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Commercial Arbitration in the ASEAN Region Poised to Increase Confidence in Foreign Investment

By Alex Larkin

ASEAN, the Association of Southeast Asian Nations, has been progressing toward achieving its heightened goal of an integrated ASEAN Economic Community (AEC). A significant part of this effort has been an increased focus on commercial arbitration as a means of resolving commercial disputes. This continuing development, as an alternative to the disparate judicial systems among ASEAN member states, brings with it a measure of increasing confidence that foreign investors in these states can avail themselves of certain investment protections.

Of the ten ASEAN member states, several consistently rank poorly in annual surveys related to civil justice and enforcement of contracts in local judicial systems. The World Justice Project (WJP) Rule of Law Index 2015, which surveyed 102 countries, ranked ASEAN members Indonesia at 83, Myanmar at 94, Vietnam at 76, and Cambodia dead last at 102 for civil justice according to such factors as freedom from corruption, accessibility and affordability of the civil justice system, and enforcement of judicial decisions.

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Arbitration, Mediation, and Alternative Dispute Resolution

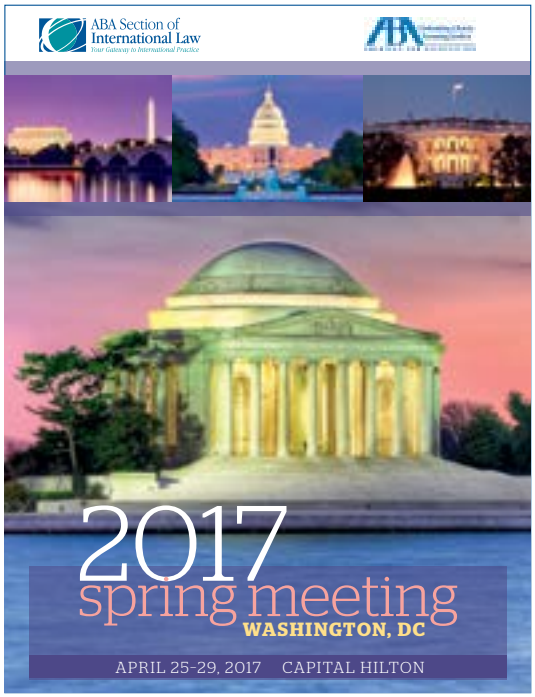
CHAIR'S COLUMN

The theme of this issue of *International Law News* (*ILN*) is recent developments in the areas of arbitration, mediation, and alternative dispute resolution. The articles reflect the broad array of expertise we are lucky to have among the members of the ABA Section of International Law.

Sara Sandford (*ssandford@gsblaw.com*) is an owner in the Seattle office of Garvey Schubert Barer and chair of the ABA Section of International Law.

The cover article focuses on commercial arbitration in the ASEAN region. Next, we get timely insights from the U.S. State Department on international law and the South China Sea that were recently shared at the Section-sponsored "Live from the L" program. Next, we delve into a discussion of the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings. Later, we learn about international sports arbitration in Germany and then dispute resolution in Myanmar, a country, the author tells us, ripe for investment with untapped opportunities and abundant natural resources. We'll hear from the Section's International Arbitration Committee on top trends in, major challenges to, and predictions for the future of arbitration and receive some practical and insightful information in *ILN*'s new column, "Perspectives from the Field." You will also find other noteworthy pieces in this issue, including an interview with Ms. Haya Rashed Al-Khalifa, a lawyer and diplomat from Bahrain who has served as the President of the UN General Assembly and Bahrain's Ambassador to France has played significant roles in arbitration and mediation organizations. Another article reports on HIV and drug testing requirements imposed on non-ethnic Korean foreign teachers in South Korea. Still others discuss the EU Bail-In Rule and China's transition to market economy status under the WTO.

As you can see, *ILN* circles the globe, and each issue highlights a few of the legal developments, issues, and initiatives in which our members are engaged.



With over 60 committees and roughly 20,000 members, the ABA Section of International Law enjoys access to a veritable fount of information about almost any internationally related legal topic in the world. I hope these articles will inspire every reader to sign up to be a member of the Section, if you aren't already. And, if you are, I hope they will inspire you to join one or more of our substantive committees, in the field that is of most interest to you. Whether it is work on publications, programming, policy, or special projects, there is a way for every member to engage, share ideas, and make connections with colleagues around the world. So many of us have found it enriching, informative, engaging, and enjoyable to be active in the Section. I hope that you will, too! ◆

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Upcoming deadlines and themes:

Fall 2017 Issue Deadline: June 1, 2017
Theme: Building Rule of Law

International Law and the South China Sea: Insights from the U.S. Department of State

