A SEMINAR
ON INTERNATIONAL COMMERCIAL ARBITRATION

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on

13 May 2010
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AN INTRODUCTION - WHERE HAS INTERNATIONAL COMMERCIAL ARBITRATION COME FROM?

1.1 If we are to understand fully the present role of international commercial arbitration, and what shape it is likely to take in future, it is important to look at past developments that are the basis for our current system of arbitration. In short, to understand the future you need to understand the past.

1.2 Arbitration is a system of justice, born of merchants. In one form or another, it has been in existence for thousands of years. The origins of arbitration go back to dispute settlement usages in ancient times, in Europe, in Greece and Rome, including Roman law, and in Asia.

1.3 The earliest law dedicated to arbitration in England was in 1697. In France, the French Revolution considered arbitration as a *droit naturel* and the Constitution of 1791 proclaimed the constitutional right of citizens to resort to arbitration. It was also included in the Code of Civil Procedure in 1806. The origins of the concept of arbitration in France go back to the ancient courts of Pie Poudre (from the French *pied poudreux*, meaning vagabond), set up by boroughs to settle disputes between merchants on market days.

1.4 Up until the 20th century, the national courts lagged behind in recognising the decisions of arbitrators. This may be because the courts saw arbitration as a rival, as well as being suspicious about the standards being applied in arbitrations at the time. Even in England, for long a centre for international commercial arbitration due to its pivotal position as the centre for shipping, insurance, commodity and financing businesses, arbitration was initially closely controlled by the English courts.

1.5 In 1883 the *Court of Common Council* of the *City of London* set up a committee to consider the establishment of a tribunal for the arbitration of trans-national commercial disputes arising within the ambit of the City. The initiative came from the London business community, which was becoming increasingly dissatisfied with the slow and expensive process of litigating in the English courts. As *The Law Quarterly Review* was to report at the inauguration of the tribunal a few years later:

“This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife”

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1.6 In 1919 the world’s business community established the International Chamber of Commerce ("the ICC"). The ICC has been the voice of the international business community and has been a major driving force in the promotion of both arbitration as a mechanism for the resolution of international commercial disputes and the need for international regulations to uphold and support the arbitration process.

1.7 As world trade expanded, the need to create a mechanism for international recognition and enforcement of both arbitration agreements and awards in relation to international commercial agreements was regarded as essential.

1.8 In 1958 the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the NYC") was adopted. The NYC provides for international recognition and enforcement of arbitration agreements and awards by national courts. Since it was adopted, the NYC has been the cornerstone of international commercial arbitration and has represented a quantum leap forward for international arbitration. Lord Mustill described the NYC as a convention which: “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law”. The success of the NYC is illustrated by 3 factors:

1.8.1 144 countries are signatories to the NYC;

1.8.2 A body of international case law has developed in applying the NYC which has had a direct influence on international arbitration practice and law;

1.8.3 It is accepted that agreements to arbitrate and arbitration awards will be enforced by the courts of the countries that are party to the NYC.

1.9 As international arbitration increased and the influence and benefits of the NYC became apparent new arbitration institutions began to be created as a supplement to ad hoc arbitrations. Each institution has its own arbitration rules and procedures and offers arbitration services that were initially influenced considerably by its own national institutions.

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2 The ICC is currently undertaking a review of its Rules, the most recent of which came into force on 1 January 1998. The review started at the beginning of 2008 and was considered necessary in order to reflect the increasing diversification of the industries using ICC arbitration and the increasing complexity of disputes being referred to ICC arbitration. The review is being undertaken by a Task Force of 120 members, and should report by the end of this year.


4 Which is a large number when compared with other international treaties such as UNICTRAL where there are only about 60 signatories

5 Whilst these case authorities are not automatically binding on national courts, they are increasingly being considered for guidance. US case law and practice is becoming an increasingly important source and influence for international arbitration.
environment. Whilst there are a large number of arbitral institutions, the major institutions are:

1.9.1 London Court of International Arbitration (“LCIA”), based in London (established in 1892);

1.9.2 Stockholm Chamber of Commerce (“SCC”), based in Stockholm (established in 1917);

1.9.3 International Chamber of Commerce (“ICC”), based in Paris (established in 1919);

1.9.4 American Arbitration Association (“AAA”), based in New York (established in 1926);

1.9.5 China International Economic and Trade Arbitration Commission (“CIETAC”), based in Beijing (established in 1956);

1.9.6 Hong Kong International Arbitration Centre (“HKIAC”), based in Hong Kong (established in 1985);

1.9.7 Singapore International Arbitration Centre (“SIAC”), based in Singapore (established in 1991).

1.10 In the early 1970s there was an increasing need for a neutral set of arbitration rules suitable for use in ad hoc arbitrations. Under the auspices of the United Nations, arbitration rules were prepared by the United Nations Commission on International Trade Law (“UNICTRAL”). The UNCITRAL Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and establishing rules in relation to the form, effect and interpretation of the award.

1.11 The UNCITRAL Rules were intended to be acceptable in both capitalist and socialist countries, in developed and developing countries, and in common law as well as civil law jurisdictions. The UNCITRAL Rules have achieved international recognition and are now widely used. Since 2006, UNCITRAL has engaged its Working Group II in the revision of the Rules which is now in a late stage of completion. The revised Rules are expected to be adopted by UNCITRAL in the summer of 2010.

