YCAP

LEX ARBITRI

The E-Newsletter of
Young Canadian Arbitration Practitioners
Jeunes praticiens canadiens de l'arbitrage

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30 Second Jurisprudence Update

CASE SUMMARY: *YUGRANEFT CORP. V. REXX MANAGEMENT CORP.*, 2010 SCC 19

Alejandro Manevich and Mark St. Cyr, Heenan Blaikie LLP.

On May 20, 2010 the Supreme Court of Canada issued its long-awaited decision in *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19. Affirming the decisions of the courts below, the Supreme Court held that the recognition and enforcement of foreign arbitral awards under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("Convention") and the UNCITRAL *Model Law on International Commercial Arbitration* ("Model Law") may be refused on the basis of local limitation periods.

In brief, the proceedings concerned an application by the appellant Yugraneft Corporation ("**Yugraneft**") to recognize and enforce a foreign arbitral award against the respondent Rexx Management Corporation ("**Rexx**"), an Alberta corporation. The award was issued on September 6, 2002; however, it was not until January 27, 2006 that Yugraneft applied to the court in Alberta for the recognition and enforcement of the award.

In its decision, the Supreme Court made the following key points:

- Article V of the Convention and Article 36 of the Model Law set out an exhaustive list of substantive grounds upon which the recognition and enforcement of foreign arbitral awards may be refused. However, Article III of the Convention says that recognition and enforcement must be "in accordance with the rules of procedure of the territory where the award is relied upon". As used in the Convention, "rules of procedure" includes limitation periods, despite that limitation periods are considered substantive under Canadian conflicts of law rules. Accordingly, courts may refuse recognition and enforcement of a foreign arbitral award when such proceedings are time-barred by the law of the enforcing jurisdiction.
- Canadian courts must look at the particular statutory language in their jurisdiction to establish the applicable limitation period. Under Alberta law, the recognition and enforcement of foreign arbitral awards concerns a "remedial order" as that term is used in the *Limitations Act*, as that Act is comprehensive, and applies to any cause of action not expressly excluded by the Act or covered by other legislation.
- The Court rejected the appellant's argument that an order recognizing and enforcing a foreign arbitral award type is a remedial order based on a "judgment or order for the payment of money" under s. 11 of the *Limitations Act*, which is subject to a 10 year limitation period. The recognition and enforcement of foreign arbitral awards is subject to the general 2 year limitation period in s. 3 of the Act. Unlike local judgments, arbitral awards are not directly enforceable in Alberta, as they must first be recognized by the court. If the legislature intended for arbitral awards to be treated as judgments it should do so expressly, as it has done in other statutes.

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- The award does not crystallize for limitations purposes until the expiry of the three month period for moving to set aside the award in the courts of the jurisdiction where the award was rendered (as provided under Article 34(3) of the Model Law), or until the conclusion of any such proceedings if launched. This is because an award may be considered "not binding" where it is open to being set aside, and a Canadian court could refuse recognition and enforcement of an award until such period had expired.
- The discoverability rule under the *Limitations Act* may also apply to delay the start of the limitations period. The limitation period for bringing a proceeding to recognize and enforce an award does not start running until the award creditor knew or reasonably should have known that bringing such a proceeding in that jurisdiction was warranted, for example, because the debtor had assets in the jurisdiction. No such argument was available on these facts, however, as the award debtor was registered and had its head office in Alberta.

As a practical matter, the Supreme Court's decision imposes a burden on award creditors to be diligent in determining whether there are assets in Canada against which a foreign arbitral award can be executed. Once such assets have been located, or could have reasonably been located, the creditor will have a limited period of time to seek recognition and enforcement of the award. Furthermore, that period will vary significantly depending on the law of limitation or prescription of the particular jurisdiction where recognition is sought. Despite the apparent uniformity of treatment of foreign arbitral awards under the Convention and the Model Law, therefore, the Supreme Court's decision has left great scope for legislatures to limit the enforceability of such awards as they see fit, through the application of local limitation periods.

Watch for YCAP's Fall / Winter 2010 Newsletter for further commentary on the *Yugraneft* case.

LARC DEVELOPMENTS (B.C.C.A., JUSTICE CHIASSON): DEMAND FOR PARTICULARS DISENTITLES PARTY FROM SEEKING STAY OF COURT PROCEEDINGS IN FAVOUR OF ARBITRATION

Mary Paterson, Osler, Hoskin & Harcourt LLP

In *Larc Developments Ltd. v. Levelton Engineering Ltd.* (2010 BCCA 18, January 18, 2010), the British Columbia Court of Appeal confirmed the rule that a party who makes a demand for particulars in a court proceeding has taken a legal step in that proceeding, and cannot ask the court to stay it in favour of arbitration.

An insurance company sued Larc for its involvement in building a leaky condo; Larc third partied Levelton despite the broadly-worded arbitration clause in their contract. Levelton's counsel sent a letter demanding particulars as well as stating the third party action would have to be discontinued until arbitration was completed. Larc did not deliver particulars or discontinue the third party proceeding. Levelton moved for an order staying the court proceeding in favour of arbitration under the B.C. *Commercial Arbitration Act*.

