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## Emerging Markets Special Edition

Welcome to the 18th edition of Arbitration World, a publication from K&L Gates' Arbitration Group. This special edition focuses on issues and recent developments in emerging markets. We also include our usual round-up of news items in international commercial arbitration and investment treaty arbitration.

We hope you find this edition of Arbitration World of interest, and we welcome any feedback (email [ian.meredith@klgates.com](mailto:ian.meredith@klgates.com) or [peter.morton@klgates.com](mailto:peter.morton@klgates.com)).

## News from around the World

Sean Kelsey (London)

### Africa

#### Tanzania

In the case of *Tanzania Electric Supply Company Ltd v (1) Dowans Holdings SA and (2) Dowans Tanzania Limited* (28 September 2011), the High Court of Tanzania dismissed an application to set aside a US\$65 million ICC award rendered by a Tanzania-seated tribunal in a dispute concerning the validity and enforceability of an emergency power “take-off” agreement. Proceedings for recognition and enforcement of the award (rendered against a state-owned electricity company) had begun in England two months before the application to set aside. The grounds for the petition were excess of jurisdiction, public policy and misconduct due to alleged errors of fact and law on the face of the record. The High Court's decision was based on principles of *kompetenz-kompetenz*, and the autonomy of the arbitral process.

### Asia

#### Hong Kong

A recent decision of the Hong Kong Court of Appeal has firmly upheld judicial respect in that jurisdiction for the decisions of arbitrators. In *Gao Haiyan v. Keeneye Holdings Ltd* (2 December 2011), the Hong Kong Court of Appeal overturned a decision of the Court of First Instance (CFI) to refuse enforcement of a Chinese arbitration award on public policy grounds. As part of a “med-arb” procedure, arbitrators had participated in a mediation conducted over a dinner in Xian, China, which had concluded with a proposal that the respondents pay the applicants RMB 250 million. When later the tribunal awarded the applicants RMB 50 million, the respondents alleged bias. The Court of Appeal found that refusal to enforce on public policy grounds required that enforcement “*would be contrary to the fundamental conceptions of morality and justice of the forum*”. What had happened in this case was outside the cultural norms of Hong Kong, but seen in context it could not be said that the mere fact mediation was done differently in another jurisdiction was contrary to such “*fundamental conceptions*”. The Court of Appeal also upheld the applicants' argument that the respondents, having participated in the arbitration without raising their objection, had in any event waived, pursuant to the rules of the Xian Arbitration Commission, their right to object.

**India**

The Supreme Court has recently denied an appeal against an interim order made by an arbitral tribunal seated outside India. In *Yograj Infrastructure v. Ssang Yong Engineering and Construction* (1 September 2011), the Supreme Court found that Part I of the Indian Arbitration and Conciliation Act 1996 was impliedly excluded, as the seat of arbitration was outside India and the arbitration proceedings were governed by foreign law. Alongside the *Yograj* decision, there are indicators of the challenges that remain in establishing arbitration as a widely-accepted dispute resolution mechanism in India. In *SMS Tea Estates v. Chandmari Tea Company* (20 July 2011), the Supreme Court has held that if an arbitration clause is contained in an instrument required to be stamped in order to be admissible in evidence in court under Indian legislation, the arbitration clause is ineffective. However, the Supreme Court also found that where an arbitration clause is contained in an instrument which is required to be registered, but that instrument is not registered, then the arbitration clause in the instrument is valid and enforceable. These are some of the developments which provide the context in which (as we reported in our [December 2011 edition](#)) the reasoning in the *Bhatia* case has recently come under scrutiny by the Supreme Court. In the *Bharat Aluminium v. Kaiser* case and consolidated appeals, the Supreme Court is revisiting a judgment which has caused considerable doubt for parties to arbitrations seated outside India which have Indian subject matter. Hearings commenced on 10 January 2012. See our full report on that case in the “[Developments in Indian Arbitration](#)” article.

**Singapore**

The Singapore Ministry of Law has concluded a one-month consultation on proposals published in October 2011 for the amendment of the International Arbitration Act. The main proposed amendments are to relax the requirement that arbitration agreements must be in writing; to permit Singapore courts to review arbitral awards declining jurisdiction, as well as those accepting it; and to clarify that awards granted by emergency arbitrators will be enforceable in the Singapore courts. To deal with current ambiguity as to the power of tribunals to award interest, the draft bill provides expressly

that a tribunal may grant simple or compound interest on money awards, as well as costs.

**Europe****Russia**

On 25 January 2012, amendments to the law on international commercial arbitration passed their first reading in the lower chamber of the Russian Parliament. The aim of the amendments is to bring Russian law into line with the UNCITRAL Model Law of 2006. The proposed amendments include provisions relating to the power of arbitral tribunals to grant interim relief, including emergency measures available before filing of the statement of claim. The proposed legislation will also place on a statutory footing the finding of the Supreme Commercial Court of the Russian Federation that state courts possess authority to grant interim measures in support of any arbitration taking place in Russia and abroad.

The Russian Cassation Court recently confirmed the annulment (granted by a lower court on 5 October 2011) of an *ad hoc* award rendered against Dutch and Slovenian shareholders in Moldova's largest bank in an arbitration which the shareholders contended had never taken place. The award had already been enforced in the Moldovan courts, although the Moldovan Supreme Court has since set aside the judgment recognising and enforcing the award.

On 23 March 2012, the UK-Russia Liaison Group on Moscow as an International Final Centre released the interim report of what it calls its “*ADR workstream*”. Released under the auspices of The CityUK, an organisation which promotes the UK's financial and related industries around the world, the report considers the task of enhancing ADR in Russia. Its recommendations include: designating a court in Moscow to supervise all international arbitrations seated in Russia, irrespective of the actual city where the arbitration takes place; making the same court responsible for recognition and enforcement of all international arbitral awards, which are subject to enforcement in Russia; and, legislative and judicial solutions to issues in international arbitration in relation to Russia, such as arbitrability, interim measures and public policy. These recommendations come with influential backing from the Russian government and the

Corporation of the City of London, and mark an interesting development in the lively on-going debate around ADR in Russia, aspects of which are discussed further in our article [below](#).

