A WORLD OF CHOICE: THE COMPETITION FOR INTERNATIONAL ARBITRATION WORK—PART II

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This is the second part of an edited version of a paper given to an evening meeting of the Chartered Institute of Arbitrators (East Asia Branch) on 3 December 2007. The author considers some of the principal factors that influence party choice of venue for international arbitrations, in particular factors arising from the legal environment. This part discusses the impact of privacy and confidentiality, arbitral impartiality and the implementation of new arbitration rules and legislation, in particular the UNCITRAL Model Law.

PRIVACY AND CONFIDENTIALITY

Because arbitration is a private means of dispute resolution and privacy and confidentiality are general characteristics of the arbitration process, it might be assumed that the position is universal and therefore neutral as between legal regimes. *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co*[1] was the occasion for an examination by the English Court of Appeal of what the law requires and permits by way of exception to obligations of privacy and confidentiality.

An arbitration of a dispute arising under a finance agreement had been held under the UNCITRAL Arbitration Rules (1976 Edn), during which allegations of corrupt practices were made against Moscow's employees. When a challenge to the award was made in the English High Court, Moscow argued initially that the judgment should be confidential, because the subject–matter of the arbitration was highly sensitive. When, however, it transpired that the award exonerated it completely, Moscow sought full publication, which the bankers resisted. Inadvertently, neither party had asked for the judgment to be protected from publication and a headnote and link to the complete judgment were made available by LAWTEL, the online legal database. The 1996 Act contains no provision as to privacy or confidentiality. The UK Government's Departmental Advisory Committee on Arbitration Law had cited a London Business School study of Fortune 500 US corporations as supporting the view that:

There is no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features.

However, it was decided that the UK legislature would leave provision for privacy and confidentiality to the parties and, of course, a number of international commercial contracts contain express obligations on the parties in these respects.

By contrast, the *City of Moscow* case, in the absence of party agreement, had to be decided under common law principles. A further complication was that the case concerned legal proceedings arising out of the arbitration rather than the arbitration itself. The Court of Appeal upheld the first instance decision that the judgment should remain private, but Moscow's appeal succeeded insofar as a brief and factually neutral summary was allowed to remain on LAWTEL.

In the absence of detailed agreement between the parties, the principal institutional regimes make varying degrees of provision for confidentiality and privacy. Unsurprisingly, given the sensitivity of intellectual property disputes, the WIPO Arbitration Rules (2002 Edn) give the fullest protection.[2] By contrast, the most 'open' regime is the ICSID Rules of Procedure for Arbitration Proceedings (2006 Edn), which

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contemplate the possibility of attendance by 'other parties'[3] and publication of excerpts from decisions by the Centre.[4] Between these two extremes are several variants. The UNCITRAL Arbitration Rules provide for privacy of hearings unless the parties agree otherwise[5] and for the award to be made public only by consent.[6] The ICC Rules are notably silent on the subject of party confidentiality obligations, although they do provide for private hearings unless the parties agree otherwise.[7] The AAA's ICDR International Arbitration Rules (2007 Edn) provide for privacy of hearings unless the parties otherwise agree[8] and also make general provision as to confidentiality.[9] The LCIA Rules provide for both privacy and confidentiality unless otherwise agreed.[10]

There is likewise considerable variation in national laws. English law applies a basic presumption of privacy and confidentiality in the arbitration itself, although the opposite is the case in litigation. This presumption is subject to exceptions where there is party consent or an order of the court.

In Sweden, by contrast, the Supreme Court decision in *Bulgarian Foreign Trade Bank v Al Trade Finance Inc (the Bulbank case)*[11] established that there is no inherent confidentiality obligation in arbitration under Swedish law. This appears to be somewhat similar to the position in Australia. In *Esso Australia Resources Ltd v Plowman*,[12] the High Court of Australia rejected arguments based on English law in favour of implied terms in the arbitration agreement, Mason CJ stating that complete confidentiality cannot be achieved, no such obligation attaches automatically to witnesses and arbitration proceedings will sometimes be disclosed during litigation. Arbitrating parties may have to disclose information to insurers, shareholders and even to the market, in certain situations. In *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*,[13] the New South Wales Court of Appeal stated that in certain circumstances the public interest need for transparency would operate to create an exception to confidentiality.

