INTERNATIONAL ARBITRATION **NEWS**

quadrant chambers

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EDITORIAL by SIMON CROALL QC

International Arbitration continues to go from strength to strength. It is increasingly the preferred mode of dispute resolution for international parties, or is at least regarded as being an option on an equal footing with home jurisdiction litigation. Each of ICSID, ICC, SIAC, LCIA and SCC has seen an increase in referrals over the past few years – ICSID in particular has continued its extraordinary growth. Referrals under the other rules have typically increased by at least 5% a year (and in some markets by much more than that).

There are a number of drivers behind these trends. Perhaps most important is the increasing globalisation of international commerce and hence the need for a dispute resolution process which reflects that trend. However this driver behind demand poses challenges for International Arbitration to ensure it is evolving to meet the needs of end-users in an ever changing and dynamic trading world. Those challenges are not simply directed at institutions and rule makers. They are as much challenges for arbitrators and lawyers. The task is to ensure a correct balance is struck between, on the one hand, clarity and predictability and, on the other, a flexible, dynamic process capable of addressing and taking account of the diverse and changing world from which the disputes are referred.

As such, energy has rightly been directed to addressing issues. An example is the 2013 IBA Party Representation Rules, which sets guidelines as to how party representatives should conduct themselves in International Arbitration. Similar evolution is being driven by the institutions and legislatures. The LCIA has updated its Arbitration Rules in 2014, as did SIAC and HKIAC in 2013, and the ICC and CIETAC in 2012. Hong Kong and France have ushered through important new amendments to their arbitration laws. However such changes need to be accompanied by lawyers and arbitrators focusing on and ensuring they understand the needs of end-users. This can only be assisted by greater communication between and amongst participants in International Arbitration.

This brings us to this Newsletter. It is intended as part of Quadrant Chambers' contribution to encouraging discussion, debate, and innovation in International Arbitration. As participants in and enthusiasts for International Arbitration, we are keen to ensure that International Arbitration's star continues to rise.

Consent and Nationality: Two Old Chestnuts of ICSID Jurisdiction Revisited

AUTHOR: LUCAS BASTIN

Consent and nationality are two concepts of deep significance in ICSID jurisprudence. Consent forms a fundamental pillar of ICSID jurisdiction, and counsel for would-be ICSID claimants regularly advise their clients to express their consent to arbitrate as early as possible. Nationality is an equally core component of ICSID jurisdiction, with the place of incorporation test achieving pre-eminence for determining when a claimant is an 'investor' under an applicable investment treaty.

The recent Award in *Venoklim v Venezuela* revisited these two old chestnuts of ICSID jurisdiction, with noteworthy results.

On consent, the *Venoklim* Award considered the effect of Venezuela's denunciation of the ICSID Convention on the jurisdiction that an ICSID tribunal has over a dispute to which the investor consented after notification of Venezuela's denunciation, but within the six months before that denunciation took effect. This situation had been much discussed in scholarship. Some authors had opined that jurisdiction would only exist over a dispute in which the State had denounced the Convention if the investor had expressed its consent before the denunciation was notified. Others argued that the consent could be expressed during the six month period. Still others concluded that the consent could be given at any point while the State's consent was extant – which in the case of investment treaties could be long after the denunciation of the Convention had taken effect. The *Venoklim* Award, while not dealing with many aspects of this debate, held that the expression by an investor of its consent during the six month period meant that its consent was given in a timely manner to establish ICSID jurisdiction. During this period, the denouncing State was still an ICSID Contracting State and

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UPCOMING EVENT

24 September at 1800

Quadrant Chambers will host on 24 September 2015 a panel/lecture event on the topic, '*Procedural plays for substantive goals in international arbitration: Old lessons and recent development*'. Audley Sheppard Q.C., Head of International Arbitration at Clifford Chance, and Dr Jacomijn van Haersolte-van Hof, Director-General of the LCIA, are confirmed speakers. We look forward to welcoming you.

Lucas Bastin together with Volterra Fietta, win US$ 455m for US bottle maker Owens-Illinois from the Venezuelan government in a claim following Hugo Chavez' nationalisation of a bottle plant in 2010.

Simon Croall QC, Simon Kverndal QC and Robert Thomas QC recently presented papers at the International Congress of Maritime Arbitrators XIX Hong Kong including Simon's paper on Cultural and Linguistic Sensitivity – An Essential Ingredient in effective International Arbitration.