## South America

### Brazil

The Court of Appeals in the State of Paraná has struck down an arbitration-related decision of its own which had been the subject of heavy criticism. In its judgment dated 7 December 2011 in the case of *Itiquira Energetica v. Inepar S.A. Industria e Construcoes*, the Court of Appeals reversed the decision that execution of an agreement to submit the dispute to arbitration was a necessary step before initiating arbitral proceedings, even when the parties had entered into a contract containing a valid arbitration clause, and had participated in ICC proceedings without objecting to the tribunal's jurisdiction.

Meanwhile, an October 2011 judgment of the Brazilian Superior Court of Justice has extended the scope of the Brazilian Arbitration Act and the Public Tender Contracts Act. The Court ruled, in *COMPAGAS v. Consórcio Carioca Passarelli*, that a post-dispute agreement to submit the dispute to arbitration was valid despite the fact that the relevant public request for proposals did not provide for arbitration. This decision confirms that disputes arising under contracts stemming from public requests for proposals may also be resolved by arbitration, and that post-dispute submission agreements are equally as valid as pre-dispute arbitration agreements.

## Institutions

### ACICA

The Australian Centre for International Commercial Arbitration (ACICA) has joined the growing number of institutions around the world whose rules provide for the appointment of emergency arbitrators. Parties to an ACICA arbitration agreement will now be able to apply for emergency protective measures before the arbitral tribunal has been constituted. The new rules provide that ACICA use its “*best endeavours*” to appoint an emergency arbitrator within one day, subject to disclosures and other requirements. An emergency arbitrator may not act as the arbitrator to the dispute, unless agreed otherwise, and will have five days from the date of

the application to issue an interim award. The test for granting relief includes the likelihood that the applicant will suffer irreparable harm, outweighing the impact on the other party, and has a reasonable possibility of succeeding on the merits. Any interim award will lapse if a tribunal is not subsequently appointed within 90 days.

### CIETAC

The China International Economic and Trade Arbitration Commission (CIETAC) has announced that it has completed revision of its existing rules, adopted in 2005. Subject to approval by the China Council for the Promotion of International Trade (CCPIT, also known as CCOIC), it is expected that the revised rules will take effect 1 May 2012. The current draft of the proposed new CIETAC Rules of Arbitration has been published for purposes of the Vis Moot in Vienna and Hong Kong, which CIETAC sponsors.

### HKIAC

A deadline for submission of views on whether revisions should be made to the Administered Arbitration Rules of the Hong Kong International Arbitration Centre (HKIAC) has recently closed. Views were sought on a number of topics, including whether provision for appointment of arbitrators in a multi-party arbitration needs to be simplified, whether provision should be made for joinder or consolidation of proceedings, and whether the Rules should be amended to include an emergency arbitrator provision. A further series of consultations is planned before a decision is reached on when, and in what form, any amendments to the Rules will be introduced.

### PCA

In December 2011, the Permanent Court of Arbitration (PCA) adopted Optional Rules for the Arbitration of Disputes Relating to Outer Space Activities. The rules are intended for use in relation to the public international law element pertaining to disputes that may involve states and the use of outer space. Their most obvious application (at present) would seem therefore to be in relation to the use of outer space in the satellite and related telecommunications industries. Commentators observe that there already exists a well-developed body of international and commercial practice in this field, such as the legal instruments of the

International Telecommunications Union. But the news is already prompting reflection (and not just by science fiction fans) on possible applications in relation to the exploitation of mineral and other resources beyond Earth.

### SCIA

The Swiss Chambers Arbitration Institution (SCIA) is the new name for the Arbitration Institution of the Swiss Chambers of Commerce. SCIA will issue an updated and revised version of the Swiss Rules which comes into effect on 1 June 2012. The new rules will be available on the SCIA website at the beginning of April 2012.

## World Investment Treaty Arbitration Update

Lisa Richman (Washington, D.C.) and Dr. Sabine Konrad (Frankfurt)

In each edition of *Arbitration World*, members of K&L Gates' Investment Treaty practice provide updates concerning recent, significant investment treaty arbitration news items. This edition features a discussion of [Venezuela](#)'s recent withdrawal of its ICSID membership; an update relating to a number of disputes against [Argentina](#); a summary of the dismissal of claims at the International Center for the Settlement of Investment Disputes ("ICSID") against [Romania](#) (and denial of Romania's related counter-claims); and an update concerning the disputes between Chevron and [Ecuador](#).

### Venezuela's Exit from ICSID

On 24 January 2012, President Hugo Chávez followed through on his repeated threats to withdraw Venezuela's membership from ICSID, the most widely used facility for the settlement of global investment disputes. (See our [previous report](#) on these threats in September 2011.) The timing coincides with the merits hearing in the ICSID arbitration by Exxon Mobil against Venezuela that occurred in February 2012 in Paris.

In its notice, Venezuela noted a concern for its sovereignty and for alleged partiality by ICSID tribunals in favor of investors. Venezuela also has separately indicated that it intends to "re-negotiate" existing BITs.

The ICSID Convention provides a number of protections for current and some future claims despite Venezuela's withdrawal. For instance, in accordance with Article 71 of the ICSID Convention, the denunciation of Venezuela's ICSID membership will take effect only **six months after** the receipt of Venezuela's notice by ICSID, i.e., on 25 July 2012. Moreover, in accordance with Article 72 of the ICSID Convention, notice of withdrawal will not "affect [Venezuela's or its subdivisions' or agencies'] rights or obligations under [the ICSID] Convention... arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received" by ICSID.

A withdrawal from ICSID therefore will take some time to come into effect, and will not adversely impact claims already filed at ICSID. However, other investors in Venezuela need to consider how to best protect their future rights. The correct view for investors is that unilateral consent in a bilateral investment treaty already triggers the rights to arbitrate reflected in Article 72 of the Convention. *See, e.g.,* Emmanuel Gaillard, "The Denunciation of the ICSID Convention", TDM Vol. 4(5) (2007) (noting that "the investor is protected by Article 25(1) of the convention, which defines jurisdiction and provides that '[w]hen the parties have given their consent, no party may withdraw its consent unilaterally'").

However, this has not yet been tested in practice. For example, although both Bolivia and Ecuador denounced their ICSID membership in 2007 and 2009, respectively, the issue of whether claims filed with ICSID after the notices of withdrawal were submitted has not yet been determined. This is, in part, because arbitrations that might consider the issue have—to date—been resolved by agreement of the parties (*see, e.g., Corporación Quiport S.A. v. Republic of Ecuador*, ICSID Case No. ARB/09/23) or have not yet progressed to the relevant deciding point in the proceedings (*see, e.g., Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8).

