favour of Sulamérica, holding that the combination of:

1 the choice of London as the seat of arbitration (and the attendant expectation that the English Arbitration Act 1996, including its more substantive sections, would apply to any arbitration); and

2 the consequences which would flow from Brazilian law governing the arbitration clause (i.e. that the clause would become one-sided – Enesa's consent being required before Sulamérica would be able to commence arbitration), which would undermine the effectiveness of the clause to an extent which the parties could not have intended;

was sufficient to overcome any inference which might be drawn from the choice of Brazilian law as the substantive law of the contract. Moore Bick LJ considered that this was the case, whether on the basis that there was an implied choice of English law to govern the arbitration clause or on the basis that the arbitration clause had the closest and most real connection with English law.

Conclusions

The case emphasises the importance of clarity when drafting choice of law and arbitration clauses. In addition to specifying the substantive law of the contract and the curial law of the arbitration, it may be prudent also to state explicitly the law governing the arbitration clause itself. Otherwise, this is likely to become a question of interpretation for the courts – adding unnecessary complexity, risk and delay to any dispute resolution process.

This might be especially important in situations where: (i) it is crucial that one or other of the chosen systems of substantive or curial law governs the arbitration clause; (ii) the parties choose either a substantive law which is unconnected with their nationalities and the place of performance of the contract or a curial law which is not a common international arbitral jurisdiction; or (iii) perhaps less likely, where the parties specifically wish to have a third system of law govern the arbitration clause, which is different to either the substantive law of the contract or the curial law of the arbitration.

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

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White Industries Australia Limited v The Republic of India - India breaches Australian/Indian BIT

On 30 November 2011, a final award was delivered by the UNCITRAL Tribunal in the bi-lateral investment treaty arbitration between White Industries Australia Limited (**White Industries**) and the Republic of India (**BIT Award)**[2]. The BIT award arose from the circumstances which followed an earlier ICC arbitration which awarded White Industries $4.08million in a dispute with Coal India arising from the development of a coal mine at Piparwar, India (**Original Award)**.

The Original Award against Coal India was obtained on 27 May 2002. Shortly afterwards, Coal India applied to the Calcutta High Court to have the Original Award set aside under the *Indian Arbitration and Conciliation Act 1996* (**Set Aside Application**). Around the same time (but before it had notice of Coal India's Set Aside Application) White Industries applied to have the Original Award enforced in the High Court at New Delhi (**Enforcement Application)**.

Initially some progress was made in both the Set Aside Application and the Enforcement Application. However, following the lodgement in July 2004 of an appeal by White Industries against the decision of the Appellate Division of the Calcutta High Court rejecting White Industries' application to dismiss the Set Aside Application to the Supreme Court of India, neither the Set Aside Application or Enforcement Action[3] progressed to a final hearing despite White Industries' attempts to progress the matter in the court.

By 2011 neither the Set Aside Application nor the Enforcement Application had been determined leading White Industries to commence an arbitration against the Republic of India pursuant to the bi-lateral investment treaty (**BIT**) between Australia and India.[4] White Industries application was based upon a number of grounds which arose from the judicial delay White Industries continued to experience in obtaining payment pursuant to the Original Award. At the time of the final award in November 2012, still neither the Set Aside Application nor the Enforcement Application had been determined.

Although White Industries was unsuccessful in a number of its arguments, as detailed below, it succeeded in establishing that, by reason of the delays in the Set Aside Application, India was in breach of the BIT because it had failed to provide an effective means for the enforcement of rights.

To reach this conclusion the Tribunal made the following key findings:

White industries had made an investment in India for the purpose of the BIT

To be entitled to protection by the BIT (and therefore to give the Tribunal jurisdiction) White Industries was required to have made an "investment" within the definition of investment in article 1 of the BIT. Investment was broadly defined to mean:

"every kind of asset … although not exclusively, includes:

… right to money or any other performance having a financial value contractual or otherwise. "

[2] White Industries Australia Limited v The Republic of India (UNCITRAL, Final Award 30 November 2011)
[3] On 9 March 2006 the Delhi High Court ordered a stay of the Enforcement Application
[4] The Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, made in new Delhi on 6 February 1999

The Tribunal found that the correct approach to determining whether an investment has been made is to consider the plain ordinary meaning of the words used in the BIT in their context and in light of its object and purpose.