By Renee Dopplick

The U.S. Department of State Legal Adviser's Office discussed an array of legal issues related to international law and the South China Sea during the seventh annual "Live from L" program held in February. The program was sponsored by the ABA Section of International Law and co-sponsored by the George Washington University Law School and the American Society of International Law. Acting Legal Adviser Richard C. Visek and two additional speakers from the Legal Adviser's Office addressed customary international law and sovereignty claims over land territory, international law related to boundary limitations, the UN Convention on the Law of the Sea (UNCLOS, also referred to as the Law of the Sea Convention), and the peaceful settlement of international disputes. The program included questions from the audience attending in person at the George Washington University Law School and by live webcast. Watch the video at http://bit.ly/2017LiveFromL

Several countries assert overlapping territorial claims in the South China Sea. China in 2009 clarified its claim when it communicated its Notes Verbales and provided a map delineating its claim with nine dashes in the South China Sea, commonly referred to as the "nine-dash line." China's encircled area includes the disputed Paracel Islands, Scarborough Reef, and the Spratly Islands.

The discussion explored the outcomes and implications of the arbitral decision by the Permanent Court of Arbitration (PCA) in a dispute brought by the Philippines against China for its claims and actions in the South China Sea. South China Sea Arbitration (Phil. v. P.R.C.), PCA Case No 2013-19, Award (July 12, 2016), http://www.pcacases.com/pcadocs/PH-CN - 20160712 - Award.pdf. Key issues included jurisdictional issues, maritime entitlements and baselines, fishing rights, petroleum exploration rights, large-scale land reclamation on disputed features, the construction of installations and artificial islands, and legal obligations to protect and preserve the marine environment. Following the decision, China issued formal statements criticizing the arbitral Award and reasserting its claims, including those based on historic rights. The formal diplomatic protest by the United States asserting that China's claims are inconsistent with international law will be included in the 2016 Digest of the United States Practice in International Law published by the Legal Adviser's Office.

The State Department urged all claimants to avoid provocative statements or actions, to clarify their maritime claims in accordance with international law as reflected in the UN Convention on the Law of the Sea, and to use the decision as an opportunity to resolve disputes peacefully.

The speakers clarified four major points about the U.S. posture on the South China Sea. First, the United States takes no position on competing sovereignty claims over naturally formed land features. Second, maritime claims must be in accordance with international law as reflected in the UN Convention on the Law

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Renee Dopplick is Editor-in-Chief of *International Law News* and is co-chair of the Section's UN and International Organizations Committee. A special thank you to Ronald Bettauer for his dedicated efforts to make "Live from L" the premier annual event since its creation in 2011. Watch the February 2017 "Live from the L" video at http://bit.ly/2017LiveFromL

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UNCITRAL Notes on Organizing Arbitral Proceedings Get a Modern Makeover

By Richard Bainter

The United Nations Commission on International Trade Law (UNCITRAL) recently updated and modernized its "Notes on Organizing Arbitral Proceedings." Over the past 20 years, the Notes have become an essential reference for attorneys and arbitrators faced with resolving disputes arising from international commercial transactions. The 2016 updates reflect a desire by UNCITRAL to provide expanded guidance in a number of areas, including evidence, consultations, confidentiality, administration of the proceedings, multiple languages, interim measures, amicable settlement of the dispute, and joinder and consolidation.

UNCITRAL recognized the need to update the Notes following the revision of the UNCITRAL Arbitration Rules in 2010 and in light of evolving practices. The updates reflect input from a range of arbitration practitioners, scholars, arbitral institutions, and international organizations. The full body of UNCITRAL, made up of 60 member states of the United Nations, considered several working group drafts of the updated Notes before adopting a final version at its 49th meeting in 2016.

UNCITRAL expects the updated Notes to be widely distributed in the six official languages of the United Nations and recommends their use by the parties to arbitration, arbitral tribunals, and arbitral institutions, as well as for academic and training purposes. A summary of the most notable updates follows.

Flexibility and Broad Applicability

The introduction to the updated Notes makes clear that the guidance does not seek to identify or promote the best practices in the field of arbitration. They recognize that styles and practices vary and instead provide guidance to the broadest possible cross-section of participants in arbitral proceedings.

Modernizing for Digital Technologies

Several of the revisions were dictated by the dramatic changes in technology since 1996, such as those in the areas of electronic communications and the production of evidence. As such, new provisions address electronic documents and electronic communications between parties and the tribunal, as well as electronic records, video evidence, and software. The updated Notes refrain from referencing specific technologies and means of communication in anticipation of continuing technological advances.

Consultations

Changes in practice are reflected in the updates addressing the more developed practice of consultation between parties to an arbitration and the arbitral tribunal. In recognition of the increasingly central role of consultations in organizing the proceedings, the subject was moved from its prior brief coverage in the introduction to become Note 1. Also new to the discussion are descriptions of situations when the parties typically would consult with the tribunal in the organization of the proceedings.

Confidentiality

Note 6 on confidentiality was expanded to more clearly describe situations in which the parties might desire a confidentiality agreement and to give additional examples of the issues that such an agreement might address. A new paragraph was added to address the specific circumstances related to confidentiality in investor-state arbitration.