Ideally, investors should take steps to protect their interests before the withdrawal takes effect on 25 July. For example, investors should consider with their lawyers issuing a letter to the Venezuelan government stating explicitly that they accept Venezuela's offer under the applicable bilateral

investment treaty (or other relevant source) to submit disputes to ICSID jurisdiction. This may improve the investor's situation should a claim arise before the current bilateral investment treaties expire. In addition, investors should evaluate whether the BIT contains an alternate to ICSID, such as *ad hoc* arbitration under UNCITRAL rules.

### **Argentina Update – US \$185 Million UNCITRAL Award Vacated and US \$43 Million ICSID Award Released**

By way of an update to our prior reports on the substantial number of international arbitration claims against Argentina (see, for example, the [October 2010](#), [February 2011](#) and [December 2011](#) editions of *Arbitration World*), there are two recent updates of particular note.

#### **U.S. Court Vacates UNCITRAL Award Against Argentina**

On 17 January 2012, the U.S. Court of Appeals for the D.C. Circuit vacated the District Court's confirmation of a US\$185 million arbitration award issued by an UNCITRAL tribunal against the Republic of Argentina. *See Republic of Argentina v. BG Group PLC*, No. 11-7021, 2012 U.S. App. LEXIS 905 (Jan. 17, 2012 D.C. Cir.).

The underlying arbitral award determined that Argentina was liable for denying fair and equitable treatment to BG Group's investment in a gas distribution enterprise. The heart of the dispute relates to an "emergency law" enacted by Argentina in 2002. The tribunal determined that the exhaustion of local remedies provision contained in the UK-Argentina BIT should not apply because it would lead to an "absurd and unreasonable result" given Argentina had, among other things, restricted access to its courts.

Because the *BG Group* arbitration was conducted under the 1976 UNCITRAL rules (not ICSID), the award was subject to challenge in court. Argentina filed a petition to vacate or modify the award in 2008, arguing that the arbitrators exceeded their authority by not taking into account the section of the UK-Argentina BIT requiring exhaustion of local remedies. BG Group cross-moved to confirm the award.

When the D.C. District Court denied Argentina's motion to vacate and confirmed the award, Argentina appealed. The appellate court determined that arbitrability could not be determined by the tribunal until the case had been subjected to local litigation for at least 18 months. The court determined that, unlike the inter-state BIT provision, the investor-state provision lacked clear intent about whether the arbitrators should decide the issue. Therefore, courts at the seat of arbitration had sole authority in that regard because there was no "clear and unmistakable evidence...that the contracting parties intended an arbitrator to decide" the issue. *Id.*, page 13.

It remains to be seen whether BG Group will take action to seek to overturn the decision, including requesting a petition for a rehearing of the Appeals Court sitting en banc or seeking leave to appeal the decision to the U.S. Supreme Court.

#### **ICSID Award Against Argentina is Released**

The award rendered in October 2011 in *El Paso v. Argentina* was published in January 2012. *See El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011. In this case—which also relates to Argentina's financial crisis—the tribunal found that through a series of measures, Argentina breached the fair and equitable treatment standard in violation of the US-Argentina BIT. According to the tribunal, the cumulative impact of Argentina's changes to the "legal setup for foreign investments" in the energy sector, including the introduction of regulations that purported to alter provisions in concession agreements intended to protect investors from the impact of peso devaluations, had a detrimental impact on the value of El Paso's investment. *Id.*, para. 517 - 519. As a result, the tribunal awarded damages in the amount of US\$43 million plus interest.

The tribunal was not unanimous on whether Argentina could invoke the defense of "necessity", however. The majority determined that the "context" of the treaty was aimed at creating a stable investment environment, that the economic crisis was occasioned by internal and external factors, and that Argentina's actions contributed substantially to the crisis. Consequently, the

majority decided that the legal necessity defense was not an available defense.

Brigitte Stern, Argentina's nominee and the one dissenter, disagreed with the majority on this point. In her view, the majority's "far-reaching conclusion" was not based on "an in-depth understanding of the intricacies of economic development", particularly given the "contradictory" analyses by the experts. Professor Stern included her views only in the majority opinion (instead of writing a separate dissenting opinion) because they did not have "far-reaching consequences on the material aspects of the final disposal of the case". *Id.*, para. 670. The majority's conclusion on Argentina's necessity defense appears to be consistent with the majority of the tribunals that have looked at this issue, including the tribunal in the underlying arbitration in the *BG Group* case.

### Claims Against Romania Dismissed, but Jurisdiction Over Counter-Claims Rejected

On 7 December 2011, an ICSID tribunal dismissed the claims of a Greek investor against Romania relating to a dispute over a share purchase agreement. *See Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011. The tribunal rejected Roussalis' contention that various Romanian governmental agencies took "malicious and unjustifiable acts" with respect to his investment that amounted to an indirect expropriation or "substantial impairment" in violation of the Greece-Romania BIT. Roussalis also contended that the government's actions violated the fair and equitable treatment, full protection and security, and non-impairment requirements of the BIT. Interestingly, Roussalis also alleged violations of Article 6 of the European Convention on Human Rights ("ECHR") and Article 1 of Protocol No. 1 to the ECHR.

Although it found that it had jurisdiction to hear his claims, the tribunal rejected all of them. Of potential relevance for future disputes, however, the tribunal did "not exclude" the possibility that claims for violation of the ECHR could be compensable under a BIT. Finding the issue "moot" because the Greece-Romania BIT provided "higher and more specific protections" than those in the ECHR, the tribunal denied recovery. *Id.*, para. 312.

The majority of the tribunal also rejected Romania's counter-claims, however, finding that the investor did not consent to having them decided at ICSID. *Id.*, para. 872. Professor Reisman, Romania's nominee, referred to this as an "ironic, if not absurd, outcome" in a tersely-worded one paragraph declaration. *See Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of 28 November 2011. At issue in the counter-claims was Roussalis' alleged failure to meet a post-purchase investment condition of the share purchase agreement.

The tribunal ordered Roussalis to reimburse Romania for 60 percent of the advance on costs of the arbitration and 60 percent of its legal fees and expenses which amounted to over 6 million Euros. It decided not to charge Roussalis with responsibility for all of the costs, legal fees and expenses because of his success on jurisdictional grounds and Romania's failed counter-claims.