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its consent to ICSID arbitration subsisted, which consent could be 'accepted' and 'perfected' by the investor's consent.

Notable though this finding will be for investors who see a State against which they wish to commence ICSID arbitration suddenly denounce the ICSID Convention, the *Venoklim* Award is equally notable for its treatment of the issue of nationality. The Dutch claimant was owned and controlled by a Venezuelan company. As a result, Venezuela argued that these facts meant the project in issue was a domestic investment, which should not receive the protections that the claimant invoked under the Venezuelan Investment Law, Dutch-Venezuela BIT and ICSID Convention. The Tribunal agreed. It held that the claimant was not a foreign investor as required by the Venezuelan Investment Law and, eye-catchingly, that the Dutch claimant was not a national of an ICSID Contracting State other than ICSID because, in reality rather than form, it was a domestic Venezuelan investor. In reaching this latter finding, the Tribunal relied on the oft-discussed, but oft-rejected, dissenting opinion of Prosper Weil in *Tokios Tokeles v Ukraine*. By giving new currency to such a proposition, the Tribunal may have lit the fuse on a new wave of objections by States to the way in which jurisdiction *ratione personae* over such "foreign structured" claimants operates under the ICSID Convention.

Lucas is a specialist in public international law, investment treaty arbitration and international commercial arbitration. Having practised before joining the Bar for several years in the International Arbitration and Public International Law Groups of Latham & Watkins, Lucas has carried across to the Bar a strong full-time practice in these areas.

Enforcing arbitration awards against States: What is an award creditor looking for in an asset?

AUTHOR: LIISA LAHTI

This article sets out some of the key issues that an award creditor faces when seeking to enforce an arbitration award against a State. Given London's position as a major international financial centre States frequently have bank accounts in London and banks in London often act as fiscal/paying agents under sovereign bond issues such that coupon payments will periodically pass through accounts in England. Therefore particular emphasis has been placed on issues concerning enforcement against sums of money held by a bank for or on behalf of a State.

The bank account must be held in England and there must be money in the account at the time of obtaining a third party debt order (See *Kuwait Oil Tanker Co SAK and Another v Qabazard* [2003] UKHL 31, *Re Greenwood* [1901] 1 Ch 887).

The asset must be an asset of the State. If the award is against a specific organ of the State the debt must be the debt of that organ of the State or other organs if the State is, according to its own laws, a unitary body (see State Immunity Act 1978).

The debt must not be immune from enforcement. The starting point is that all assets of a State are immune - but there are exceptions. The commercial purposes exception allows enforcement against assets in use or intended for use for commercial purposes. However it is not enough that the *source* of the assets is commercial (*SerVaas Incorporated v Rafidian Bank & Others* [2012] UKSC 40) and the exception does not apply to the property of a State's central bank/other monetary authority, which can be difficult to define (*AIG Capital Partners, Inc & Another v The Republic of Kazakhstan & Others* [2005] EWHC 2239).

An award creditor should consider applying for freezing injunctions, asset disclosure orders and/or gagging orders in order to obtain more information about assets within the jurisdiction and/or protect its position pending the conclusion of enforcement proceedings. This is something lawyers should be thinking about at the outset of an arbitration against a State or State entity.

This is a summary of an article published in the April 2015 edition of the Butterworths Journal of International Banking and Finance Law (available on request).

Liisa's broad commercial practice includes experience of international commercial arbitration and the relationship between arbitration and the courts. Liisa has particular expertise in proceedings to enforce arbitration awards and the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

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Simon Croall QC, Simon Kverndal QC, Robert Thomas QC and Stewart Buckingham participated in a mock arbitration with colleagues from 20 Essex Street. For those who missed it click here.

John Passmore QC gave a paper on Shipbuilding Arbitrations a 2015 Survival Guide at the Inter Pacific Bar Association Conference 2015 Hong Kong.

Lucas Bastin has been appointed as the representative of the London Bar on the International Arbitration Attorney Network and Adjunct Professor of Public International Law at Pepperdine University.

Quadrant Chambers is co-sponsoring the Inter Pacific Bar Association Arbitration Day in Kuala Lumpur on 14 September 2015. **Luke Parsons QC** and **Poonam Melwani QC** will be speakers at the event.

If there are any topics you would like covered in future editions of the newsletter or enquiries arising out of this edition please contact Simon Slattery. Similarly if you would like more details of or to register your interest in the 24 September event please let Simon know.

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