1.12 A further historical landmark came in 1985 with the UNCITRAL Model Law on Arbitration, which is accepted by an increasing number of countries throughout the world; and many other countries (where they have not adopted it outright) have based their arbitration laws upon it. As the authors of *Redfern and Hunter on International Arbitration* (5th Edition) state at p. 76:
“If the New York Convention propelled international arbitration onto the world stage, the Model Law made it a star, with appearances in States across the world.”

1.13 Whilst accepting the significant advance brought by the Model Law, it soon fell behind the pace of the fast-moving world of international arbitration in at least two respects. Firstly, the requirement for an arbitration agreement to be in writing, if it is to be enforceable; and secondly, the provisions of Article 17 governing the power of an arbitral tribunal to order interim measures of relief. This resulted in the Revised Model Law, which was approved by the United Nations in December 2006. The Revised Model Law allows for the “writing requirement” to be defined in very wide terms, and recommends that an arbitral tribunal should have the power to issue interim measures.

1.14 In the last 25 or so years there has been an increase in the number of institutions providing arbitration services. In particular, in 1985 the Hong Kong International Arbitration Centre (“HKIAC”) was established; and in 1991 the Singapore International Arbitration Centre (“SIAC”) was established. More recently, in 2008 the ICC set up a branch of its Secretariat in Hong Kong and in Singapore. Also, in 2008, the LCIA established (together with the Dubai International Financial Centre) a centre in Dubai, known as DIFC-LCIA. And, in April 2009, the LCIA set up a satellite branch in India, known as LCIA India.

1.15 This brief summary of the history of international commercial arbitration shows that, throughout history, international trade has led to the creation of arbitration machineries and legal frameworks. In looking to the future of arbitration, one similarly has to look at the current and future needs of international business practice to consider what future developments will occur in the field of international commercial arbitration.
2 AN OVERVIEW - WHERE IS INTERNATIONAL COMMERCIAL ARBITRATION GOING?

2.1 In giving an overview of potential future trends, there is obviously an element of “crystal ball gazing”, and the following suggestions are just my thoughts that are designed to encourage debate.

2.2 It is possible to discern the following trends in international commercial arbitration, in that there is likely to be:

2.2.1 A further increase in the number of arbitration cases;

2.2.2 A further increase in the number of arbitration centres to meet the demands for arbitration in particular in Asia, The Middle East, Russia, and South America;

2.2.3 A greater uniformity of the rules and laws governing international arbitration;

2.2.4 A risk of further “judicialisation” of arbitration (unless restrained);

2.2.5 A continued rise in international bilateral investment treaty arbitration;

2.2.6 An increasing diversity in the subject matter of international arbitration;

2.2.7 An increasing use of mediation and other forms of ADR.

Increased number of cases

2.3 The most obvious future trend for international commercial arbitration is that the number of cases is increasing. With the continuing expansion of international trade and investment, the number of arbitration cases in general will increase. In particular, the Far Eastern “boom” in arbitration is part of a global phenomenon. There is also a considerable increase in arbitration in Russia and South America.

2.4 Arbitration has become increasingly popular as large companies expand into these emerging markets. With domestic courts in such countries often unpredictable and vulnerable to corruption, companies regard arbitration as a more reliable and neutral option. Another attraction is that hearings are held in private, away from the scrutiny of politicians, shareholders and the media.

2.5 Whilst there are no statistics available to record the number of ad hoc arbitrations, the most established centres of arbitration report an increasing upsurge in demand.

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6 There are now more than 2,400 BITs that provide for arbitration between the host state and foreign investors.
Increased number of arbitration centres

2.6 New arbitration centres have been established to service this new level of business in Asia and the Middle East. In particular, in April 2009 LCIA opened its satellite branch in New Delhi, India, to create the first LCIA independent office outside London. This adds to LCIA’s previous joint venture in February 2008 with the Dubai International Financial Centre to form DIFC-LCIA.

2.7 The ICC also has, since 2008, had a branch of the Secretariat of the Court in Hong Kong and in Singapore, which has added to the dispute resolution options previously available to parties doing business in the Asia Pacific region. To reflect increasing international commercial trade, the balance of which is inexorably tipping geographically eastwards, it is anticipated that there will be considerable growth in international arbitration in India, China, and the Middle East. There is also likely to be growth in Russia (and its neighbouring countries) and South America.

Greater uniformity of the Rules

2.8 There is an ineluctable trend towards a uniformity and harmonisation of the rules and laws governing international commercial arbitration. The last 20 years or so has seen an increase in uniformity of both arbitration rules and national legislations. This is perhaps not surprising as national legislators will continue to be pushed by their own constituencies, particularly their business communities, to adapt their respective legal frameworks to the demands of

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international business practice for efficient dispute settlement machineries. Part of this process can be seen in the fact that since 2006 UNCITRAL has had its Working Group II engaged in a revision of its Rules, and have held many meetings at different locations across the globe to seek the views of a wide group of users of arbitration services.

2.9 Once the UNCITRAL Rules have been revised, it is expected that other institutions will follow suit. The ICC has already started to revise its Rules, and the LCIA will no doubt follow suit.

2.10 It has been said that the rules of the ICC, LCIA, and AAA, for example, “have much more in common than one would expect taking into account their locations and the legal traditions of the host countries”\(^8\). If one looks closely at the different Rules one can see many similarities and often identical solutions, which contributes to a global harmonisation of the Rules. This also reflects the fact that lawyers and arbitrators engaged in international arbitration are less dependent on their specific national particularities and more open and flexible to the specific needs of disputes in the international context. This increasing harmonisation of the rules is likely to continue; particularly once the new UNCITRAL Rules are adopted in the summer of 2010.