Administration of the Proceedings

Special attention was given to the administration of the proceedings, especially the role of the secretary to a tribunal. The updated Notes specify that secretaries, with rare exceptions, do not participate in the decision making of the tribunal, that they are expected to be impartial and independent, and that an appointment of a secretary by the tribunal would normally be disclosed to the parties.

Proceedings in Multiple Languages

Expanded discussion addresses the possibility of arbitration

Richard Bainter (*rbainter@richardbainter.com*), of counsel with de Castro, P.C., in San Diego, practices international law and has experience in arbitration and mediation. In 2015, he worked with the European Court of Arbitration to establish special rules for the resolution of international, employment-related disputes.

proceedings in multiple languages, yet a clear preference is expressed for the conduct of proceedings in one language. The common practice of choosing a single language is stated in Note 2(a), and the logistical difficulties and added costs of using multiple languages are described in 2(c).

Checklist for Practitioners

The updated Notes feature more prominently a useful UNCITRAL checklist for practitioners in recognition of its value as an organizing tool. The "List of Matters for Possible Consideration in Organizing Arbitral Proceedings" provides a pragmatic tool for practitioners in the early stages of an arbitration.

Omissions

Suggestions to add more specific references to the various types of arbitration (e.g., investment arbitration) were rejected in favor of maintaining the general and universal applicability of the guidance. Thus, the Notes maintain their intended purpose of providing guidance, regardless of whether the arbitral proceedings are ad hoc or are conducted through an arbitral institution.

In their updated form, the Notes will continue to serve as a useful tool for the next generation of arbitration practitioners. Read the full text of the UNCITRAL Notes on Organizing Arbitral Proceedings (2016) and its travaux préparatoires at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html. ◆

Commercial Arbitration in the ASEAN Region

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Likewise, the World Bank Group's Doing Business 2016 Report, which surveyed 189 economies, ranked Myanmar at 187 out of 189 economies, Cambodia at 174, Indonesia at 170, and the Philippines at 140 according to their ability to enforce contracts, with a focus on the efficiency of commercial court systems as measured by the procedures and time and costs to resolve commercial disputes.

In light of the domestic judicial environments, investors contemplating projects in ASEAN member states should consider whether their investments, in particular commercial contracts, can be effectively protected and enforced. Commercial arbitration is poised to increase that confidence in foreign investments in the region.

The ASEAN Comprehensive Investment Agreement

Of particular interest in the context of commercial disputes under the AEC has been the adoption of the ASEAN Comprehensive Investment Agreement (ACIA) by ASEAN member states. The ACIA includes commercial dispute resolution provisions that call for arbitration and resemble those found in many bilateral investment treaties. The provisions provide investors from ASEAN member states with investment projects in other ASEAN member states the option to seek resolution of commercial disputes against the host member state by way of commercial arbitration. Under the ACIA, ASEAN member states are obligated to ensure certain

Articles 5 and 6	Member states must treat investors and investments from other member states no less favorably than domestic investors and investments (Article 5) from any other Member state or non-member state (Article 6)	**Article 12**	Member states must accord to investors, concerning their entitled investments that suffer loss due to armed conflict, civil strife, or emergency and, non-discriminatory treatment with respect to restitution and compensation
Article 8	No requirement to appoint senior management of a particular nationality	**Article 13**	Capital, profits, dividends, and other transfers related to entitled investments can be freely moved into and out of each member state
Article 11	Member states must provide fair and equitable treatment to investors	**Article 14**	Covered investment cannot be expropriated or nationalized without fair compensation and due process

Table 1: ACIA – ASEAN Member State Obligations for Covered Investments

Alex Larkin's (*alex.larkin@dfdl.com*) experience includes corporate and commercial law, litigation and arbitration, and intellectual property and labor law. Mr. Larkin has acted for clients in relation to civil litigation and arbitration in the United States and arbitration at the Singapore International Arbitration Center. His experience also includes advising on corporate transactions, as well as mergers and acquisitions.

protections for covered investments, including those summarized in Table 1.

Under Article 4(a) of the ACIA, a covered investment is an investment made by an investor of one member state in the territory of another member state that has been admitted to the laws, regulations, and national policies of the member state where the investment was made and, where applicable, has been specifically approved in writing by the competent authority. Covered investments include every kind of asset owned or controlled by an investor, including, but not limited to, movable and immovable property, shares, stocks, intellectual property rights, and claims of money, among others.

The ACIA benefits apply to investors from member states, including both natural and legal persons, and extend protection to investors from outside ASEAN who set up a juridical entity in any ASEAN member state. The entity, however, cannot be merely a shell company established solely for the purpose of providing an investment vehicle and taking advantage of the ACIA investor protections.