Among other arguments India contended that an investment must meet the Salini test as summarised by Douglas in *The International Law of Investment Claims* (Cambridge 2009). The Tribunal rejected India's arguments. It said that the definition of investment in the BIT expressly includes 'a right to money or to any performance having financial value' and said that this was exactly what White Industries had under the contract with Coal India. Namely White Industries had a right to money for the performance of its obligations.[5] The Tribunal also noted that it is well established that rights arising from contracts may amount to investments for the purpose of many bilateral investment treaties.[6]

That, by reason of the delay in the determination of the Set Aside Application, India had failed to provide an effective means for the enforcement of rights in breach of the BIT

This finding involved satisfaction of two key elements. First that the BIT contained an obligation to provide an effective means to enforce rights, and secondly that India had failed to meet that obligation because of the judicial delay.

1) The BIT between Australia and India did not, in its express words, contain an obligation to provide investors with effective means for enforcement of rights. However, article 4(2) contained a "most favoured nation clause". Based upon this article, White Industries submitted that the BIT incorporated article 4(5) of the Agreement between the Republic of India and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, 27 November 2001 (**India and Kuwait BIT**) which provided that India would provide an effective means of asserting claims and enforcing rights with respect to investments. The Tribunal accepted this argument.[7]

2) White Industries submitted that the judicial delay in determination of the Set Aside Application and the Enforcement Application breached India's obligation to provide an effective means to enforce its rights. The Tribunal described that the 'effective means' standard required of a host nation at paragraph 11.3.2 and then applied this standard separately to the delay in the Set Aside Application and the delay in Enforcement Application. It rejected the submission that India had failed to provide an effective means for the enforcement of its rights with respect to White Industries' Enforcement Application on the basis that White Industries had failed to take all steps available to it to advance the matter.[8] However, the Tribunal found that India had breached its obligation to provide an effective means to enforce rights with respect to Coal India's Set Aside Application. It found that, while in the lower courts the delays were not significant, the Supreme Court of India's failure to hear an appeal for over five years (which created a total period of over nine years to deal with the Set Aside Application) was a failure to provide an effective means to assert claims and enforce rights.[9]

While not determinative of the arbitration, it is notable in relation to the issue of delay that the Tribunal rejected White Industries' argument that this judicial delay amount to a denial of natural

[5] White Industries paragraphs 7.3.1 to 7.3.8
[6] White Industries paragraph 7.4.1
[7] White Industries paragraphs 11.1 to 11.2.9
[8] White Industries paragraph 11.4.15
[9] White Industries, paragraph 11.4.19

justice. The Tribunal considered that the delay was not such that it met the stringent test required before judicial delay can amount to a denial of natural justice.[10]

The incorporation of the obligation to provide an effective means for the assertion of claims and enforcement of rights represents a significant issue for India with respect to its bi-lateral investment treaties given the issues that caused the judicial delay in the White Industries case may not alter for some time. This award shows the potential ramifications for states, such as India, entering BITs if their legal systems are not able to provide efficient means to enforce rights or awards either by reason of judicial delay or by other causes. It also offers investors in such countries some level of hope (assuming there is either an express requirement in the applicable bilateral investment treaty) that despite the difficulties encountered with a local judiciary there may be options to secure the enforcement of rights pursuant to a state's obligations in a bi-lateral investment treaty. Having said this, the investor may still be required to endure significant delays or other hurdles before these options become available.

Contact
Graeme Slattery
Partner, Perth, Australia
T +61 8 9429 7576
E graeme.slattery@squiresanders.com

[10] White Industries Australia Limited v The Republic of India (UNCITRAL Final Award, paragraph 10.4.24). A denial of natural justice would have constituted a breach of article 3(2) of the BIT

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Editor Profiles

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

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

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Contributor Profiles

Peter Chow leads the IDR/Arbitration practice in Asia. He handles disputes related to oil and gas, energy and natural resources, infrastructure and construction projects, international trade and general commerce. Peter has acted as counsel in numerous cases, appearing for parties in court, mediation and arbitration proceedings, including those involving ICC, HKIAC, CIETAC and SIAC arbitral rules. He has helped many clients to achieve expeditious resolution of disputes using alternative dispute resolution techniques.

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.

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.

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 disputes arising from energy projects, as well as other commercial and securities-related litigation. Maciej also advises clients on energy-related projects including renewable energy, and has acted as counsel in numerous merger and acquisition transactions in Poland and abroad. He has significant experience assisting Italian and Spanish based clients operating in the Polish market.

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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.

Felicia Cheng is an associate in the International Arbitration/Dispute Resolution team in Asia. She handles commercial disputes with particular experience in trade, construction, insolvency and employment disputes. She is experienced in facilitating resolution of disputes, whether through formal court or arbitration proceedings, or settlement negotiations. She also has a special interest in intellectual property.

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