A further “judicialisation” of arbitration

2.11 There is also a perceived trend towards “judicialisation” of international commercial arbitration, meaning that arbitrations tend to be conducted more frequently with the procedural intricacy and formality more native to litigation in national courts\(^9\). The problem seems to be most acute in the United States, where there is a tradition of broad-ranging “discovery”, as well as the possibility of challenging arbitral decisions\(^10\).

2.12 The “judicialisation” has also occurred with more intervention by local courts in some parts of the world that has rendered the arbitral process more often akin to a formal judicial one. This has been described as a “tidal wave of arbitral law submerging international commercial arbitration”\(^11\). It would be helpful to check this trend, and to recalibrate; otherwise some of the positive features of arbitration – such as expedition, reduced cost, relative informality – may be lost. Arbitration does not need to be a mirror image of litigation. One should always

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bear in mind that each arbitration can be different and tailored to the specific needs of the dispute. Provided the parties remain, in effect, in control arbitration will remain true to its roots: “a peacemaker and not a stirrer-up of strife” (see Para 1.5 above)

Increasing diversity in the subject matter of international arbitration

2.13 In terms of the subject matter of arbitration, as the past has shown us, changes in technology and in international contract practice will dictate what the future subject matter of international arbitration will be. For instance, new types of contracts in fields such as telecommunication, the transfer of technology, genetic engineering, electronic commerce, entertainment and sports will in the future probably take a greater share of arbitration cases. The growing significance of intellectual property will also mean that the World Intellectual Property Organisation (“WIPO”) will need to expand.

Increasing use of mediation and other forms of ADR

2.14 There is presently a great variety throughout the world as to what role arbitrators may play in the promotion of amicable settlements between the parties. In countries such as China, Germany, and Japan, at least in domestic arbitrations, there is an expectation by the parties and their lawyers that the arbitrators, at some stage in the procedure, and in consultation with the parties, will try to promote an amicable settlement and suggest solutions for such settlement. In these countries, this is permitted by law and leads to a majority of domestic arbitration cases ending in such amicable settlement. In many other countries, such a role of the arbitrators is either not permitted by law or at least not performed in practice.

2.15 Research has shown that companies would often like to have an option for mediation available, because an amicable settlement provides a better basis for future business relations between the parties. The traditions in countries such as China may have an impact on arbitration in other parts of the world in promoting arbitral procedures in which an amicable settlement is proactively sought with the consent of the parties.

2.16 Recently, in December 2009, the Centre for Effective Dispute Resolution (“CEDR”) published its own Rules for the Facilitation of Settlement in International Arbitration. If these Rules are adopted by parties, either on an ad hoc basis or as part of the underlying contract between them, the arbitral tribunal would then be able to invite the parties to participate in a first procedural meeting, at which it will “ensure that [they] are aware of the different resolution processes such as mediation which, in the opinion of the tribunal, might assist the parties”; will allow the tribunal to give a preliminary view on the merits and issues in the case; and the parties will agree to the inclusion of a mediation window in the arbitration
proceedings to make it easier for them to come to an amicable settlement, with arbitration proceedings being adjourned so that the mediation can proceed. The CEDR Rules are akin to the pre-action protocols in English Court proceedings; and it is, perhaps not surprising, that it was Lord Woolf who introduced the new Rules in December 2009.

3 THE RELATIONSHIP BETWEEN NATIONAL COURTS AND INTERNATIONAL COMMERCIAL ARBITRATION

3.1 It is important to reflect on the current relationship between national courts and international commercial arbitration as both must co-exist together. Because arbitration is essentially a consensual process, where there is a reluctant party it is sometimes necessary to use the court’s coercive powers.

3.2 The nature of this relationship has been compared to a relay race. As Lord Mustill put it:

“Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can, in case of need, lend its coercive powers to the enforcement of the award.”

3.3 There is a tension that lies at the heart of the relationship of the courts and arbitration. On the one hand, the concept of arbitration as a consensual process, reinforced by the ideas of transnationalism, leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side, there is the plain fact, palatable or not, that it is only a court that possesses coercive powers which can rescue the arbitration if it is in danger of foundering.

3.4 In the recent case of West Tankers the tension that lies between international commercial arbitration and the intervention of the courts in the arbitral process has come to the fore.

12 Lord Mustill, “Comments and Conclusions in Conservatory Provisional Measures in International Arbitration”, 9th Joint Colloquium (ICC Publication, 1993)

ANTI-SUIT INJUNCTIONS AFTER WEST TANKERS – THE RISE OF THE “FOREIGN TORPEDO”

4.1 There may be occasions when the involvement of a national court is necessary in order to ensure the proper conduct of the arbitration. One such example is the use of an anti-suit injunction.

4.2 In the present context, an anti-suit injunction is a national court order used to protect the jurisdiction of the arbitration tribunal. Through such an injunction, a party can be ordered not to pursue court proceedings initiated in breach of an arbitration agreement. This is, in part, to hold the parties to their contractual agreement and also out of concern that those court proceedings (unless restrained) could frustrate the ongoing arbitration.

4.3 The concern has always been that such tactical litigation results in delay and expense. As these so-called “torpedo” actions are often brought in countries where the judicial process is slow or complex, or is likely to favour a local litigant, the risk of frustrating the arbitration process is real. Traditionally, the anti-suit injunction has been viewed in England as the primary means to deal with such tactical litigation.