The Chambers judge granted the stay. The judge first reviewed the leading case, *Fofonoff v. C and C Taxi Service Limited* (1977, 3 BCLA 158 S.C.), in which the Court held that a demand for particulars was a step in a proceeding since the Rules required a demand for particulars before an application for an order for particulars could be made. The Chambers judge distinguished *Fofonoff* and held that Levelton's demand for particulars was not a step in the proceeding because Levelton intended to seek an order staying the court proceedings, and not an order for particulars.

The Court of Appeal disagreed and set aside the stay, holding that when a party demands particulars, that party implicitly agrees to have the court resolve the matter. The Court rejected the argument that the party should be able to nullify this agreement by stating an intention to stay the proceedings. Accepting that argument would permit a party to both obtain the benefit of the court proceeding (i.e. obtaining particulars) and reject the propriety of the court proceeding. The Court refused to permit Levelton to equivocate in this manner and set aside the stay.

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Contact
YCAP
c/o Martin Valasek
Ogilvie Renault
Suite 2500
1 Place Ville Marie, Montreal, QC
H3B 1R1,
CANADA

Email: info@ycap.ca

Website: www.ycap.ca

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WIRES JOLLEY LLP (B.C.S.C., JUSTICE WILLCOCK): ENFORCEMENT ADJOURNED PENDING APPEAL BUT SECURITY FOR AWARD ORDERED

In *Wires Jolley LLP v. Wong* (2010 BCSC 391), the British Columbia Superior Court adjourned an application to enforce an arbitration award made in Ontario pending appeal but also ordered the appellant to provided security for the award.

Wong retained Wires Jolley LLP (an Ontario law firm) to manage a complex, international estate litigation. The fee agreement contained an arbitration clause. When a dispute arose about the fees, Wires Jolley LLP issued a notice of arbitration under the Ontario *International Commercial Arbitration Act*.

Preliminary wrangling resulted in a Court of Appeal for Ontario decision which confirms that an arbitrator could decide the question of a lawyer's fees but must do so in accordance with the substantive statutory rights contained in the *Solicitors Act*. The matter proceeded to arbitration - Wong lost.

Wong appealed to the Court of Appeal for Ontario, but it was quashed since the Superior Court had jurisdiction. Wong then applied to the Ontario Superior Court for an order granting leave to appeal and an order setting aside the arbitration award. Wong alleged that the arbitrator made several errors of law.

One week later, the British Columbia Superior Court heard Wires Jolley LLP's application for an order enforcing the arbitration award under the British Columbia *International Commercial Arbitration Act* and *Foreign Arbitral Awards Act*.

The Court adjourned Wires Jolly LLP's application and ordered Wong to provide security for the award by paying that amount to his solicitors in trust. Although the Court had doubts that Wong's appeal would succeed, it could not conclude that the appeal had no prospect of success. The balance of convenience favoured Wong as he was appealing with alacrity and would be prejudiced if he had to pay Wires Jolley LLP and then succeeded with his appeal. The Court ordered Wong to secure the award as he had few assets in Ontario and the provision of security would not jeopardize his appeal.

MIN MAR (ONT. S.C.J., MASTER SPROAT): COURT CANNOT VARY ARBITRATION AWARD IN ENFORCEMENT PROCEEDING

On March 26, 2010, Master Sproat of the Ontario Superior Court released her reasons in *Min Mar Group Inc. v. Belmont Properties LLC* (2010 ONSC 1814). She enforced an arbitration award under the *International Commercial Arbitration Act* but refused Min Mar's request to vary the award.

The plaintiff, Min Mar, entered three purchase agreements with Belmont to buy shares in three companies. After a dispute, Min Mar commenced court proceedings in Ontario. Before Min Mar served the statement of claim, Belmont commenced arbitration proceedings in Virginia in accordance with the terms of the purchase agreements. The parties then settled the dispute.

Three months later, Belmont brought a motion in the arbitration alleging Min Mar failed to comply with the payment terms of the settlement. Min Mar brought a cross-motion alleging Belmont failed to deliver share certificates required by the settlement. In January, arbitrator issued an award in favour of Belmont requiring Min Mar comply with the settlement.

After Min Mar refused to pay, Belmont commenced contempt proceedings in Virginia. In response, Min Mar brought a motion in Ontario for an order recognizing the arbitration award, staying the enforcement of the award for 30 days, and varying the award to provide that the terms of the award be completed within 30 days of the transfer of the disputed securities.

Belmont agreed that the award should be enforced but opposed the remainder of the motion. Master Sproat enforced the award but refused to vary it. She held, among other things, that Section 11 of the *International Commercial Arbitration Act* gives the Court jurisdiction to enforce but not review or vary a final arbitration award. Rule 59 of the Ontario *Rules of Civil Procedure* does not provide the Court with such jurisdiction; rather, it permits courts to vary court orders but not arbitration awards. She concluded by noting that had she varied the award, Min Mar would have improperly avoided the consequences of not complying with the award.