### New Decisions in the Longstanding Chevron v. Ecuador Dispute

By way of an update to our prior reports (see, for example, our report in May 2010), there have been substantial new developments in both the court and arbitral proceedings relating to the alleged environmental damage by Chevron, for which Chevron alleges the Ecuadorian government is liable.

On 3 January 2012, an Ecuador appeals court upheld the US\$18 billion judgment against Chevron in favor of the Lago Agrio plaintiffs relating to the environmental damage. In response, Chevron took a number of actions including asking the Second Circuit to prevent enforcement of the judgment, a request that was denied. Chevron also asked the UNCITRAL arbitration tribunal to order Ecuador to explain how it intends to comply with the tribunal's February 2011 order requiring Ecuador to take measures to prevent enforcement of the judgment.

The tribunal granted Chevron's request ordering Ecuador to take all measures available to prevent enforcement within and outside Ecuador until further order of the tribunal. *See Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, First Interim Award on Interim Measures of 25

January 2012 and Second Interim Award of 16 February 2012. Chevron, in turn, was ordered to deposit US\$50 million as security for the “costs or losses” Ecuador might incur in performing its obligations under the orders for which Chevron “shall be legally responsible”. Second Interim Award of 16 February 2012, para. 4.

On 17 February 2012, the appellate panel of the Provincial Court of Justice in Sucumbrios, Ecuador held that awards (such as the First Interim Award) have no effect because international law protecting investors cannot take precedence over human rights under Ecuador’s Constitution and the Inter-American Convention of Human Rights, including the right to bring legal proceedings. However, the court also granted Chevron’s petition for cassation (*recurso de casación*) for a merits review by the Ecuador National Court of Justice. The National Court will consider Chevron’s argument that the lower courts violated the Ecuadorian Constitution by failing to take corrective action in response to alleged fraud and corruption by the Lago Agrio plaintiffs’ lawyers and representatives.

It remains to be seen what will be the next step in each of these proceedings.

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## Developments in Indian Arbitration

Rachel Stephens (London) and Ashish Chugh (Singapore)

### **Bharat Aluminium**

As reported in the [December 2011](#) edition of *Arbitration World*, a five-member Constitution Bench of the Indian Supreme Court has been hearing arguments in *Bharat Aluminium v. Kaiser Aluminium* and other cases (“*Bharat Aluminium*”). The principal issue in the case is whether Part I of the Indian Arbitration and Conciliation Act, 1996 (“the 1996 Act”) is applicable to arbitrations seated outside of India. In the course of the hearing, which has already lasted several weeks, the Indian Supreme Court has heard arguments for and against a reconsideration of its prior decisions as to this issue, including its 2002 decision in *Bhatia International v. Bulk Trading SA & Anr* (“*Bhatia*”). Considering the importance of issues involved,

several leading arbitral institutions, including LCIA India, the Singapore International Arbitration Centre and the Nani Palkhivala Arbitration Centre have intervened as *amici curiae*.

The *Bhatia* decision itself has been the subject of great debate within the international arbitration community. In that case, the Indian Supreme Court found, *inter alia*, that Part I of the 1996 Act applied to arbitrations seated outside of India, unless the parties had expressly or impliedly excluded its application. This enabled the Supreme Court, in that particular case, to grant the interim measures sought under Section 9 of the 1996 Act even though the arbitration was seated in Paris. In the subsequent case of *Venture Global Engineering v. Satyam Computer Services* (“*Venture Global*”) in 2008, the Indian Supreme Court, relying on the *Bhatia* decision, held that even an award issued in an arbitration seated outside India could be set aside by the Indian courts unless the parties had expressly or by implication excluded the application of Part I of the 1996 Act.

This approach has been widely criticised for a variety of reasons. The end result has been to create more uncertainty for foreign parties wanting to do business in India and with Indian parties. To add to the confusion, several subsequent decisions by the Indian courts have lacked clarity when attempting to follow the *Bhatia* and *Venture Global* decisions. 2010 saw some more positive decisions from the Indian Supreme Court, possibly pointing to a shift in judicial attitude towards arbitration and a need to deal with the negative effects of the earlier decisions. It is therefore hoped that the Indian Supreme Court will use this current opportunity to craft an authoritative opinion that not only resolves the key issues in dispute but which will also be seen in years to come as the watershed decision that gave impetus to the transformation of India into an arbitration-friendly jurisdiction.

### **White Industries**

News has recently emerged of an UNCITRAL tribunal’s decision in the long-running *White Industries* case. White Industries, an Australian private company, obtained an award against state-owned Coal India in 2002, at the end of a Paris-seated arbitration. White Industries applied for enforcement of the award in the Delhi High Court in

2002 and Coal India applied for the award to be set aside in the Kolkata High Court. In 2006, the Delhi High Court stayed White Industries' enforcement application pending the resolution of Coal India's set aside application in Kolkata. Meanwhile, the Kolkata High Court had refused to dismiss Coal India's application for want of jurisdiction (relying, in part, on *Bhatia*), and White Industries appealed that refusal to the Supreme Court in 2004.

Frustrated by the delays in the court processes, White Industries commenced an UNCITRAL investment treaty arbitration against the Government of India. By the time this arbitration was commenced in 2010, the Supreme Court had not heard White Industries' substantive application. The UNCITRAL Tribunal is said to have found India in breach of an investment treaty obligation to provide "effective means" for the resolution of claims and enforcement of rights. This obligation was in the India-Kuwait BIT, rather than the India-Australian BIT, but the India-Australia BIT contained a Most Favoured Nation clause, on which White Industries was able to rely to obtain relief for a failure to provide the "effective means" required by the India-Kuwait BIT.

The timing of this award is interesting, coming so shortly before the hearing by the Supreme Court in *Bharat Aluminium*. The latter may overtake the *White Industries* award as a catalyst for swifter enforcement of foreign arbitral awards in India. However, the *White Industries* decision highlights the importance of structuring investments into India in a way which takes the maximum advantage of India's BIT obligations.

Recent reports suggest that India is contemplating following Australia's example and excluding investor-state arbitrations from provisions in new BITs currently being negotiated with the EU and others. This must surely be all the more likely in light of the *White Industries* decision.