4.4 In February 2009 the European Court of Justice (“ECJ”) delivered its controversial decision on anti-suit injunctions in the case of West Tankers Inc v Allianz SpA (Case C-185/07). This case dealt with anti-suit injunctions as they apply within Europe and, in particular, how to apply EC Regulation 44/2001 (“the Judgments Regulation”) to cases involving arbitrations.

4.5 After West Tankers, the English courts can no longer use their traditional weapon of choice, the anti-suit injunction, in response to proceedings started elsewhere in EU or Lugano states in breach of an agreement to arbitrate.

4.6 The effect of West Tankers is that in a case where a party has first issued court proceedings in another EU state court, in that case Italy, the Italian court should not be deprived of its right to determine its own jurisdiction pursuant to the Judgments Regulation and should not be restrained by the English court pursuant to an anti-suit injunction.

4.7 The facts of the case are these. West Tankers Inc had chartered a vessel called The Front Comor to Erg SPA (Erg) pursuant to a charterparty which provided for disputes to be resolved by arbitration in England. The vessel had a collision with a jetty in the Italian port of Syracuse, Sicily, causing substantial damage and Erg claimed compensation from its insurers.

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14 Aggeliki Charis Compania Maritima v Pagnan (The Angelic Grace) [1995] 1 Lloyd’s Rep 87

15 The Lugano states are Iceland, Norway and Switzerland
Allianz, for compensation up to the limit of its cover. Erg also commenced arbitration proceedings in London against West Tankers to recover the balance of its losses.

4.8 In the meantime, Allianz, who were the insurers, commenced subrogated proceedings against West Tankers in the Italian courts in order to recover the sums they had paid to Erg under the insurance policy.

4.9 West Tankers challenged the Italian proceedings in the English courts on the basis that the Italian courts lacked jurisdiction as the insurer’s claim was covered by the arbitration agreement. West Tankers requested, amongst other relief, an anti-suit injunction requiring Allianz to discontinue the Italian proceedings.

4.10 The English High Court upheld West Tankers’ claims and granted the anti-suit injunction. The insurers argued that the grant of such an injunction was contrary to the Judgments Regulation, since they had a right to bring a claim in the Italian courts and, if the Italian courts took jurisdiction, then that should be the end of the matter. On appeal, the House of Lords made a referral to the ECJ on the question whether anti-suit injunctions issued to give effect to arbitration agreements are compatible with the Judgments Regulation.

4.11 The ECJ decided that anti-suit injunctions in support of agreements to arbitrate are incompatible with the Judgments Regulation. Whilst acknowledging that because of the arbitration exception under art. 1(2)(d) of the Judgments Regulation an anti-suit injunction made to restrain the breach of an arbitration agreement fell outside the scope of the Judgments Regulation, the ECJ focused on the secondary effects of such relief on other proceedings which fell ostensibly within the Judgments Regulation. In particular, the ECJ characterised the insurers’ claim before the Italian courts as a tort claim, which did fall within the scope of the Judgments Regulation, and also regarded the question as to whether these claims were covered by an arbitration agreement to be a preliminary matter for determination by the Italian court. As an anti-suit injunction could interfere with the Italian court’s ability to exercise that jurisdiction, the ECJ decided that such relief must be incompatible with the Judgments Regulation. In these circumstances, it was exclusively a matter for the courts first seised of the dispute – in this case the Italian courts – to determine the validity of an arbitration agreement relied upon by a respondent in order to contest its jurisdiction. Otherwise, it would amount to stripping that court of the power to determine its own jurisdiction under the Judgments Regulation.

4.12 The ECJ decision is based on the doctrine of practical effectiveness (effet utile) in EC law, which provides that the application of national procedural rules must not prejudice the effectiveness of the Judgments Regulation in allocating jurisdictions. The principle is based
on comity and “mutual trust”, namely that the courts of each EU state are equally qualified to
determine whether the courts of another such state have jurisdiction. The ECJ thought that an
anti-suit injunction made by a fellow EU Member State was an impermissible interference
with the principle underpinning the Judgments Regulation.

4.13 It is worth emphasising that *West Tankers* does not affect any anti-suit injunction in England
that is sought against proceedings in a country outside of the Judgments Regulation or
Lugano Convention states. The long range capabilities of the anti-suit injunction are,
therefore, unchanged and relief will continue to be available against proceedings brought in
breach of an arbitration agreement in other states including, amongst others, by way of
example the United States, China, India and Russia. This important fact was confirmed by
the recent decision of Cook J in *Shashou v Sharma*¹⁶ in relation to an anti-suit injunction to
restrain court proceedings in India.

4.14 The practical effect of *West Tankers* is that where a party to an arbitration agreement has
brought court proceedings in another EU Member State, it will not be possible to prevent him
from continuing with those court proceedings through injunction. Those court proceedings
will need to be determined; but that does not mean necessarily that the arbitration proceedings
have to wait for the outcome of the court proceedings (although that will ultimately be
dependent on the merits of the court proceedings and the approach of the arbitrators). In such
circumstances, it may be possible to obtain an award well in advance of a determination by
the foreign court. This would then mean, in principle at least, that any award would be
enforceable under the NYC (although there may be problems with enforcement in the country
running parallel proceedings!).