Brief Case Comments

THREE YEAR DELAY IN THE DELIVERY OF AN ARBITRAL AWARD DOES NOT ABROGATE ARBITRAL IMMUNITY

Mandy Moore, Borden Ladner Gervais LLP

In *Flock v. Beattie,* [2010] A.J. No. 313, the Alberta Court of Queen's Bench confirmed that in the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability for all types of claims, including tort and breach of contract. The failure of an arbitrator to deliver his award for almost 3 years following the conclusion of the hearing did not abrogate his ability to rely on the defence of arbitral immunity, as there was no evidence of fraud or bad faith on the part of the arbitrator.

In the divorce and matrimonial proceedings, the Plaintiff Arlene Flock, and the Defendant, Doran Flock, divorced and thereafter entered into an arbitration agreement to resolve the division of their matrimonial property. Allan Beattie, Q.C., was appointed as arbitrator. The arbitration hearing was concluded on February 25, 2003 and written submissions were filed by the parties by September 3, 2003. The arbitration agreement provided that Beattie would communicate his award no later than 60 days thereafter, subject to any reasonable delay due to unforeseen circumstances. The arbitration award was not issued until July 12, 2006, almost 3 years after the delivery of the final written submissions and in the absence of any noted "unforeseen circumstances".

Following successful proceedings by Doran to have the award set aside, Arlene commenced an action before the Alberta Court of Queen's Bench suing both her ex-husband and the arbitrator. Arlene alleged that Beattie was liable to her for breach of contract, breach of duty of good faith, negligence and breach of fiduciary duty as a result of Beattie's delay in issuing the award.

The Court adopted the legal analysis contained in the Supreme Court of Canada's decision in *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564. The Court held that in the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability. Arbitral immunity is not restricted to tort alone, but rather extends to all types of claims including breach of contract. Such immunity is a matter of public law because of the similarity of arbitration to the judicial function.

The Court rejected Arlene's argument that the delay in issuing the award contrary to the terms of the arbitration agreement took Beattie outside of his "judicial" role and therefore outside of the protection of arbitral immunity. The Court noted that if the rendering of a decision is part of an arbitrator's judicial role, the matter of timing of the decision could not transform a judicial decision into a non-judicial decision. The content of the decision remained the same. While the effect of the delay may render a decision of less value or of no practical benefit to one or both of the parties, such an effect does not change the judicial nature of the decision.

A further ground for rejecting Arlene's argument was that, if accepted, the existing exceptions to arbitral immunity (fraud and bad faith) would be expanded to include situations where an arbitrator simply fails to follow the terms of the arbitration agreement, regardless of the arbitrator's motives or in the absence of a blameworthy state of mind.

This case is notable in that Alberta Court of Queen's Bench has confirmed that the exceptions to arbitrator immunity remain limited to fraud and bad faith. Those who seek to impose liability on arbitrators will have to demonstrate cogent evidence that the arbitrator was acting outside his or her judicial role, or that in exercising his or her judicial role, the arbitrator's misconduct can be elevated to the level of fraud and/or bad faith.

ENFORCEMENT OF ARBITRAL AWARDS IN ENGLAND UNDER THE NEW YORK CONVENTION – *DALLAH ESTATE AND TOURISM HOLDING CO. V. MINISTRY OF RELIGIOUS AFFAIRS, GOVERNMENT OF PAKISTAN*

Christina Porretta, Borden Ladner Gervais LLP

Dallah ([2009] EWCA Civ 755; [2009] WLR (D) 250) involved a project to build housing in Mecca for Pakistani pilgrims to the annual Hajj. Negotiations commenced between the Government of Pakistan and Dallah Estate and Tourism Holding Co. ("Dallah"), a Saudi Arabian company, and resulted in a Memorandum of Understanding for the acquisition of land to build accommodation suitable for pilgrims. Subsequently, Pakistan established a Trust as the vehicle for this project under a separate agreement with Dallah (the "Agreement"). The Agreement contained an ICC arbitration clause that provided for disputes to be settled by arbitration held under the Rules of Conciliation and Arbitration of the ICC in Paris. Pakistan was not a party to the Agreement, nor did it sign it in any capacity.

A contractual dispute arose between Dallah and Pakistan, and Dallah initiated arbitration in Paris. Pakistan challenged the jurisdiction of the tribunal on the ground that it was not a party to the Agreement.

The arbitral tribunal held that Pakistan was bound by the agreement to arbitrate and that it had jurisdiction to determine Dallah's claim. The tribunal awarded Dallah damages and costs, and subsequently Dallah commenced enforcement proceedings in London. Pakistan resisted enforcement on the basis that the arbitration agreement was invalid pursuant to section 103(2)(b) of the New York Convention as implemented by the *English Arbitration Act*, which states:

> Recognition or enforcement of the award may be refused if the person against whom it is invoked proves … (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.