### Mr. Nariman's Ten Steps

In the February 2011 inaugural LCIA India lecture, Mr. Fali Nariman (Senior Advocate of the Supreme Court of India and former President of the Bar Association of India) set out "Ten Steps to Salvage Arbitration in India." Space does not permit a full analysis of progress measured against each of Mr.

Nariman's Ten Steps, but a few bear consideration in light of the developments explored above.

The argument that parties should honour "*l'esprit de arbitrage*", or not be a sore loser (First Step), is more likely to be won by ensuring effective means of enforcement for international arbitral awards in India. Mr. Nariman joined the chorus of calls for a new arbitration law for India (Tenth Step), but such reform appears unlikely in the immediate to medium-term future. This accounts, in part, for the eager anticipation of the Supreme Court's decision in *Bharat Aluminium* (Eighth Step) and a tendency for non-Indian parties to expressly exclude the application of Part I of the 1996 Act from their arbitration agreements (Ninth Step) (although pending the outcome of *Bharat Aluminium*, a bare exclusion of Part I of the 1996 may not achieve the parties' aims, as it could render the Indian courts unable to grant interim measures in aid of foreign-seated arbitrations).

### Conclusion

Like all dispute resolution clauses, those in contracts concerning India and/or Indian interests require careful drafting; there are many potential pitfalls for the unwary. Whether drafting a dispute resolution clause or faced with a dispute under an existing contract, the sooner these issues are addressed by the parties, the better.

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## Harmonizing Arbitration in China with International Best Practice

Raja Bose and Andrea Utasy (Singapore)

In recent years, China has continued to gain traction as one of the leading global arbitration centres, due in large part to its steady economic growth, fuelled by foreign investment and domestic expansion, as well as the development of the China International Economic and Trade Arbitration Commission ("CIETAC"). The Arbitration Law of the People's Republic of China ("Arbitration Law") has helped to both frame and promote this progress as it regulates arbitration across China and seeks to bring China's arbitration system into line with



international best practice, contributing to China's international appeal.

### **Adapting Arbitration Practices**

The Arbitration Law, enacted in 1995, is supplemented by the Civil Procedure Law, the Civil Code, judicial interpretation and even CIETAC's Arbitration Rules and those of other arbitration institutions. Thus, arbitration practices in China are not only subject to legislative revision but changes may be pushed ahead by arbitration institutions.

The Arbitration Law applies to proceedings conducted in China, regardless of whether the dispute is foreign-related or domestic, although each is subject to different regulations. Disputes between companies in China, including between multinational companies with regional headquarters in China, are considered domestic. This article will focus on foreign-related arbitrations. A dispute is considered 'foreign-related' if at least one party is foreign or the subject matter of the agreement is located in a foreign jurisdiction. Both Hong Kong and Macau are considered foreign for purposes of arbitration in China.

Arbitrations seated in China are generally conducted by an arbitration institution. Parties to a foreign-related dispute are free to choose arbitration administered by a foreign arbitration institution, such as the International Chamber of Commerce ("ICC"), or by a PRC arbitration tribunal, commonly CIETAC. In the event parties instead choose to conduct an *ad hoc* arbitration seated in China, the resulting award will be valid only to the extent that the parties voluntarily comply with the award; it will not be enforceable in Chinese courts. Interestingly, however, Chinese courts may enforce *ad hoc* arbitral awards rendered in foreign jurisdictions.

Generally, Chinese courts lack jurisdiction to interfere with arbitration proceedings, though under the Arbitration Law, only the Courts have the power to grant interim relief, even in respect of foreign-related arbitrations. However, the ICC has recently revised its Arbitration Rules, effective 1 January 2012, introducing a procedure for the appointment of an emergency arbitrator with ability to grant interim relief. CIETAC has followed suit and revised its rules, effective as of 1 May 2012, to similarly provide for interim measures to be granted

by the tribunal. In light of these changes within both foreign and local arbitration institutions, it remains to be seen how China will react to the divergence created between the existing legislation and new procedures giving the tribunal power to award interim relief. The Civil Procedure Law, which supplements the Arbitration Law and governs the conduct of civil court proceedings in China, is currently being revised.

### **Enhancing Enforcement Procedures**

Turning to the post-award phase, pursuant to the Arbitration Law and Civil Procedure Law, arbitral awards are final and binding. In the event an award debtor does not comply with the award, the prevailing party may elect to enforce that award either in China or in another jurisdiction. Where the award debtor has considerable assets in China, a party may turn to the courts in China for enforcement. In other cases, it may prove more strategic to enforce in a foreign jurisdiction.

### **Enforcement in China**

If the prevailing party chooses to enforce in China, the party will need to petition the appropriate court. Regulations under the Arbitration Law differ as between awards rendered in China and foreign awards (as well as between domestic and foreign-related disputes).

Unfortunately, local protectionism within the judiciary is perceived as a critical and continuing problem when it comes to enforcement of foreign-related arbitral awards. Many practitioners believe the socio-economic pressures judges face often result in decisions favoring local parties when arbitration has not provided a desirable outcome. Adding to these issues are reports that delays, political intervention and corruption are being used to encourage the judiciary to refuse enforcement.

Nonetheless, China has sought to alleviate some of these concerns by implementing a review process in the event a lower court intends to deny an application for enforcement of a foreign-related arbitration award. That court must refer the application to the Higher Court, which must, if it also intends to deny the application, refer it to the Supreme Court who will ultimately decide the issue.

### Enforcement Abroad

A party may instead wish to enforce outside China, which is facilitated by China's status as a signatory to the New York Convention on Recognition and Enforcement of International Arbitration Awards ("New York Convention"), subject to the 'reciprocity reservation'. China's ratification of the New York Convention was extended to Hong Kong in 1997 and to Macau in 2005 and has undoubtedly increased its appeal as a potential seat for international arbitrations.

If the party wishes to enforce a China-seated arbitral award in Hong Kong or Macau, however, the New York Convention will not apply as these two jurisdictions, combined with Mainland China, comprise one member state under the convention. Enforcement would instead be pursuant to 'arrangements' entered into by China with Hong Kong, the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, and with Macau, the Arrangement between the Mainland and Macau on Reciprocal Recognition and Enforcement of Arbitral Awards, implemented in 1999 and 2008, respectively. Both of these arrangements provide for mutual enforcement of arbitral awards. However, enforcement may be refused on several grounds, corresponding to those under the New York Convention, the most significant being when enforcement would be contrary to public interest. China has implemented these enforcement procedures where previously lacking and has further increased the enforcement possibilities for arbitration in China.