4.15 The ECJ decision of *West Tankers* has been widely criticised by commentators. One of those
criticisms has been that the decision does not respect one of the fundamental principles of
arbitration law, which is that parties select specific jurisdictions as seats for their arbitration
because of their arbitration-friendly judicial systems which can include such procedural rules
as the power to grant an anti-suit injunction. The ECJ overlooked the *prima facie* case for
giving priority to the forum expressly chosen by the parties in the arbitration agreement. And,
by signing up to an arbitration agreement, the parties have elected to exclude the powers of
the national courts of any jurisdiction to deal with any disputes between them covered by their
agreement. This is surely the very point of the arbitration exception to the Judgments
Regulations, as set out in art. 1(2)(d). And so, restraining foreign proceedings in such

¹⁶ [2009] EWHC 957 (Comm) at [23] and [35]-[39]
circumstances should not amount to a challenge to the Regulation because there is no jurisdiction to be allocated in the first place.

4.16 The *West Tankers* decision also ignores the well-established principle of competence-competence, which provides that it is for the arbitral tribunal to decide on the applicability and validity of the agreement to arbitrate. In the *West Tankers* case, the only issue that the Italian court needed to consider was whether an arbitration agreement existed in the case.

4.17 In assessing the practical impact of the *West Tankers* case in terms of an adverse impact on parties choosing London as a seat of arbitration in the future, two factors need to be borne in mind. Firstly, given that arbitration between parties from different EU States and Lugano Convention States are considered to comprise a comparatively small proportion of London-based arbitrations, the overall impact of the decision on London as a choice for parties to select as a centre for international dispute settlement should, in real terms, be quite limited. Secondly, other key venues for international arbitration within Europe, such as Paris, Geneva and Stockholm are popular notwithstanding the fact that anti-suit relief has never been available under those jurisdictions’ procedural rules. In light of these two practical factors, there is a risk that some commentators have overstated the likely practical effect of *West Tankers* on international commercial arbitration in London.

4.18 The ECJ decision in *West Tankers* was considered by the Court of Appeal in November 2009 in *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)*. This case is worth examining as it provides the first detailed consideration of the impact of *West Tankers* on alternative relief available to the English courts now that the possibility of anti-suit injunctive relief has been excluded.

4.19 In the *Wadi Sudr* there was a London arbitration clause which was governed by English law. The Spanish court took jurisdiction in proceedings brought by Endesa and held that the arbitration agreement did not apply, partly because it had not been validly incorporated under Spanish law. Prior to the Spanish court delivering its judgment, NNC issued an arbitration claim and applied for an anti-suit injunction and a declaration that disputes between the parties were referable to London arbitration and that the English court was not required to recognise the Spanish judgment. The anti-suit injunction application was dismissed following *West Tankers*; however Gloster J granted the application for a declaration in the arbitration claim. That decision was appealed.

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17 [2009] EWHC 137 (Comm)
4.20 The Court of Appeal held:

4.20.1 The effect of the decision in *West Tankers* was that a judgment on a preliminary issue – including one on whether an arbitration clause had been included in the relevant contract – was a Regulation Judgment if it formed part of proceedings the main scope of which fell within the scope of the Regulation;

4.20.2 The judgment of the Spanish court in this particular case was binding on the arbitration proceedings and gave rise to an issue estoppel;

4.20.3 In the light of *West Tankers*, a party was entitled to challenge the incorporation of an arbitration clause in another EU court, and the English court had no alternative but to recognise such judgment.

5 THE EUROPEAN COMMISSION'S GREEN PAPER ON THE JUDGMENTS REGULATION

5.1 On 21 April 2009 the European Commission published its report on the Judgments Regulation together with a Green Paper introducing a consultation on the relationship between the Judgments Regulation and arbitration. The Green Paper raises the question as to whether arbitration should be brought within the scope of the Judgments Regulation and suggests a deletion of the exclusion of arbitration from its scope.

5.2 Section 7 of the Green Paper addresses the issue of the integration of international arbitration in the scope of the Brussels 1 Regulation. The European Commission considers that its proposal would allow for more standard recognition and enforcement of arbitral awards as well as extending the reach of the provisional and conservatory measures that may be awarded by a court assisting the arbitral process.

5.3 This Green Paper has been criticised by many practitioners as being incompatible with the NYC, and it now appears that the European Commission will not engage in a risky overhaul of a system of enforcement under the NYC that is already working well within Europe.

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19 Green Paper on the review of Regulation 44/2001
RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AWARDS

6.1 In the recognition and enforcement of arbitral awards, the arbitral process is reliant upon national systems of law. This is the classic example of what Lord Mustill meant when he referred to the relationship between the national courts and arbitration being like a relay race. The arbitral tribunal, whilst having sufficient powers to make the award, has no coercive powers to force a reluctant party to comply with the award. This is where the national court system takes up the baton.

6.2 In this regard, the NYC has been very successful as a system in obtaining the recognition and enforcement of international awards; and it continues to be the cornerstone of international commercial arbitration. Indeed, the NYC has been eulogised as “the single most important pillar on which the edifice of international arbitration rests”\(^{20}\). The NYC has provided a considerable degree of uniformity in the recognition and enforcement of awards. It enshrines a strong pro-enforcement policy and there are, purposefully, very few grounds for objecting to recognition and enforcement under the NYC.

6.3 Internationally, it is easier to obtain recognition and enforcement of an international arbitral award than it is of a foreign court judgment (which is dependent on a bilateral treaty of recognition, or within EU Member States under the Judgments Regulation). It is one of the main advantages of arbitration as opposed to litigation in resolving international commercial disputes. This is due to the fact that the provisions for the enforcement of foreign court judgments are less well developed with no recognition treaties that come anywhere near to the widespread adoption of the NYC, which has been adopted by 144 countries.