This provision has been used as an exception to enforcement in cases where a party never entered into an arbitration agreement.

To determine the issue of whether Pakistan was a party to the arbitration Agreement, the Court of Appeal undertook a full review of the tribunal's decision and resolved to apply French law the law of the seat. French law specified that the law of the country into which the contract was entered (i.e. Pakistan) governed the question of capacity to enter into the Agreement. Under the law of Pakistan, the Agreement would have required the signature of the President of Pakistan. Since Pakistan was not a signatory to the Agreement, the Court held that it was not a proper party to the arbitration.

The *Dallah* decision has raised concern in the UK, as it sets a precedent for a wide interpretation of the grounds to resist enforcement of an international arbitral award, as well as power to extensively review a tribunal's decision.

Dallah has successfully obtained leave to the Supreme Court, where it is hoped that the Court will scrutinize the issue of whether English courts should continue to retain excessive power to refuse to enforce an international arbitral award. In the meantime, however, the Court of Appeal's decision is important in two respects: (1) it reiterates that core elements of an agreement to arbitrate must all be present in order to avoid problems at the enforcement stage; and (2) it confirms the importance to include properly drafted governing law and arbitration clauses in arbitration agreements.

ACCENTUATE LTD V ASIGRA INC (A COMPANY INCORPORATED IN CANADA) [2009] EWHC 2655 (QB) (30 OCTOBER 2009) ("*ACCENTUATE*") ONLINE:

Mona Pinchis, Ogilvy Renault LLP

Significance

If mandatory provisions of European Union ("EU") law may be relevant to a contracted agreement, then non-EU parties must remain mindful when selecting non-EU choice of law and jurisdiction clauses to govern their agreements with EU members, as the EU law may override mutually contracted-out arrangements and continue to apply to the parties. Therefore, lawyers should be aware that by not giving effect to mandatory provisions of EU law, the validity of jurisdiction clauses and choice of law clauses may be held null, void and inoperative in certain situations. Decided in 2009, *Accentuate* signifies that despite a contracted agreement to refer to disputes to arbitration in a non-EU jurisdiction, such an agreement must not amount to an unlawful attempt to contract out of mandatory provisions of EU law.

Background

In 2004, Accentuate Limited, an English distributor (the "Distributor"), and Asigra Inc., a Canadian licensor (the "Licensor"), entered into a master reseller agreement (the "Agreement") for the distribution of software products and related hardware. The Agreement was to be governed by Ontario law and all disputes were to be settled by arbitration in Toronto. Disputes arose over a breach of the Agreement in 2006. The English District Court granted the Distributor permission to serve the Licensor out of the jurisdiction to advance claims for breach of contract and compensation as a commercial agent in the sum of £1.75 million in England, as governed by the Commercial Agents (Council Directive) Regulations 1993 (the "Regulations"). If applicable, the European Self-Employed Agents Directive and Regulations entitle a Commercial Agent (as defined in the Regulations) to be indemnified or compensated by its principal upon termination of an agency relationship. The Regulations also provide that parties may not derogate from these provisions to the detriment of the commercial agent prior to the expiry of the agency contract.

In response to the Distributor's claims, the Licensor applied for and was subsequently granted, an order setting aside permission to serve out of the jurisdiction. It also obtained a stay of the proceedings pursuant to s. 9 of the Arbitration Act 1996 by the English District Court. The Licensor commenced arbitration proceedings in Toronto, claiming a declaration that the Distributor had no claims against it. The Distributor participated in the arbitration but argued that any claim under the Regulations fell outside the scope of the Agreement. The Distributor also submitted a counterclaim for compensation under the Regulations. Claiming proper jurisdiction and denying the Distributor's request that the Regulations were outside the scope of the Agreement, the arbitrators concluded that the Regulations did not apply in determining the rights and liabilities of the parties. They issued a number of awards and declared that the Licensor was liable to the Distributor for certain direct losses unrelated to the Regulations. Rather than challenge the arbitration awards in Canada, the Distributor appealed the District Court's decision to stay the proceedings. The Distributor submitted that the non-EU arbitration awards were irrelevant to the compensation claims, as they were contrary to public policy and a nullity under EU law.

On appeal, the High Court supported the Distributor's submission that it had a good arguable case in establishing that the Regulations applied, and was not defeated by the Agreement's choice of Ontario law or arbitration clauses. The High Court determined that there could be no stay of the compensation claim brought in England and that the arbitration award may have been unenforceable. In concluding this, the High Court referenced *Ingmar GB Limited v Eaton Leonard Technologies* Limited, [2000] EUECJ C-381/98, where the European Court Justice established the mandatory nature of EU law, notwithstanding any expression to the contrary on the part of the contracting parties. Based on the facts of the case, the High Court selected the English courts as the appropriate forum to consider whether the Agreement applied to, or was binding as it applied to, the Distributor's claims as a commercial agent, as governed by the Regulations.