### Conclusion

The developments in China's arbitration system and China's approach to international arbitration generally in recent years suggest that China will continue to adapt to harmonize arbitration in China with international best practice and accordingly continue to increase its international appeal as a global arbitration centre.

## Arbitration in Ukraine — Moving Forward

Dr. Rafał Morek & Tomasz Sychowicz (Warsaw)

With a territory larger than that of Western European countries such as Germany, Spain or even France, Ukraine takes up a notable part of the map of Europe. Given the country's market size (with a population of approx. 48 million – 7<sup>th</sup> largest in Europe), its strategic location between Russia with its vast natural resources on one side and the European Union with its developed economies on the other, as well as the prospects of further economic development (GDP growth in 2011 estimated at 4.5%), Ukraine is likely to attract increasing attention of foreign investors in the coming years. As for all jurisdictions, when doing business, it is always good to know what the options are when things go wrong.

With the Ukrainian judiciary still suffering from some problems that may be described as "typical" for CEE and CIS states experiencing a period of economic transition, arbitration should be considered as a recommended method of dispute resolution in Ukraine. Despite being referred to as an 'arbitration-hostile' jurisdiction in the past, mostly due to the state courts' unfriendly approach to arbitration, current developments, as described below, suggest that the situation is changing.

### Legal framework

International commercial arbitration is regulated by the International Commercial Arbitration Law of 1994 (the ICA Law). The ICA Law is a verbatim adoption of the 1985 UNCITRAL Model Law. Likewise, the 2004 law on domestic arbitration is based on the UNCITRAL Model Law. Ukraine is also a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 European Convention on International Commercial Arbitration, and the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (since 2000). Thus, the legal framework for arbitration in Ukraine may be described as a "standard" and relatively modern setting. What is relevant is that attempts are being made, both by the government and arbitral institutions, to upgrade the current regulation and

practice of arbitration, and to establish more favorable conditions for conducting arbitration and enforcing arbitral awards.

## Current developments

### 1. New regulations on interim measures in the enforcement of arbitral awards proceedings

On 3 February 2011, the Ukrainian Parliament adopted laws introducing important amendments to the procedural legislation in arbitration-related matters, including: Law No.2979-VI, Law No.2980-VI, and Law No. 2983-VI, in force since March 2011. They set forth new procedural rules of enforcement and for setting aside of arbitral awards (both domestic and international, if rendered in Ukraine), and address the arbitrability of certain types of disputes in Ukraine.

Just recently another important amendment to the Ukrainian Code of Civil Procedure (UCCP) was adopted by the Ukrainian Parliament on 22 September 2011. The Law No.3776-VI, which came into force on 19 October 2011, allows the courts for the first time to order interim measures in the course of proceedings regarding enforcement of foreign court decisions and arbitral awards.

According to the new regulation, a party applying to a Ukrainian court for enforcement of a foreign arbitral award may now move, either at the time of filing the application or later, for interim measures. The applicant needs to satisfy a standard requirement, i.e. prove that failure to grant such a measure will result in impediment to or impossibility of enforcement of the award.

The introduction of interim measures in the enforcement of arbitral awards proceedings is likely to become an effective tool for securing, or at least increasing the chances for successful enforcement. Ukrainian law provides for a broad choice of interim measures, including sequestration of property, prohibition of certain actions, establishment of an obligation to perform certain actions, or prohibition against other parties making payments and transmitting property or performing other obligations towards the respondent. However, it must be emphasized that the scope of the amendment is limited. No interim measures are yet

available for a party to a *pending* arbitration seated outside of Ukraine.

### 2. Rules of assistance available from the ICAC at UCCI in UNCITRAL arbitrations

Another recent development in the field of international arbitration in Ukraine is the adoption of the Rules of assistance available from the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in arbitration under the UNCITRAL Arbitration Rules (“Rules of Assistance”) by the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce and Industry (UCCI).

ICAC at UCCI is the most important arbitration institution in Ukraine. Its status and activities are regulated by the ICA Law and the Rules of the ICAC at UCCI.

The Rules of Assistance, approved by the Decision of the Presidium of the UCCI of 27 October 2011, follow the UNCITRAL’s Recommendations to Assist Arbitral Institutions and Other Interested Bodies. They provide for two kinds of assistance that the ICAC may offer to parties that wish to choose *ad hoc* arbitration under the 2010 UNCITRAL Arbitration Rules.

Firstly, the parties may select the ICAC at UCCI as the appointing authority. The appointment of the arbitral tribunal is to be made by the president of the ICAC or—in case of his absence—by one of the ICAC vice presidents. In turn, the ICAC presidium is competent to decide on challenges to and replacement of arbitrators.

Secondly, ICAC offers administrative services, including:

- forwarding of written communications of a party or the arbitrators;
- assisting the arbitral tribunal in establishing the date, time and place of a hearing and giving advance notice to the parties;
- hearing and meeting facilities for the arbitral tribunal;
- interpreting and translating services;

- certification of the arbitrators' signatures on the arbitral awards with the ICAC's official seal and signature of the ICAC secretary general;
- receipt of advance amounts for arbitration costs and further transmission thereof in accordance with the specified distribution of such costs;
- keeping of the case files; and
- any other assistance to the extent possible.

The fees for appointing services amount to US\$1,000 regardless of the amount in dispute, whereas the fees for administrative assistance are to be determined depending on the amount of the claim and the character and scope of the functions that the parties or arbitral tribunal request. However, the maximum fees may not exceed the schedule of administrative expenses fixed by the UCCI presidium for cases handled by the ICAC.

## Recent Developments on Arbitrability in Russia

Sergey Milanov (Moscow/Tokyo)

### Real Estate Disputes

#### Background

The issue of whether disputes involving real property may be resolved by Russian domestic tribunals or international arbitration tribunals has been debated for a long time by the Russian legal profession. At the end of 2005, the Higher *Arbitrazh* (Commercial) Court of the Russian Federation ("VAS") seemed to have ended this dispute for the lower *arbitrazh* (commercial) courts when it stated its position in Item 27 of its Informational Letter No. 96, dated 22 December 2005 (the "Informational Letter").