Under Article 33 of the ACIA, where an investor with a covered investment has been deprived of any of the protections to which it is entitled by an ASEAN member state, such an investor has the right, after attempting to resolve the matter by consultation and negotiation, to submit a claim against the member state to the courts of the member state or to arbitration. For investors seeking to resolve disputes by arbitration, the ACIA permits a number of different options for arbitration venue, including:

- Kuala Lumpur Regional Centre for Arbitration (KLRCA) in Malaysia;
- International Centre for Settlement of Investment Disputes (ICSID); or
- other arbitration institutions agreed to by the parties, which may include the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, and the Vietnam International Arbitration Center, among others.

Once the arbitration tribunal has issued a final arbitration award, the host ASEAN member state must provide for enforcement of the award. Additionally, under Article 41 of ACIA, the award can be enforced in any country worldwide that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

A Look at Arbitration in Selected ASEAN Member States

Aside from the ACIA, the ASEAN member states are in different stages of enacting and enabling local arbitration rules and arbitration institutions and legislation to enable judicial recognition and enforcement of arbitral awards. Leading in these areas are Singapore and Malaysia, both of which feature well-established and highly reputable international arbitration institutions—the Singapore International Arbitration Centre and the Kuala Lumpur Regional Centre for Arbitration, respectively. The following discusses the status of commercial arbitration in a number of developing ASEAN member states.

Vietnam founded the Vietnam International Arbitration Center (VIAC, www.viac.vn) in 1993, which has seven locations. In its first year in operation, the VIAC received six cases, and, to date, has heard about 1,000 cases, with 146 cases submitted in 2015. The arbitrators of the VIAC currently number about 150 and have extensive experience and expertise in many areas of commercial disputes, including foreign trade, maritime, banking and finance, construction, manufacturing, intellectual property, and more. Vietnam upgraded the country's Commercial Ordinance of 2003 to bring it in line with the Law on Commercial Arbitration of 2010. Having more than 20 years' of operating experience, the VIAC has a generally positive reputation and provides investors with a viable alternative to court action.

In Cambodia, the National Commercial Arbitration Centre (NCAC, www.ncac.org.kh), the country's sole commercial arbitration institution, officially launched in 2013. At its first annual general meeting in July 2014, it adopted the NCAC's arbitration rules and internal rules, marking a significant step towards full operation of the commercial dispute resolution body. The NCAC is the product of Cambodia's Law on Commercial Arbitration, enacted in 2006, and the related Sub-Decree on the Organization and Functioning of a National Arbitration Centre, passed in 2009. Cambodia also enacted a new Code of Civil Procedure in 2007, which includes key provisions on execution of arbitration decisions, both foreign and local, as well as provisions allowing courts to issue decisions for interim relief in the context of matters subject to arbitration proceedings. The NCAC, at the end of 2016, had received three cases, with one case being dropped and the other two yet to complete proceedings and arbitral awards. *See Arbitration Inching Forward*, Phnom Penh Post, Dec. 19, 2016, *available at* http://www.phnompenhpost.com/business/arbitration-inching-forward. While the NCAC is a new, yet-to-be-proven institution, it offers significant promise as an alternative dispute resolution body for Cambodia.

As with most arbitration rules, the arbitration rules of the NCAC (NCAC Rules) are flexible and allow disputing parties significant control over the arbitration proceedings. For example, the parties may determine the law to be applied

to the substance of the dispute (Article 17) and may select the language of the proceedings (Article 18). The NCAC Rules allow parties to be represented by any person of their choice (Article 3) and prohibit *ex parte* communications between a party and an arbitrator, meaning communication between one party and an arbitrator without including the other party or simultaneously providing the same communication to the other party (Article 4.5).

Regarding arbitrators, the parties to a dispute may determine the number of arbitrators (Article 9) and may select the arbitrators, so long as the arbitrators meet qualification criteria set out by the NCAC (Article 10). While the details of the qualifications to act as an arbitrator are set forth in the internal rules of the NCAC, rather than in the NCAC Rules, generally parties may appoint an arbitrator who is registered with the NCAC or any person who has served as, or is registered as, a commercial arbitrator of any local or international commercial arbitration institution. The spirit of the NCAC Rules is in keeping with the desire to appoint arbitrators who have experience and expertise in the specific commercial area associated with the subject matter of the dispute. The aim, under the NCAC Rules, is to permit the parties to a dispute to appoint arbitrators who are well suited to resolve the dispute fairly and efficiently, in part based on the arbitrators' familiarity with the type of commercial activity underlying the dispute.

In January of 2016, Myanmar adopted its Arbitration Law (the "Arbitration Law"), which supersedes the country's seldom used Arbitration Act of 1944. The Arbitration Law is intended to bring Myanmar into compliance with its obligations as a party to the New York Convention. The Arbitration Law appears to be modeled after the UNCITRAL Model Law on International Commercial Arbitration of 1985. The Arbitration Law requires the courts of Myanmar to recognize and enforce arbitral awards, so long as none of the non-enforcement justifications under the New York Convention, discussed below, are present. To date, this author is not aware of any arbitration proceedings having been initiated under the Arbitration Law, nor aware of any arbitration institution in Myanmar.