Effect of the Decision

Based on the specific facts in *Accentuate*, the High Court clearly concluded that it would be unlawful for parties to contract out of mandatory provision of EU law if it had the practical effect of depriving a commercial agent of his rights. This applies to governing law and arbitration clauses. While the High Court clarified the question on jurisdiction, it did not address whether an arbitration clause remains valid if it makes it clear in the contract that an arbitrator may apply mandatory provisions of EU law alongside the chosen law. This point was not addressed in *Accentuate* because the Distributor decided to pursue proceedings in England rather than seek to appeal the Canadian arbitration awards in Canada

QUEBEC COURTS AND THE AUTONOMY OF ARBITRAL PROCEDURE

Azim Hussain, Ogilvy Renault LLP

In two recent cases, the Quebec Superior Court and Court of Appeal have confirmed that parties who are unhappy with the procedural decisions of arbitrators cannot seek to have the courts review those decisions

In the Court of Appeal case of *Endorecherche Inc. et al v. Université Laval et al* (2010 QCCA 232), which involved a domestic arbitration, the petitioning parties sought to overturn a decision made by the arbitrators requiring the disclosure of various documents requested by the claimants. The contract between the parties provided for the disclosure of relevant documents upon the demand of the claimants. The petitioners argued that the arbitrators had exceeded the scope of the arbitration agreement in ordering the disclosure, which they claimed was a ground for annulment under the Quebec *Code of Civil Procedure.*

Both the Superior Court and the Court of Appeal rejected the petitioners' attempt to involve the courts in a review and the Court of Appeal specifically pointed out that the arbitrators' decision was a procedural order.

Book VII, Title I of the Quebec *Code of Civil Procedure* lays down the rules of arbitral procedure for parties who choose Quebec rules to govern their proceedings. Title I also sets out the scope of intervention available to the courts. There is no general power of review of arbitral procedural decisions. In fact, Article 944.1 provides that arbitrators have full authority to determine the procedure to be applied in arbitral proceedings.

In the Superior Court case of *Terrawinds Resources Corp. et al. v. ABB Inc* (2009 QCCS 5820), which involved inter-provincial arbitration, Terrawinds and related companies sought to overturn the decision of the arbitrators to disallow examinations on discovery. The arbitrators had decided to permit document disclosure but no oral examinations prior to the hearing on the merits. The petitioners unsuccessfully tried to characterize that decision as an award, i.e., a decision on the merits of the dispute, in order to trigger the power of the Quebec courts to annul an arbitral award.

The Superior Court confirmed that Book VII, Title I of the *Code of Civil Procedure* does not permit the court to review the procedural rulings of arbitrators. The Court even questioned the reasoning of a previous judgment of the Superior Court in which it had concluded that it had jurisdiction to review an arbitrator's decision regarding the capacity of a lawyer to represent a party in arbitral proceedings (*Paris* v. *Macrae*, EYB 2006-117195 Sup Ct). The Court in *Terrawinds* underscored that there are limited grounds of intervention available to the courts in matters of arbitration. If the application before the court does not invoke one of these grounds, there is no jurisdiction to intervene.

These decisions of the Quebec courts dovetail with a recent decision of the Ontario Court of Appeal (*Inforica Inc* v. *CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642) where it confirmed under the Ontario *Arbitration Act, 1991* that a party could not seek the intervention of the Ontario courts on an issue of security for costs.

Endorecherche and *Terrawinds* confirm the international consensus that there are very limited grounds for court intervention during arbitral proceedings.

Articles

'GETTING TO KNOW AN OLD FRIEND' – THE PERMANENT COURT OF ARBITRATION

Heather Clark, Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) has been administering international arbitrations for over 100 years and is the oldest institution of its kind in the world. It was established in The Hague in 1899 with the object of creating a permanent administrative framework to resolve disputes between states. It now operates under an expanded mandate administering arbitrations involving various combinations of states, private parties, state entities, and intergovernmental organizations. The PCA has just reached a record high of 51 pending cases, approximately two thirds of which are investment arbitrations under bilateral or multilateral investment treaties, including a significant number of NAFTA disputes. While the number of new cases at the PCA in 2009 was almost on par with ICSID, the PCA is still better known as an institution concentrating on state-to-state arbitration and is sometimes perceived as somewhat of a new player in the field of investment arbitration. Accordingly, it is worth getting to know this 'old friend' as you may soon find yourself walking through the gilded doors of the Peace Palace.

The PCA has developed significant expertise in administering arbitrations under the UNCITRAL Rules, partly due to its special role in the designation of appointing authorities. This is important because it has been estimated that approximately 25% of new investment arbitrations are conducted under the UNCITRAL Rules. While many of the cases at the PCA involve disputes between investors and states, the PCA has also developed a healthy niche in maritime disputes under UNCLOS and, more recently, due to the flexibility of its framework, it has administered a dispute between two parties emerging from a civil war. The Abyei Arbitration, between the Government of Sudan and the Sudan People's Liberation Movement/Army, addressed a dispute regarding the delimitation of territory lying between the North and the South of Sudan. This arbitration was exceptional because the award was delivered nine months from the constitution of the Tribunal, despite involving massive amounts of evidence and extensive pleadings. Of note, the parties were provided €500,000 from the PCA's Financial Assistance Fund, which is available to developing countries to meet part of the costs involved in arbitration.