There, VAS underlined that although the Russian legislation generally grants disputing parties the right to entrust the resolution of their commercial (civil-law) disputes to an arbitration tribunal, disputes involving "public elements" may not be resolved by such tribunals, even if the disputing parties attempted to conclude an arbitration agreement to the contrary. VAS stated, further, that transactions involving the establishment or transfer of rights to real property in Russia must undergo a

state registration and that such administrative procedure attributes to them a "public element." Therefore, disputes over such transactions subject to state registration may not be resolved by arbitral tribunals, because their awards may not oblige the public authority maintaining the state property registration files to register a transfer or establishment of a right to real property (in favor of the prevailing party).

In practice, the above position of VAS was interpreted by the lower *arbitrazh* (commercial) courts broadly, which gradually adopted the approach to practically deny any competence of arbitration tribunals in respect of disputes involving Russian real estate, particularly disputes involving title. Russian *arbitrazh* (commercial) courts, with only a few exceptions, widely rejected applications of parties seeking enforcement of arbitral awards delivered in disputes related to real estate. This approach was later upheld by VAS in its Letter No. VAS-C06/OMP-1200, dated 23 August 2007, in which VAS expressed the opinion that disputes involving real estate fall into the exclusive competence of Russian *arbitrazh* (commercial) courts.

#### New Approach Taken by the Constitutional Court

In the spring of 2011, the issue of the arbitrability of real estate disputes was finally examined by the Constitutional Court of the Russian Federation (the "Constitutional Court"). Consideration of this matter by the Constitutional Court was initiated by VAS, faced with a certiorari appeal in a case involving an arbitral award on foreclosure over real property under a mortgage agreement. VAS asked the Constitutional Court to examine certain legislative provisions with respect to their compliance with the Constitution of the Russian Federation and to provide an elaborate interpretation of these provisions, particularly in relation to the scope of competence of Russian domestic arbitration tribunals and international arbitration forums.

In its Resolution No. 10-P, adopted on 26 May 2011 (the "Resolution"), the Constitutional Court criticized and rejected the above practice of the *arbitrazh* (commercial) courts triggered by the Informational Letter of VAS. The Constitutional

Court also expressed its view with regard to the legal nature of arbitration, as well as the available ways to ensure compliance with the constitutional guarantees when parties entrust their dispute to arbitration.

In its Resolution, the Constitutional Court concluded that the “public” nature of a dispute may not be determined by the type of property involved in it. Thus, the legal requirement to register rights to real property and transactions involving such property has no bearing on the legal relationship between the disputing parties and cannot serve as a basis to qualify the nature of the parties’ dispute as “public.” Therefore, such registration requirement may not exclude the competence of arbitral tribunals to resolve disputes related to real property.

The Constitutional Court also pointed out that the provisions of Chapter 32 (in particular, Item 2 of Section 1 of Article 248) of the Arbitrazh Procedure Code of the Russian Federation (“APC”) may not be interpreted as excluding real estate disputes from the competence of arbitral tribunals. According to the Court, the foregoing provisions are aimed at preventing the disputing parties from entering into agreements that change the territorial competence of *arbitrazh* (commercial) courts, or engage the state courts of foreign countries, rather than curtailing the competence of arbitral tribunals to settle such disputes.

#### **Applicability to International Arbitration Tribunals**

The Constitutional Court expressly refused, however, to take any position with regard to the competence of international arbitration forums to resolve disputes involving Russian real property. Whether Russian courts will apply the approach of the Constitutional Court in respect of Russian domestic tribunals to awards delivered by international arbitral tribunals remains to be seen.

#### **Corporate Disputes**

Another category of disputes, the arbitrability of which remains unsettled, is disputes related to the sale and purchase of shares of Russian joint-stock companies. This issue has been caused by the broad interpretation of Articles 33, 38 and 225.1 of the APC by certain *arbitrazh* (commercial) courts which have categorized a dispute arising from the sale-purchase of shares as a “corporate” dispute, thus

rendering it non-arbitrable. In this regard, we note two recent remarkable decisions, one adopted by VAS, the other by the Constitutional Court, both related to the same dispute.

In its decision F05-8762/11, dated 10 October 2011 on case A40-35844/2011 the court of first instance affirmed the decision of the lower court denying the motion of a seller of shares (the “Seller”) who tried to enforce the Russian arbitral award delivered in his favor through the *arbitrazh* (commercial) courts. The Seller’s certiorari request was also denied by VAS. Simultaneously, the Seller tried to challenge the constitutionality of Paragraph 2, Section 1, Article 33, in conjunction with Section 1, Article 225 of the APC in the Constitutional Court, but the court disagreed that this provision was by itself unconstitutional. The rationale of the Constitutional Court was that the legislator has the authority to place a class of disputes into the exclusive competence of the *arbitrazh* (commercial) courts, such as the class of “corporate” disputes, in this case. The Constitutional Court did not elaborate if disputes from the sale and purchase of shares fall in such class.

The above decisions caused a wave of discussions among Russian scholars and legal practitioners, because they reveal the unsettled limits of “corporate” (and, therefore, non-arbitrable) disputes under the current Russian doctrine and court practice. Authoritative interpretation of this issue by VAS is anxiously awaited.

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## **The Arbitration Landscape in Latin America**

Ian Meredith and René Gayle (London)

### **Evolution of Latin American Attitudes to Arbitration**

The role of arbitration has largely been expanding in Latin America. The increasing relevance is twofold: on one front arbitration has been developing internally and on the other, even externally, arbitration is playing a greater role due to the increasing number of Latin American parties in disputes before both commercial arbitral institutions, such as the International Chamber of

Commerce (ICC) and treaty-based institutions, such as the International Centre for the Settlement of Investment Disputes (ICSID). Indeed, ICSID in its 2012 Caseload Statistics reported that cases involving a South American state-party account for 30% of its present caseload and state-parties from Central America and the Caribbean make for another 7%. The combined percentage is greater than that for any other geographic region, which means that Latin America is the region most frequently involved as state-parties in ICSID cases. The ICC in its 2010 Statistics Report revealed a similar picture.

Like most other regions, Latin America has been experiencing the tide of globalisation. Consequently, Latin American countries have had to foster a legal climate congenial to arbitration to facilitate their integration into the global trading market, as investors generally prefer the neutrality, speed and flexibility of arbitration to litigation in domestic courts. Presently, the majority of Latin American countries have ratified at least one international convention on international arbitration—be it the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Inter-American Convention on International Commercial Arbitration (Panama Convention) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or Washington Convention)—and have enacted domestic arbitral laws inspired by the UNCITRAL Model Law. Other clear evidence that arbitration is growing within Latin America is the numerous global law firms that have set up shop in Latin American countries (including K&L Gates which opened an office in São Paulo in November 2011), the establishment of indigenous arbitral institutions and the considerable number of conferences that have been recently hosted in Latin America.