Enforcing Foreign Arbitral Awards

One key advantage of arbitration, as compared to court action, in many jurisdictions, is the ability to enforce arbitral awards across borders. While arbitration proceedings are possible in the less-developed ASEAN states like Myanmar and Cambodia, as discussed above, parties often prefer to have commercial disputes, arising out of or in relation to investments and commercial activities in such jurisdictions, resolved by arbitration institutions in more developed jurisdictions, such as Singapore, Hong Kong, and Malaysia, followed by enforcement of the arbitration award back in the jurisdiction where the dispute arose. Such cross-border enforcement is made possible by treaty, specifically the New York Convention, as well as enabling legislation in the jurisdiction of enforcement.

Every ASEAN member state, as well as 148 other states, is a party to the New York Convention, thus providing the ability to enforce foreign arbitral awards in each member state, although not all of the member states have adopted enabling legislation providing clear procedures for seeking judicial recognition and enforcement of awards.

Given that arbitrators and arbitration institutions generally do not have enforcement power, it is necessary to present an arbitration award to a court of competent jurisdiction and seek a court order to recognize and enforce the award. Once such a court order has been obtained, enforcement is possible just as in the case of a court judgment following a civil trial. Importantly, when a court considers a request for an order to recognize and enforce an arbitral award, such consideration by a court is not an appeal of the arbitral award. The court will not review or reconsider the evidence or the legal arguments presented during arbitration proceedings, nor the reasoning of the arbitral tribunal in reaching its decision and preparing its award. Rather, the court will only consider issues related to notice, jurisdiction, scope of proceedings, and certain procedural aspects of the arbitration proceedings.

The grounds for a court to decline to issue an order to recognize and enforce a foreign arbitral award under the New York Convention are limited to the following:

1. The arbitration agreement is not valid under the law governing the underlying agreement;
2. Notice of arbitration is not properly served;
3. The award is given in relation to disputes or matters falling outside the scope of the arbitration agreement;
4. The composition of the arbitration tribunal is not in accordance with the arbitration agreement or the laws of the country where the arbitration is held;
5. The award is not final and binding under the laws of the country in which the award was given;
6. The subject matter of the arbitral proceedings is not capable of being settled by arbitration; or
7. Recognition or enforcement of the award would be contrary to public policy.

While enforcement of foreign arbitral awards is legally

possible in all ASEAN member states, certain of the less-developed members have very few, if any, instances of successful enforcement. The author is not aware of any successful foreign arbitral award enforcements in Myanmar or the Lao PDR, and the courts of Cambodia, to date, have granted one request for enforcement. In March 2014, the Supreme Court of Cambodia confirmed the decision of the Cambodian Court of Appeal, which ruled in favor of recognition and enforcement of an arbitral award issued by the Korean Commercial Arbitration Board (KCAB) of Seoul, Republic of Korea.

The award issued by the KCAB resolved a commercial dispute among multiple Korean parties, who entered into contractual agreements in relation to the financing and development of a large-scale commercial and residential project in Phnom Penh, Cambodia. In May 2012, in accordance with Article 353 of the Code of Civil Procedure of Cambodia and Articles 6 and 7 of the Law on Approval and Implementation of the New York Convention, the prevailing party in the KCAB arbitration proceedings sought enforcement of the KCAB's award in Cambodia by filing a motion to the Court of Appeal of Cambodia. The Court of Appeal issued its decision, in favor of recognizing and enforcing the award, in April 2013. A non-prevailing party subsequently filed an appeal to the Supreme Court of Cambodia to seek reversal of the Court of Appeal's decision. Ultimately, that motion was rejected by the Supreme Court on grounds that the appeal to the Supreme Court was not timely, resulting in the prior Court of Appeal decision being a final judgment in favor of recognition and enforcement, a result that provides encouragement as to enforceability of foreign arbitration provisions in commercial contracts.

Reason for Optimism

The continuing efforts by ASEAN member states to develop commercial arbitration institutions and enact corresponding enabling legislation, in line with the New York Convention, demonstrates a determined and concerted effort in that region of the world, to provide efficient and effective means of commercial dispute resolution, which is encouraging for foreign investors looking to enter ASEAN markets or expand existing operations in those markets, while ensuring protection of their investments. Much work remains to be done to accomplish the goals of the AEC and to ensure transparency of proceedings and enforceability of arbitration awards throughout much of the region. The recent and current trends, however, are very promising. ◆

Judicial Review of Arbitration Awards in International Sports Arbitration—the German Federal Court of Justice's Ruling in the *Pechstein* Case

By Oliver Englisch

On June 7, 2016, the German Federal Court of Justice (BGH) decided the *Pechstein* case. The issue was whether an arbitral award issued by the Court of Arbitration for Sports (CAS), Lausanne, Switzerland, could be reviewed before German courts when the athlete involved in the dispute subject to the arbitral award had entered into an agreement stipulating that the CAS had jurisdiction to determine the dispute. The case attracted wide media attention in Germany. This article summarizes the different legal conclusions of the various stages of the case.