6.4 The available statistics suggest that most arbitral awards are in fact carried out voluntarily. In a study carried out by PriceWaterhouseCoopers LLP in 2008\(^{21}\), it found that only in 11% of cases did participants need to proceed to enforce an award and, in those cases, in fewer than 20% did the enforcing parties encounter difficulties in enforcement. There are also often commercial pressures on a party to comply with an award.

6.5 Before considering recognition and enforcement in detail, it is worth just mentioning the limited scope of the ability to challenge an award by way of appeal in the seat of arbitration. In considering whether or not it is possible to challenge an arbitral award, it is necessary to


\(^{21}\) See the study by the School of International Arbitration and Queen Mary, University of London (sponsored by PricewaterhouseCoopers LLP entitled “International Arbitration: Corporate Attitudes and Practices 2008”.

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look at the applicable Rules of Arbitration\textsuperscript{22}, as well as the law of the seat of arbitration. Each state has its own concept of the level of control it wishes to exercise over the arbitral process, and this can vary (as well as distinguish between domestic and international arbitration). If the seat of the arbitration is London, the appeal is to the Commercial Court of the Queen’s Bench Division of the High Court of Justice; if it is in France, it is to the Cour D’Appel, Paris; and if in Switzerland, it is to the Swiss Federal Tribunal.

6.6 Challenges to awards by way of an appeal are difficult to make; and, purposefully so, as the decisions of arbitrators are meant to be final and binding\textsuperscript{23}. Having said that, in the case of \textit{Shell Egypt West Manzala GmbH & Anor v Dana Gas Egypt Ltd}\textsuperscript{24} the English High Court held that the UNICTRAL Rules that provide for “final, conclusive and binding” does not exclude the possibility of appeal on a point of law. It is, therefore, important that parties agreeing to arbitrate in London under the UNICTRAL Rules include clear and unambiguous wording in their arbitration clause if they want to prevent the possibility of an appeal on a question of law.

6.7 This is because the legal system recognises that the parties have decided that they are to be bound by the decision of the arbitrators as an alternative to the national court. The law, therefore, gives effect to the intention of the parties and enforces the award just as it would a national court judgment. The House of Lords decision in \textit{Lesotho Highlands Development Authority v Impregilo SpA and others}\textsuperscript{25} clarifies the basis on which arbitral awards may be challenged in the English courts and affirms the underlying policy of the English Arbitration Act 1996, which is to reduce court intervention in the arbitration process to a minimum.

6.8 In terms of the recognition and enforcement of arbitral awards, it should be noted that - unlike a challenge to the award by way of an appeal - this will probably not take place in the seat of arbitration; as the seat of arbitration may specifically have been chosen for its neutrality to the parties. Thus, it will be entirely fortuitous if the party to whom enforcement is required happens to have assets located within the neutral country chosen as the seat of the arbitration.

6.9 The key consideration on enforcement is obviously the location of assets to enforce against; and the application for recognition and enforcement will be driven by that factor. In such an

\textsuperscript{22} The Rules of art 32 of UNCITRAL, the LCIA, and the ICC each state that an arbitral award is final and binding

\textsuperscript{23} The words “final, conclusive and binding” does not exclude the possibility of an appeal on a point of law. Article 26.9 of the LCIA Arbitration Rules and Article 28(6) of the ICC Rules include wording which is effective to exclude the right of appeal (under section 69 of the Arbitration Act 1996) to the English Court. The UNICTRAL Rules do not contain such wording.

\textsuperscript{24} [2009] EWHC 2097

\textsuperscript{25} [2005] UKHL 43
application, the powers of the state in which those assets are located are exercised through its national courts.

6.10 The method of recognition and enforcement to be adopted depends on the place where the award was made – i.e. whether it qualifies as a NYC award. As there are 144 countries that are signatories, this is often not a point of significant practical importance.

6.11 It also depends on the relevant provisions of the law at the place of intended enforcement. The procedure to be followed in any given case will vary from country to country, and it is important to obtain advice from experienced lawyers who practise in the particular jurisdiction where enforcement of an arbitral award is sought.

6.12 In terms of procedure, by way of example, there may be differences in the time limits for making the application. In England, it is 6 years; but in the US it is 3 years. Also, it is often necessary to have the original or certified copies of the arbitration agreement and award. It may also be necessary to serve a translation of the award, which can sometimes require the formality of obtaining consular attestation in the country of origin.

6.13 There are several different ways in which a national legal system can provide for the enforcement of arbitral awards:

6.13.1 Where the laws of the country of enforcement provide that, with the leave of the court, the award of an arbitral tribunal can be enforced directly without the need for deposit or registration (as in England).

6.13.2 Where the award is deposited, or registered, with a court following which it may be enforced as if it is a judgement of that court (as in Switzerland).

6.13.3 Where it is necessary to apply to the court for some form of recognition as a preliminary step to enforcement (as in France).

6.14 The formalities required under the NYC are straightforward. The party seeking such recognition and enforcement is required to produce to the relevant court the duly authenticated original award, or a duly certified copy of it; and the original agreement to arbitrate, or a duly certified copy of it. If the award and the arbitration agreement are not in the official language of the country in which recognition and enforcement is sought, certified translations are needed\(^26\).