However, this was not always the reality. The present situation represents a paradigm shift from that which obtained before the late 1900s. Prior to this, the majority of Latin American countries subscribed to the Calvo doctrine, developed by Argentine jurist Carlos Calvo, which required investors to have recourse to local courts rather than seeking redress on the international plane. Recent developments within Latin America have led some

to question whether they foretell a resurrection of the Calvo doctrine.

While one may be inclined to speak of “arbitration in Latin America” or “Latin American attitudes to arbitration”, such a taxonomy should not suggest uniformity in the arbitration landscape in Latin America. In fact, there are several variations in approach and a number of factors accounting for this. It is this disparity and an appreciation for the factors at play that will form the focus of this article.

### **Argentina versus Brazil: A Case Study**

Argentina was traditionally averse to arbitration because of its adherence to the Calvo doctrine. This has largely changed, but many now suspect a rehardening of attitudes toward arbitration due to Argentina’s experience at ICSID. Such commentators point to Argentina’s multiple applications for annulment of ICSID awards and failure to abide by those awards as evidence in support of this. Yet despite such anecdotal evidence, Argentina remains a party to ICSID, as well as the New York Convention, the Panama Convention, and countless bilateral investment treaties, and does not show any signs of an intention to withdraw from any of these treaties.

Argentina can be contrasted with Brazil, a relatively late entrant to the arbitration scene. Brazil did not begin to embrace arbitration until 1996 when it enacted comprehensive domestic legislation to promote arbitration. The Brazilian Arbitration Law spent its first five years languishing in a debate over its constitutionality and a challenge to this effect was brought by the Brazilian Federal Supreme Court. Despite its belated start, arbitration has grown rapidly in Brazil. Nevertheless, while many have lauded Brazil for its swift and positive developments in the area of commercial arbitration it should still be borne in mind that Brazil remains indisposed toward investor-state arbitration: it is not a state-party to ICSID and has not ratified any BITs.

The inappropriateness of a one-size-fits-all label relates not only to comparing the approach of different Latin American countries, but also to describing the approach taken within any individual country. Using Brazil again for illustration, there are numerous court judgments where the judiciary

has demonstrated a refined appreciation for the interface between courts and arbitral tribunals. However, there have also been some very unfortunate decisions that have called into question Brazilian courts' friendliness toward arbitration. For example, in *Conflito de Competência* (2009), the Brazilian Superior Court ruled that it has competence to settle disputes over conflicts of jurisdiction between judges and arbitrators: an obvious blow to the fundamental principle of *kompetenz-kompetenz*. There is also the controversial case of *Companhia do Metropolitano de São Paulo (Metrô) v Tribunal Arbitral do Procedimento* (2010) in which it was decided that a dispute arising out of a turn-key agreement entered into by a state-owned entity and certain construction companies for the construction of a new underground line in São Paulo was not arbitrable as it concerned public contracts.

It is worthy of note that the majority of the unfavourable decisions within Brazil were issued by the courts of São Paulo and those of the State of Paraná, whereas the courts of the State of Minas Gerais are generally considered more arbitration-friendly. Other Latin American countries with a federal system may also reveal a similar pattern of some regional courts being friendlier than others. This again demonstrates that there are several cross-currents that make generalisations difficult and unreliable.

Disparity within a country not only concerns their attitude toward arbitration, but also the popularity and adoption of arbitration. Latin America cannot be described as demonstrating a wholesale espousal of arbitration, as some cities have developed as the main center of arbitration, while it remains underused in others. Statistics from Ecuador in 2008, for example, show that while 61 cases had gone to the Quito Chamber of Commerce, only 10 cases were before the Manta Chamber of Commerce and the Azuay Production Chambers had only received one case. Similarly in Brazil, some regions have been more receptive of arbitration than others. São Paulo has developed as the mainstay of arbitration, not only due to its reputation as the main city of commerce within Brazil, but also because its courts are notorious for being back-logged, while the courts in other large cities such as Rio de Janeiro are

not equally as burdened and so there is less incentive there to seek arbitration as an alternative.

### Scepticism to Enthusiasm and Back?

Overall, arbitration has largely been embraced in Latin America, with a few exceptions. There are several countries within Latin America that were initially considered as embracing arbitration that now appear less inclined to continue with its promotion. Nicaragua, Venezuela, Ecuador and Bolivia have all recently criticised ICSID as being more favourably disposed to the interests of investors and developed states. This has resulted in the latter three countries taking the extreme step of denouncing the ICSID Convention.

However one cannot be quick to condemn such countries as being anti-arbitration. The point must be reiterated that there are several dynamics at play that all coalesce to account for a very varied picture within Latin America—the chief forces being mainly political and economic in nature. On the political side, arbitration will move in tandem with the political will of the governments involved. Invariably for example, a country's own experience of treaty arbitration will influence how it perceives the role and future of arbitration within its jurisdiction. It is such differences in experience that may account for the appearance of two separate factions in Latin America: a set of countries pro and another set anti-arbitration. Yet the fact that all twelve South American countries, including Bolivia, Ecuador and Venezuela, recently signed the UNASUR (Union of South American Nations) Treaty that entered into force on 11 March 2011 and provides for investor-state dispute resolution shows that this might not be the case. On the other hand, economic factors such as having a large economy, economic and political stability and low levels of bureaucracy will allow some countries such as Brazil to continue to flourish and attract high levels of foreign direct investment, despite the absence of investor-state dispute resolution procedures.

It is therefore not surprising that considering the robustness of its economy and the experience of its neighbours, Brazil still does not consider investor-state arbitration as an attractive option, though one might have thought that Brazil's push for the globalisation of its indigenous companies and its gradual development as a capital-exporter would

have meant that the time was now ripe for Brazil to ratify the ICSID convention. It appears that Brazil is attempting to fill this void through commercial arbitration. For example, Brazil has been undergoing heavy infrastructural development in

preparation of hosting the 2014 World Cup and 2016 Olympics and by all indications most contracts related to such investments include an arbitration clause.

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