The Facts of the Case

Claudia Pechstein is a German ice speed skater and five-time Olympic gold medalist. In order to participate in the 2009 World Allround Speed Skating Championships in Hamar, Norway, Ms. Pechstein agreed in writing to comply with the anti-doping rules of the International Skating Union (ISU). She also agreed in writing that the CAS would be the institutional arbitration organization having jurisdiction to determine any disputes between her and the ISU. Ms. Pechstein submitted to a blood doping test. The ISU's Disciplinary Committee determined that she had failed the test, and Ms. Pechstein was banned by the ISU for competing for two years. Her results from the Championships were annulled.

Ms. Pechstein challenged the ISU's decision before the CAS arguing that inconsistencies in the blood doping test resulted from an inherited blood disease. The CAS determined that the evidence was insufficient to sustain Ms. Pechstein's claim, and the CAS's arbitral award essentially upheld the ISU's ban and annulment. Ms. Pechstein unsuccessfully challenged the CAS's arbitral award before the Swiss Supreme Court.

The Procedure of the Case and the Decisions of the German Courts

Ms. Pechstein sought damages resulting from her ban before the Regional Court (LG), Munich, Germany. She challenged the decision of the LG Munich before the Higher Regional Court (OLG), Munich, Germany. The ISU then challenged the decision of the OLG Munich before the BGH.

The LG Munich Decision

The LG Munich (LG Munich 1, Decision of Feb. 26, 2014, Az. 37 O 28331/12) held that the arbitration agreement between Ms. Pechstein and the ISU was invalid, because her signature on the agreement had not been obtained voluntarily. The Court concluded this due to the ISU's monopoly in the market with respect to participation of ice speed skaters in the Championships and the fact that Ms. Pechstein's participation in the Championships was conditioned on her signing the arbitration agreement. The LG Munich went on to hold that, although the arbitration agreement was invalid, the arbitration award was indeed valid. The LG Munich reached this conclusion based on the fact that, since Ms. Pechstein had failed to plead the involuntary nature of the arbitration agreement before the CAS, she was precluded from raising this issue at a later stage. The LG Munich concluded that Ms. Pechstein's claim for damages was, therefore, unfounded.

The OLG Munich Decision

The OLG Munich (OLG Munich, Decision of Jan. 15, 2015, U 1110/14 Kart) also determined that the arbitration agreement was invalid. The OLG Munich reasoned that the ISU abused its dominant position in the market with respect to participation of ice speed skaters in the Championships, which thereby violated

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German competition law and thus invalidated the underlying agreement between Ms. Pechstein and the ISU. The OLG Munich emphasized that a mandatory arbitration clause in a contract does not necessarily constitute an abuse of a dominant position in the market. Rather, the OLG reasoned that the process of determining the constitution of the arbitral panel was imbalanced to the detriment of athletes and that such an imbalance constituted an abuse. In contrast to the LG Munich, the OLG Munich took the view that the arbitration award of the CAS was not to be recognized because the underlying arbitration agreement was in violation of the *ordre public* by infringing German competition law. The OLG Munich did not follow the LG Munich's *res judicata* argument. Instead, the OLG Munich decided that consideration of the invalidity of the arbitration award was not precluded by *res judicata*, because the issue before the German courts dealt with Ms. Pechstein's claim for damages, whereas the claim before the CAS dealt with Ms. Pechstein's challenge to the ISU's Disciplinary Commission's decision. The OLG Munich concluded that the state of the proceedings did not permit a decision on the merits of the case.

The BGH Decision

In contrast to the LG Munich and the OLG Munich, the BGH (BGH, Decision of June 7, 2016, KZR 6/15) considered the arbitration agreement to be valid.

First, with respect to the LG Munich's concern about the involuntary character of the arbitration agreement, the BGH applied a much narrower understanding of involuntary action, which it considered to comprise situations such as physical or mental violence or deception. Still, the BGH recognized that the ISU had a significantly stronger bargaining position than Ms. Pechstein when concluding the agreement. Based on this imbalance, the BGH argued that the protection of Ms. Pechstein's fundamental rights through, in particular, the prohibition of an abuse of a dominant position, had to be taken into consideration. To determine whether the ISU had abused its dominant position, the BGH weighed Ms. Pechstein's right to access to justice and her right to occupational freedom against the ISU's autonomy resulting from its right to freedom of association. This balancing of interests led the BGH to conclude that the ISU had not abused its dominant position.