Of more practical import to most practitioners, the PCA might be considered unique among arbitration institutions in the level of administrative support it can offer. The PCA can also offer the hearing facilities of the Peace Palace (for free). Cases at the PCA are not subject to any rules on confidentiality and indeed approaches have varied from complete confidentiality to full disclosure, including live webcasts of hearings as in the Abyei Arbitration. The PCA has also entered into a network of cooperation agreements with other institutions and with states for, *inter alia*, the arrangement of hearing facilities and certain privileges and immunities for parties and arbitrators.

Through this network, the PCA has organized hearings and meetings at locations such as Brussels, Cologne, Dar-es-Salaam, Geneva, Georgetown (Guyana), Houston, Toronto, Kuala Lumpur, London, Mumbai, New York, Paris, San José (Costa Rica), Stockholm, Vienna, Washington D.C., Windhoek (Namibia), and Zurich.

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More information about the PCA is available at http://www.pca-cpa.org/.

FULSOME DISCLOSURE: HOW MUCH INFORMATION DO WE REQUIRE OF OUR ARBITRATORS?

Rachel Bendayan, Ogilvy Renault LLP

The disclosure of information required of arbitrators is becoming increasingly onerous. But how far must arbitrators go in disclosing their agendas, mandates and lists of acquaintances?

The ICC Rules of Arbitration

The International Chamber of Commerce (the "ICC"), one of the leading institutions for administering international commercial arbitration, has been paying particular attention to this issue. Like almost all arbitral institutions, the ICC requires arbitrators to be both independent and impartial.[1] Article 7(2) of the ICC *Rules of Arbitration* requires that all prospective arbitrators "sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."[2]The Secretariat then provides this information directly to the parties for comments. [3]

The IBA Guidelines

Most national *lex arbitri* and institutional rules of arbitration require that arbitrators be independent of the parties and their representatives, and impartial *vis-à-vis* the issue in dispute, that is, free of prejudice or prejudgment.[4] While these are, properly speaking, "states of mind", which may be difficult to define with precision, the practice that has evolved internationally reflects a certain level of consistency.[5] This practice was skillfully collated by a working group of international arbitration experts into the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the "*IBA Guidelines*").[6] Part I of the *IBA Guidelines* provides seven principal "General Standards" on independence and impartiality. Part II sets out the "Application Lists", which are three colour-coded "lists of specific situations that, in the view of the Working Group, do or do not warrant disclosure or disqualification of an arbitrator."[7]

Nevertheless, much continues to be written about the increasing number of challenges to the independence and impartiality of arbitrators. Whereas the sanctity and legitimacy of alternative dispute resolution rests, at least in part, on the independence and impartiality of its decision makers, many practitioners have come to view this aspect of international arbitration as a headache, even a migraine. Those practising in the field as counsel may find that such challenges have become nothing more than bad faith attempts to invalidate unfavourable results, while those acting as arbitrators resent the scrutiny of their current agendas and past affairs, professional and otherwise.

The Statement of Independence Required for ICC Arbitrations

The ICC, for one, issued a new "Statement of Acceptance, Availability and Independence" in August 2009 which dramatically broadened – or at least explicitly specified – the nature and amount of information prospective arbitrators must disclose. In particular, prospective arbitrators are asked to relate "any past or present relationship, direct or indirect, between [them] and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind."[8] The form also states that "[a]ny doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information."[9] The 2009 form even introduces a section on the availability of prospective arbitrators, and asks them to confirm that they are able to "devote the time necessary" to properly conduct the arbitration, and to list "any other professional engagements or activities likely to require a substantial time commitment […] in the next 12-18 months."[10]

A recent publication by Jason Fry and Simon Greenbery, respectively Secretary General and Deputy Secretary General of the ICC International Court of Arbitration, reveals the seriousness with which the ICC scrutinizes and even cross-checks the information disclosed

The Secretariat spot-checks its electronic database to ascertain whether arbitrators have made proper disclosure about prior or pending ICC arbitrations. The Secretariat has access to all information about an arbitrator's prior roles in ICC arbitrations, whether as counsel or arbitrator, including how the arbitrator was appointed. There have been several recent instances where undisclosed information was discovered by the Secretariat through this process.[11]