In the *City of Moscow* case, the Court of Appeal was referred to the position in New Zealand where, absent contrary agreement, 'strict confidentiality' would be implied in the arbitration itself, although not, either automatically or necessarily, in subsequent High Court proceedings. In the Privy Council case of *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich*[14] it was noted that ss 45 and 46 of Bermuda's *International Conciliation and Arbitration Act 1992* empowers the court expressly to hear such matters in private and to restrict reporting to enable '[t]he rights of privacy of the parties ... [to] be protected notwithstanding the court proceedings'.[15]

While in many cases these variations will be rendered irrelevant by express party agreement, whether or not within institutional rules, the degree of protection afforded by the law could still be of crucial importance to the parties in certain situations, and not only in factual situations such as that in *City of Moscow*, where fraud or other invidious conduct is alleged. There are many other situations in which not merely the substance of the dispute but even the existence of a dispute between the parties is highly sensitive. In such circumstances, a legal system that places greater emphasis on privacy and confidentiality in the interests of the parties will be more attractive

than one, like Australia, where transparency in the public interest imposes a different emphasis.

CONFIDENCE IN THE LEGAL SYSTEM—ENSURING IMPARTIALITY

As is apparent from Professor Crivellaro's description of the thought process of an arbitration practitioner in recommending a suitable centre for hearing an international dispute,[16] confidence in the legal system is essential and, if lost, even an established reputation may suffer. To this end, a legal system must balance two conflicting pressures, as exemplified by the recent TTMI/ASM litigation.

In *ASM Shipping Ltd of India v TTMI Ltd of England*,[17] the Commercial Court had to deal with an application to remove the chairman of an arbitral tribunal hearing a shipping dispute. The Court held that the arbitrator should have recused himself because he had acted as counsel in a previous arbitration in which serious allegations were made (though not by him) against a witness in the second arbitration. Any objective independent observer would have shared the discomfort that the witness felt as to the change in the role from counsel to arbitrator, particularly as serious allegations concerning the witness had been made in the earlier arbitration. Thus, an allegation of apparent bias had been established.

Subsequently, in *ASM Shipping Ltd v Harris*,[18] an application was made to remove the other two arbitrators, on the basis that they had inevitably been tainted by the first finding of apparent bias. The court refused this application, finding itself:

... unable to accept that there is an invariable rule, or it is necessarily the case, that where one member of a tribunal is tainted by apparent bias the whole tribunal is affected second–hand by apparent bias, and therefore should recuse themselves.[19]

This litigation illustrates well the tensions of the courts in trying to maintain confidence in standards while avoiding officious interference in the arbitral process. On the one hand, the harm done to the reputation of international arbitration would be great if apparent bias in the tribunal were ignored. Party autonomy is far–reaching, but the 1996 Act gives to the courts a supervisory jurisdiction to be exercised where harm to due process is perceived.

In the English legal system, amongst those familiar with it, there is no difficulty in a barrister appearing as an advocate in one case and as an arbitrator in another. This is not always understood by strangers to the system. However, a situation where one of the principal witnesses had experienced 'friction' with counsel and was now to be treated even–handedly by that counsel as an arbitrator a few months later, could not be so easily explained, even though no actual bias need exist.

Where, however, the perception of bias becomes tenuous and the court has to deal with an attempt to make it interfere in the arbitral process, it will decline to do so. The 'guilt by association' alleged in *ASM v Harris* was insufficient to warrant interference with the tribunal selected by the parties and the court was satisfied that it could decline to intervene without jeopardising confidence in English law.

In the recent Hong Kong case of *Suen Wah Ling t/a Kong Luen Construction Engineering Co v China Harbour Engineering Co (Group)* [2007] BLR 435, the Court of Appeal upheld the judge's refusal to set aside an arbitral award on the ground of bias where the arbitrator had, as a barrister, advised the applicant in conference in relation to the same matter, some three years before the arbitration began. The fact that both the applicant and the arbitrator had quite forgotten this fact was considered by the court to be highly material.

The law of arbitration in every country will represent a balance between supervision and party autonomy. However, different jurisdictions will distribute weight differently in the balance in favour of greater or lesser intervention. This will undoubtedly be factored into the process of choice of forum by the parties and their advisors.

THE GLOBAL MARKET

Whatever the legislature and the courts do to assist a particular country or city as a centre for international arbitration, its attractions (or drawbacks) can only be judged comparatively. Whilst, as indicated earlier in this article, international arbitration is not a perfect market, modern communications and, probably even more importantly, the global mindset of large commercial organisations mean that disputants, potential and actual, have choices.