\(^{26}\) Art IV(2)
6.15 Once the necessary documents have been supplied, the court will grant recognition and enforcement unless one or more of the 5 grounds for refusal, listed in the NYC, are present. The burden of proof for establishing any ground is upon the party seeking to object to the enforcement; and, even then, there is a residual discretion to enforce the award. The grounds are as follows:

6.15.1 The parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

6.15.2 The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

6.15.3 The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

6.15.4 The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

6.15.5 The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

6.16 For a recent Court of Appeal judgment on the first ground - where the arbitration agreement underlying the award is “not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” - the English Court of Appeal has recently refused enforcement of a NYC award.


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27 [2009] EWCA Civ 755
6.18 **Dallah** was a Saudi Arabian company that provided accommodation, transport and other services to Muslims undertaking the Haj. The Ministry was responsible for the safety and welfare of Muslims from Pakistan. The Ministry was not named as a party to the contract containing the arbitration agreement, and did not sign it. During the arbitration, the arbitral tribunal (which included Lord Mustill) decided that the Ministry was a party to the arbitration agreement. In the absence of any governing law clause (or any other indication in the contract as to which law should be applied to determine whether the Ministry was a party) the arbitral tribunal had applied “transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business.”

6.19 In the English enforcement proceedings, pursuant to the NYC (and s. 103 of Arbitration Act 1996) the question whether the Ministry was a party to the arbitration agreement had to be determined applying French law, as the “law of the country where the award was made”. Having considered evidence from French law experts, Aikens J decided that the Ministry had proved under French law it was not a party to the arbitration agreement. This had the consequence that the arbitration agreement underlying the award was “not valid” for the purposes of enforcement under the NYC.

6.20 **Dallah** appealed to the Court of Appeal, which held:

6.20.1 Where enforcement of a NYC award in England is opposed on the basis that the arbitration agreement is “not valid”, the court is required to consider all relevant factual evidence relied on by the party seeking to establish that the arbitration agreement is “not valid”. Where the same factual evidence was also considered by the arbitral tribunal, the court is required to carry out a rehearing rather than merely a review.

6.20.2 It is not necessary for the party opposing enforcement also to seek to have the award set aside by the courts at the seat of arbitration. Thus, the fact that the Ministry had not sought to challenge the award in the supervisory court (i.e. France) did not render the award final and conclusive between the parties.

6.20.3 Whilst the Court of Appeal retained some discretion to permit enforcement even when one of the grounds for refusal had been established, the discretion should not be exercised when the Ministry had never been a party to the arbitration agreement.

6.21 Leave to appeal to the Supreme Court in **Dallah** was given in January 2010.
The establishment of LCIA India is the first time that any of the international arbitration institutions have opened a satellite office in India. LCIA India’s Arbitration Rules were published on 17 April 2010.

LCIA India will allow disputes involving foreign companies with interests in India to resolve contractual claims under London arbitration rules without having to go offshore. Prior to LCIA India being established in April 2009, parties were faced with the choice of arranging ad hoc arbitrations, or having to take their legal disputes to an established arbitration centre such as London, Paris or Singapore, or trusting the often-chaotic and unreliable Indian domestic courts.

At present, there is a backlog of 31.18 million cases in the Indian judicial system. Some cases may take as long as 20 years to be resolved, with companies and individuals often inheriting them from the original parties. For India, arbitration has therefore long been seen as the solution to resolving India-related disputes for commercial parties. To support this movement, in November 2009, the London Chartered Institute of Arbitrators (“CIArb”) set up its India Chapter in Delhi.

It has to be recognised that the Indian courts have, in the past, come up with some controversial arbitration-related decisions. There have also been oddities in legislation, such as those provisions of the law in India (now repealed) which stated that where the governing law was that of India, the ensuing award was deemed to be a domestic award, even though the seat of the arbitration was in a foreign State.

Indian courts have previously adopted an interventionist approach towards the conduct of arbitration proceedings; and have assumed the power to grant injunctions restraining arbitration proceedings and to set aside awards that they consider to be contrary to Indian law. In two infamous decisions dating back to the 1980s and 1990s, the Indian courts set aside awards rendered elsewhere on the stated basis that the substance of the disputes was

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28 The Rules include several new provisions aimed at expediting proceedings, including an express requirement that all prospective arbitrators confirm their ability to devote sufficient time to ensure the expeditious conduct of the arbitration.

29 These often resembled the very Indian court proceedings which they were meant to substitute and were considered to be procedurally cumbersome and time consuming.

30 Government, 17 August 2009, PM, Chief Justice Differ on Backlog of Cases. The article breaks the 31.18 million down as Supreme Court, 52,592; High Court: 4,017,956; and subordinate courts: 27,119,092.

31 Such an award is usually regarded as a foreign (or international) award under the NYC.

governed by Indian law\textsuperscript{33}. There have also been three recent Indian court cases which have even placed in question the well-established principle of competence-competence, which is recognised in the vast majority of countries including under French law, German law and English law (Arbitration Act 1996 ss. 30 – 32) and in institutional rules such as LCIA Article 23, ICC Article 6, and UNCITRAL, Article 21\textsuperscript{34}.

7.6 These decisions cannot entirely be dismissed as a problem of the past; as is evidenced by the case of Venture Global Engineering v Satyam Computer Services Limited (2008) 4 SCC 190) where the Indian Supreme Court held that an award rendered in London that was the object of enforcement proceedings in the United States could be set aside in India on the exclusive basis that the parties had chosen Indian law to govern the substance of their dispute. The Indian Supreme Court held that foreign awards may be challenged under Part 1 of the Indian Arbitration and Conciliation Act 1996, unless the parties have specifically agreed otherwise; and in considering any such challenge, the Indian courts can set the award aside on the grounds of public policy if it contravenes any substantive provisions of Indian law. This broad application of the NYC right to refuse to enforce an arbitral award on public policy grounds goes far beyond the interpretation applied by the national courts of most NYC signatories.