Alpha Projektholding GmbH v. Ukraine

It was thus with great interest that practitioners in international arbitration learned of a recent decision on a challenge to an arbitrator under the auspices of another arbitral institution, the International Centre for Settlement of Investment Disputes ("ICSID"). In *Alpha Projektholding GmbH v. Ukraine*,[12] a challenge was raised by Ukraine against arbitrator Dr. Yoram Turbowicz because he and counsel for Claimant had attended Harvard Law School together some twenty years ago, a fact that had not been disclosed by Dr. Turbowicz. In further support of its challenge, Ukraine alleged that counsel for Claimant had had a "brief phone call" with Dr. Turbowicz regarding his availability to serve on the Tribunal, and that his lack of arbitration experience suggested that his selection was motivated by his lack of independence and impartiality.[13]

The Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz dated 19 March 2010 (the "Decision"),[14] makes extensive reference to the *IBA Guidelines.* The other two members of the Tribunal in this case, deciding pursuant to Article 58 of the ICSID Convention,[15] found that the shared educational experience of a counsel member and an arbitrator did not constitute either a "relationship" as contemplated by Article 6(2) of the Rules of Procedure for Arbitration Proceedings,[16] or a contravention of the principles of independence and impartiality, as reflected in the *IBA Guidelines*, capable of influencing the arbitrator's freedom of decision-making.

The Decision compares the challenged relationship with two often cited situations included in the *IBA Guidelines'* "green list" of acceptable situations that do not require any disclosure: "(i) membership in the same professional association or social organization and (ii) previous service together as arbitrators or as co-counsel."[17] In this respect, the Decision concludes: "In this proceeding, there is no evidence of even this minimal level of connection between Dr. Turbowicz and Dr. Specht. Long-ago acquaintanceship at school, […] has neither the currency of co-membership in some professional or social group nor the professional intimacy of prior service as co-arbitrator or as co-counsel."[18] As such, an "acquaintanceship at an educational institution was not perceived by the drafters of the *IBA Guidelines* as the kind of relationship that was deemed worthy of any mention even in the "green list" of fact patterns, much less the "orange list" or the "red list"."[19]

Also of interest are the additional, perhaps even *obiter* remarks in the Decision with respect to limiting the expansive understanding of circumstances requiring disclosure. The Decision notes "that a requirement to disclose trivial or superficial facts will prove burdensome to parties and arbitrators, will unnecessarily circumscribe the freedom of choice in the selection of party-appointed arbitrators and will encourage frivolous challenges."[20] This may be encouraging news for practitioners in international arbitration tired of having the focus of arbitral proceedings displaced from the dispute itself to the lives of its decision-makers.

Endnotes:

[1] See the ICC *Rules of Arbitration*, in force as from 1 January 1998, Article 7, available online at: http://www.iccwbo.org/court/arbitration/id4093/index.html

[2] Article 7(2) of the ICC *Rules of Arbitration* provides as follows:

> Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

[3] ICC *Rules of Arbitration*, in force as from 1 January 1998, Article 7(2).

[4] See Gary Born, "Selection, Challenge and Replacement of Arbitrators in International Arbitration – Independence and Impartiality of Arbitrators" in Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2009) 1461; and Benedikt Spiegelfeld, Susanne Wurzer and Heidrun E. Preidt, "Chapter II: The Arbitrator and the Arbitration Procedure – Challenge of Arbitrators: Procedural Requirements" in Christian Kausegger, Peter Klein, et al. (eds), *Austrian Arbitration Yearbook 2010* (C.H. Beck, Stampfi & Manz 2010), 45.

[5] See Benedikt Spiegelfeld, Susanne Wurzer and Heidrun E. Preidt, "Chapter II: The Arbitrator and the Arbitration Procedure – Challenge of Arbitrators: Procedural Requirements" in Christian Kausegger, Peter Klein, et al. (eds), *Austrian Arbitration Yearbook 2010* (C.H. Beck, Stampfi & Manz 2010), 45; William W. Park, "Part III Chapter 9: Arbitrator Integrity" in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010), 189; and Simon Greenberg and José Ricardo Feris, Appendix: References to the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") when Deciding on Arbitrator Independence in ICC Cases, *in* ICC International Court of Arbitration Bulletin, Volume 20, No. 2, (2009), 33.

[6] *IBA Guidelines on Conflicts of Interest in International Arbitration*, Approved on 22 May 2004 by the Council of the International Bar Association, available online at: http://www.int-bar.org/images/downloads/guidelines%20text.pdf.

[7] Introduction to the *IBA Guidelines on Conflicts of Interest in International Arbitration*, Approved on 22 May 2004 by the Council of the International Bar Association, at 4.

[8] ICC Arbitration News*, in* ICC International Court of Arbitration Bulletin, Volume 20, No. 2, (2009) 7, at 11 (emphasis in original).

[9] *Ibid* (emphasis in original).

[10] ICC Arbitration News*, in* ICC International Court of Arbitration Bulletin, Volume 20, No. 2, (2009) 7, at 10.

[11] Jason Fry and Simon Greenbery, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases, in* ICC International Court of Arbitration Bulletin, Volume 20, No. 2, (2009) 12, at 16.

[12] ICSID Case No. ARB/07/16.

[13] *Alpha Projectholding Gmbh v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz dated 19 March 2010, at 13-14.