Second, with respect to the OLG Munich's concern that the procedure for composing the arbitration panel led to a structural imbalance, the BGH argued that such an imbalance could arise only if sport associations and athletes belonged to groups with conflicting interests. According to the BGH, however, the interests of sport associations and athletes are in principle aligned when it comes to combating doping in sports. Based on this assumption and supported by certain provisions in the statutes and rules of procedure of the CAS, the BGH considered the CAS to be characterized by sufficient independence and neutrality. As the BGH considered the CAS to be sufficiently independent and neutral, the Court found it to qualify as a proper institutional arbitration organization under German civil procedural law and, therefore, to produce arbitration awards that are legally binding. The BGH did not find any reasons that would have led to an invalidity of the arbitration agreement. The Court, therefore, considered the arbitration award to be recognizable under German law, thus producing a binding effect.

Implications of the BGH's Judgment

The BGH is the highest court in the German civil court system. Still, the judicial dispute about this case is not over. Following the BGH's judgment, Ms. Pechstein lodged a constitutional complaint before the German Federal Constitutional Court (BVerfG), arguing that her right to access to justice as well as her right to occupational freedom have been violated. In addition, in 2010, Ms. Pechstein lodged a case before the European Court of Human Rights (ECtHR), invoking Article 6 (right to a fair trial) of the European Convention of Human Rights, which is still pending.

The relevance of this case expands beyond the immediate dispute. Considering the importance for the international sports community to progress in the combat against doping, it appears vital also to gain clarity on the protection of athletes. This case has shown that sports arbitration is a rather specific field. While arbitration awards are to be given effect in all countries (currently 156) that are party to the New York Convention of 1958, the question of whether or not awards issued by the CAS produce such an effect is rather controversial. For German athletes, the BGH's judgment produces some clarity. It is, however, possible that courts in other jurisdictions will arrive at different conclusions. The outline of the dispute in Germany in this article gives some indication as to which points might play a role in the evaluation. By reviewing the history of the case before the German courts, the composition of the panel of arbitrators can be identified as a major concern. In this context, it is noteworthy that recent reforms of the CAS have indeed addressed the composition of the arbitration panel. For instance, former athletes are encouraged to act as arbitrators, and the list of which persons may be chosen as arbitrators has expanded. Considering the current concerns regarding the credibility of sports in terms of doping, it is extremely important to provide a swift dispute resolution system that ensures sufficient and fair hearing safeguards for athletes. The *Pechstein* case may have served to promote the development of the CAS in this desirable direction. ◆

Arbitration in Myanmar—The Best Option?

By William D. Greenlee, Jr.

There is a plethora of attractive commercial reasons to invest in Myanmar, including, but not limited to, the country's abundance of natural resources, an economy that is ripe for investment in every sector, a sizeable prospective consumer base with vast untapped opportunities, and a comparative lack of competition. To foster future foreign investment, Myanmar recently updated, modernized, and adopted a new Arbitration Law.

Enacted on January 5, 2016, the new Arbitration Law represents another important development that will lessen the legal risks of investing in a frontier market like Myanmar. For the first time, Myanmar sets out the procedures for the recognition of foreign awards in the country. Enabling and codifying the procedures for the enforcement of foreign awards provides foreign investors with a key conduit to settle potential disputes and thus a more amenable legal environment for their projects in Myanmar.

Promulgating laws like the Arbitration Law is part of the continued effort by the government to provide more legal certainty and lessen legal risks common in frontier markets. The efforts of the government are paying off after a lull toward the end of 2015 and 2016, during which international investors watched to see the results of the election and the economic and foreign investment policies of the new government. Foreign direct investment into Myanmar is again on the rise.

Despite these positive developments, it is still prudent for foreign investors to arbitrate offshore. At this bourgeoning stage, the commercial environment and Myanmar courts lack experience in the use and implementation of the Arbitration Law and more generally with arbitration proceedings. Therefore, an arbitration proceeding in a neutral third-party jurisdiction with a fully developed legal system and experience in complex commercial arbitration proceedings may be more transparent and more efficient. Holding arbitration proceedings abroad limits the scope of Myanmar courts' involvement to simply enforcing a foreign arbitrated award, leaving the main benefit of the Arbitration Law of allowing foreign investors to arbitrate offshore. In the future, however, the Arbitration Law will likely coalesce an environment in Myanmar itself that will encourage arbitration in Myanmar.

The New Arbitration Law

The enactment of a new Arbitration Law represented a significant step forward for fostering foreign investment by creating a basic legal framework for dispute resolution that takes into account domestic and foreign arbitration. This new law gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which Myanmar acceded to in 2013. It replaces the Myanmar Arbitration Act of 1944 and is based on the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted and implemented in many countries.

Historical and Political Background

In recent years, the Myanmar government has worked to liberalize policies and encourage foreign investment in the country. This is contrary to pre-2011 military junta polices that some have characterized as socialist and isolationist in nature. The most significant law enacted was the Foreign Investment Law of 2012 (FIL). This was followed by the passing of numerous other laws and regulations, further encouraging foreign investment into the country.