Adoption of the UNCITRAL Model Law is seen as key to developing confidence in developing centres, to match those established centres that have already done so, in some cases long ago. For example, although the Dubai International Arbitration Centre Rules (2007 Edn) do not seek to force the parties to accept Dubai as the seat of the arbitration, it is the default choice under the Rules and the intention is clearly to seek for Dubai a bigger share of the international arbitration market than it already has. The UAE became a signatory to the

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New York Convention in 2006 and, at time of writing, was expected imminently to pass a new arbitration law based on the Model Law, replacing the Egyptian–based provisions that combine unfamiliarity with a sense of regional limitation in the minds of some international advisers.

The Singapore International Arbitration Centre continues to seek to 'raise its game'. All the evidence is that competition in the Pacific Rim is at a high level. While the Pacific International Arbitration Centre that opened in Ho Chi Minh City on 25 April 2007 is not expected to threaten Hong Kong, Singapore or even Kuala Lumpur for some time to come, SIAC recognises that it has to be proactive to remain in its strong position.

As a leading Asian venue for ICC arbitrations, it is unsurprising that SIAC has increased its institutional supervision along ICC lines. Under the SIAC Rules (2007 Edn), SIAC has a right of veto over party–appointed arbitrators[20] and, in a move echoing the role of the ICC International Court Arbitration, requires arbitrators to submit their awards to the Centre for scrutiny.[21]

CIETAC's Arbitration Rules (2005 Edn) were promulgated with the stated intention of bringing the Commission into line as a centre by:

- increasing party autonomy and flexibility of procedure;
- strengthening the powers of the arbitral tribunal;
- fostering fairness and transparency; and
- speeding up the arbitral process.

An article by Darren Fitzgerald questions whether the reforms go far enough.[22] In particular, he expresses concern that, while there is provision for non–PRC arbitrators, there is none for an arbitrator to be of a different nationality from either party, and that this could give foreign parties 'the impression that the tribunal is stacked against them'.[23] Against these concerns must be set the statistical trend which shows that since 2000, CIETAC has become the most prolific of international arbitration centres, although to some extent this must be a reflection of the volume of economic activity, especially inward investment and foreign activity.

CONCLUSION

It is clear that the choice of forum for the determination of international disputes by arbitration is sensitive to a range of factors. Probably the most important factor is the attitude of the courts to supervision or control of the arbitral process. Parties today want autonomy over resolution of their disputes and will not take kindly to 'interference' by the courts. A 'hands off' approach is thus plainly the order of the day and is likely to remain so in this highly competitive and rapidly developing market.

The courts in many jurisdictions are becoming more and more sensitive to the changing needs and wishes of consumers of legal services[24] and are proving to be remarkably willing to adapt legal rules so that the State receives the economic benefits of securing a larger slice of the growing and lucrative market in international arbitration. It remains a matter for discussion whether the differing legal and ancillary costs of conducting an arbitration in a particular location will also prove to be a factor in party choice of venue.

STATISTICS

Number of international arbitration cases received

Institution	2005	2006*
CIETAC	979	981
AAA	580	*
ICC	521	593
HKIAC	281	394
Stockholm	56	141
LCIA	118	130
SIAC	103	119

* AAA figures for 2006 not available at the time of writing

These figures show a marked increase in the number of international arbitrations being started in the main centres. Whilst the figures cannot by themselves demonstrate a trend, it seems nonetheless that this market is generally expanding at the present time.

Even more remarkable in percentage terms, as these figures show, has been the growth of HKIAC. The UNCITRAL Model Law has been embodied in Hong Kong's Arbitration Ordinance (Cap 341) since 1990 and the SAR's legal system displays most of the characteristics of its major competitors. Its status as the sole Asian centre for resolving Top Level Domain Name disputes has contributed significantly to its growing success.

REFERENCES

1. [2004] 2 All ER 193
2. Articles 73–76
3. Article 32(2)
4. Rule 48(4)
5. Article 25.4
6. Article 32.5
7. Article 21.3
8. Article 20.4
9. Article 34
10. Article 30
11. Case 1881–99, 27 October 2000
12. (1995) 128 ALR 391
13. (1995) 36 NSWLR 662
14. [2003] 1 WLR 1041
15. Per Lord Hobhouse
16. See above, Part I of this article.
17. [2005] EWHC 2238, unreported (19 October 2005)
18. [2007] EWHC 1513, unreported (28 June 2006)
19. Paragraph 44 of the judgment, per Andrew Smith J
20. Rule 5.3
21. Rule 27.1
22. CIETAC's New Arbitration Rules: Do the reforms go far enough? [2005] *Asian DR* 51
23. Ibid, p 53
24. Editorial note: 'The courts are there to serve the business community rather than the other way round'.—*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA, The Front Comor* [2007] UKHL 4, unreported (21 February 2007), per Lord Hoffman at para 20

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