[14] *Alpha Projectholding Gmbh v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz dated 19 March 2010, available online at : http://icsid.worldbank.org/ICSID/FrontServlet.

[15] Article 58 of the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, provides as follows:

> The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

[16]Article 6(2) of *The Rules of Procedure for Arbitration Proceedings of ICSID* provides as follows:

> (2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:
>
> > "To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____and_____.
> >
> > "I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.
> >
> > "I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.
> >
> > "Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

[17] *Alpha Projectholding Gmbh v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz dated 19 March 2010, at para. 61.

[18] *Ibid*, at para. 61.

[19] *Ibid,* at para. 61.

[20] *Ibid,* at para. 66.

International Arbitration Calendar 2010

As of May 2010

See www.arbitrationevents.com for a full list of International Commercial Arbitration Events.

Some events of interest are:

Date	Place	Organization	Topic	Web Address
Jun. 4, 2010	Belgium	AIA	The UNCITRAL Model Law: 25 years	www.arbitration-adr.org
Jun. 7, 2010	Internet	AAA	Using Industry Professionals as Sole Arbitrators – When and Why it is Best for Your Client *(live webinar)*	http://www.aaauonline.org/ courseCalendar.asp
Jun. 9-10, 2010	Moscow	SCC	International Law Conference on Commercial Arbitration in Russia, Sweden and England	www.sccinstitute.com
Jun. 14 2010	New York	AAA	Fifth Annual Fordham Law Conference on International Arbitration and Mediation	http://www.aaauonline.org/courseCalendar.asp
Jun. 17-18, 2010	Rome	ARBIT/Union Internationale Desavocats	Summary Proceedings in International Arbitration	www.uianet.org
Jun. 24-25, 2010	Lagos	IBA	IBA SEERIL - Arbitration Conference: Resolving International Energy & Infrastructure Disputes	www.ibanet.org

Save the Date! The next YCAP Symposium will be in Vancouver during the IBA Conference, October 3-8, 2010. For further details, please contact Jim Bunting

International Arbitration Calendar 2010

As of May 2010

Date	Place	Organization	Topic	Web Address
Jul. 1-2, 2010	Moscow	LCIA	LCIA European Users' Council Symposium	www.lcia-arbitration.com
Jul 1-3 2010	Windsor, England	FIAA	FIAA Advocacy Workshop "Questioning of Expert Witnesses in International Arbitration"	www.fiaa.com
Jul. 2-4, 2010	Hong Kong	ICC	ICC Workshop on International Commercial Arbitration	www.iccwbo.org
Aug. 5-7, 2010	Christ Church New Zealand	AMINZ	AMINZ (Arbitrators & Mediators Institute New Zealand) Conference	www.aminz.org.nz
Aug. 17, 2010	The Hague	Arbitral Women	Fifth Anniversary Celebration	www.arbitralwomen.org
Sept. 10, 2010	The Grove	LCIA	LCIA Young International Arbitration Group Symposium	www.lcia-arbitration.com
Sept. 17-18, 2010	Taiwan	ACWH/CAA	2010 Taipei International Arbitration and Mediation Conference	www.arbitration.org/tai
Sept. 23, 2010	Paris	ICC	Arbitration and Sport	www.iccwbo.org
Fall 2010	Chicago	GCG	Study of a Mock International Commercial Arbitration International Conference	http://www.globalconferencegroup.com/08arbitration/arbitration.html#date
Oct. 3, 2010	Vancouver	LCIA	LCIA North American Users' Council Symposium	www.lcia-arbitration.com

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International Arbitration Calendar 2010

As of May 2010

Date	Place	Organization	Topic	Web Address
Oct. 3-8, 2010	Vancouver	IBA	IBA 2010 Annual Conference – YCAP Symposium	www.ibanet.org www.ycap.ca
Oct. 14, 2010	Bogota	CAI	3rd Annual Americas Roundtable for Young International Arbitrators	www.cailaw.org
Oct. 14-15, 2010	Bogota	CAI	ITA-CCB Americas Workshop: Confronting Ethical Issues in International Arbitration	www.cailaw.org
Oct. 19-20, 2010	Dubai	ICC	Arbitral Awards	www.iccwbo.org
Oct. 21, 2010	London, UK	SCC	Freshfields Arbitration Lecture	www.sccinstitute.com
Nov. 8, 2010	Stockholm	AAA	Resolving Business Disputes in Today's China	www.sccinstitute.com
Nov. 18-19, 2010	Hong Kong	HKIAC	HKIAC 25th Anniversary Conference	www.hkiac.org
Nov. 20, 2010	Hong Kong	HKIAC	Mock Arbitration	www.hkiac.org
Nov. 29-30, 2010	Paris	AAA/ICC/ICSID	Joint Colloquium on International Arbitration	www.iccwbo.org
March 3, 2011	Seoul	LCIA	LCIA Young International Arbitration Group	www.lcia-arbitration.com

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