7.7 However, a recent High Court decision in Max India Limited v General Binding Corporation (FAO 193/2009) has provided a little optimism that the interventionist approach of the Indian courts towards arbitration may now be shifting. In Max India, which involved an agreement to arbitrate in Singapore under the rules of SIAC, the Appellate Court of India held that Part 1 of the Indian Arbitration and Conciliation Act 1996 had been excluded and that the arbitration should continue in Singapore\textsuperscript{35}.

7.8 India also only currently enforces foreign arbitration awards from those countries it has “notified” (which encompasses only about 44 of the countries that are signatories to the NYC), which includes (amongst others) the United States, Singapore and England. In addition, before ordering enforcement and execution of a foreign award, Indian courts will test the enforceability of such awards under Indian law and may refuse enforcement on


\textsuperscript{35} To reduce the scope of intervention by the Indian courts, it is good practice to expressly exclude part 1 of the Act even when all the elements of an arbitration clause specify another law and jurisdiction besides that of India.
“public policy” grounds. The enforcement process in India can often be quite long, with enforcement periods ranging from 6 months to 3 years.

7.9 That said, there is reason to hope that India is on the road to establishing itself as a more arbitration-friendly jurisdiction for international disputes; and many consider that the Indian legal services sector could be a major source of revenue.

8 **DIFC-LCIA**

8.1 Since oil was discovered in Dubai in 1966, trade, banking, finance, insurance and construction activities have flourished.

8.2 History has always shown that whenever there is human endeavour, there is conflict; and it is necessary to establish a procedure for dispute resolution.

8.3 In 2003 the Dubai International Arbitration Centre ("DIAC") was conceived. DIAC has grown over the years, from a case load of 34 cases in 2004 to now over 100 cases registered in 2009.

8.4 In February 2008, the Dubai International Financial Centre ("DIFC") and the LCIA announced the launch of the DIFC/LCIA Arbitration Centre in Dubai. This joint venture allows DIFC access to LCIA’s international network of arbitrators. The DIFC-LCIA Rules are based on the current LCIA Rules, with minor amendments to account for local requirements.

8.5 The DIFC-LCIA Arbitration Centre is open to any parties who agree to use it to settle their commercial disputes as the Arbitration Law does not require disputes to have any connection with the DIFC - whether through the parties, the performance of the contract or the place of execution of the contract.

8.6 In September 2008 DIFC unveiled its new Arbitration Law, which provides the legal framework of the new DIFC-LCIA Arbitration Centre. The DIFC has its own courts. The DIFC courts have been established to deal exclusively with all cases and claims arising out of the DIFC and its operations. The legal framework is based on English common law principles, and the language of the Court is English.

8.7 The UAE has previously had a reputation of being a difficult place in which to enforce arbitral awards. There have been instances where highly technical points have been accepted
as a valid reason not to enforce an award (such as when an award was thrown out because the documents were not signed on every page, but signed at the end and initially on every page).

8.8 However, past problems on enforcement are likely to be less of a problem in future in light of the UAE’s ratification of the NYC as of November 2006.

8.9 In addition, there is a procedure for DIFC Court judgments to be enforced through the execution department of the Dubai Court. The decisions of the DIFC Court will be presented (with an Arabic translation) to the execution judge who will, without interference, convert the DIFC judgment into a judgment of the Dubai Court, which is enforceable not only in Dubai, but throughout the rest of the UAE and in the Gulf Cooperation Council under the 1983 Riyadh Convention.

CONCLUSIONS

9.1 In a globalised economy, the commercial world looks increasingly towards arbitration as the best method for international dispute resolution. Arbitration offers a neutral and flexible forum, tailored to the parties’ wishes and the nature of the dispute.

9.2 International commercial arbitration has a long history. The business community places trust in the arbitral process as it gives them the confidence to expand even into countries where the national court system may be seen as corrupt or to fail to meet basic standards of natural justice.

9.3 The LCIA has had the confidence to set up a satellite office in India. It is too early to say how successful LCIA India will prove to be; as it will only be after several years will we know how many businesses choose India as the seat of arbitration in their arbitration agreements that are currently being negotiated and drafted. Currently, India has got a chequered history in terms of international commercial arbitration, with past difficulties over enforcing international arbitration awards, but it may be that there has been a culture change and there are grounds for optimism in arbitration in India.

9.4 The big success story, which has proved to be the cornerstone of international commercial arbitration, has been the NYC. It is now over 50 years old, and has stood the test of time. The number of countries who have signed up to it is truly impressive, and way above any recognition treaties in the field of commercial litigation.

9.5 There will always be some tension between the national court systems of different countries and international commercial arbitration; that is only natural. But, it is hoped that with the
greater harmonisation of arbitration Rules and laws, this tension can be reduced. The case of West Tankers, however, is an unfortunate set back on this road; but, thankfully, the decision is of limited scope. It is to be anticipated that the “relay race”, to which Lord Mustill once compared the relationship of arbitration and the support mechanisms of the national court system, will continue.

9.6 In short, international commercial arbitration has got a bright future.

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13 May 2010