Historic elections in November 2015 ended decades of authoritarian military rule and for the first time awarded the National League for Democracy (Aung San Suu Kyi's party) a majority in parliament. Since the election victory, Myanmar has been bearing witness to vast and sweeping political changes, including a ceasefire agreement with many of the country's armed groups, and initial dialogue to explore constitutional reforms that could reinvigorate Myanmar as an inclusive, multi-ethnic federation. Further laws have been

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enacted to enshrine international standards and global best practices in the body of local legislation. This is all part of Myanmar's renewed efforts to end over half a century of political and economic isolation, casting off the shadow of its former pariah status and securing the foundations for a revitalized, vibrant, and potentially very successful nation.

Foreign investors demand a stable political environment and clear, unambiguous laws that meet international standards to ensure that their investments are well protected. In this regard, should disputes arise concerning an international investment, it is often best to settle it by way of arbitration.

Arbitration Framework before the Enactment of the Arbitration Law

Although Myanmar signed the New York Convention in 2013, doubts and confusion persisted as to the enforceability of foreign awards in Myanmar as the Arbitration Law was not enacted until January 2016.

The 1944 Arbitration Act only provided for domestic arbitration and did not provide a framework for the recognition and enforcement of foreign arbitral awards. Under the 1944 Arbitration Act, a Myanmar arbitral award could not generally be enforced abroad and was only enforceable against a foreign party within the country if it had assets in Myanmar. Theoretically, foreign arbitral awards could have been enforced in Myanmar; however, for decades there were no reported cases. Additionally, a foreign award was only enforceable if it was rendered in a country that had signed the Geneva Protocol on Arbitration Clauses 1923 or the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. In reciprocity for the apparent failure of Myanmar to recognize foreign judgments, Myanmar arbitral awards were generally not recognized abroad.

Arbitration Law and Its Application

The new Arbitration Law is primarily based on the United Nations Commission on International Trade Law (UNCITRAL) rules. It is expressly aimed at settling domestic and international commercial disputes in a fair and effective manner, while recognizing and enforcing foreign awards to encourage the settlement of disputes through arbitration. UNCITRAL rules provide well-established international standards for arbitral procedures. In implementing the Arbitration Law, Myanmar has elected to align itself more closely with international norms and provide structures and processes that will be familiar to investors in more developed jurisdictions.

The Arbitration Law makes a distinction between local arbitration, foreign arbitration, and the recognition of foreign awards (as discussed later in this article). In this regard, the Arbitration Law predominantly governs domestic arbitration proceedings, while also recognizing foreign arbitration occurring outside Myanmar. While combined legislation for both domestic and foreign arbitration is common in Asia, this has occasionally resulted in uncertainty in countries like India and Malaysia. The key provisions determining the applicability of the Arbitration Law to foreign arbitration are under Section 2. The most relevant sections regarding foreign arbitration are:

- Section 10: Reference to arbitration and stay of a suit before a court;
- Section 11: Power of the court to intervene in an arbitration proceeding;
- Section 30: Court assisting in taking evidence;
- Section 31: Court enforcement of the interim orders of the arbitral tribunal; and
- Chapter 10: Recognition and enforcement of foreign arbitral award.

Local and Foreign Arbitration

Domestic arbitration is defined as arbitration that is not foreign arbitration. Foreign arbitration is further defined as one where (1) one of the parties to the arbitration has its place of business situated in a country other than Myanmar at the time of execution of the arbitration agreement; (2) the place of the arbitration as stated in the arbitration agreement or the place to conduct the arbitration in accordance with the arbitration agreement is situated outside the country in which the parties have their place of business; (3) taking into account commercially related business obligations, the place where a substantial part of the obligations is to be performed or the closest place connected to the subject matter of the dispute is situated outside the country in which the parties have their place of business; or (4) the parties to the arbitration agreement have expressly agreed that the subject matter relates to more than one country.

Furthermore, the Arbitration Law provides the definition of a "foreign arbitration award" as an award issued in a territory of the New York Convention signatory state other than Myanmar. This will be the most common scenario regarding contracts involving foreign investors, as it is common practice to include an arbitration clause referring to a third country. In Myanmar, contracts often designate Singapore as the foreign seat of arbitration.

Place of Arbitration

Under Section 23 of the Arbitration Law, the parties to an arbitration agreement are free to agree upon the location of any potential arbitration. Should the parties fail to determine a place, the arbitral tribunal (constituted by the parties

to the dispute or court in accordance with Section 13 (d) of the Arbitration Law) will make a determination based on the circumstances of the case and the convenience of the parties. The Arbitration Law defines an arbitral tribunal as comprising a sole arbitrator or a panel of them. Subject to other Section 23 stipulations, the arbitral tribunal is free to meet at any place of their choosing for consultation among its members; to hear witnesses, experts, or the parties; or for the inspection of goods, other properties, or documents. However, the parties to an arbitration agreement may preclude this right of the arbitral tribunal, subject to an agreement.

Number of Arbitrators and the Granting of Immunity (Domestic Arbitration)

Referring to arbitration proceedings held in Myanmar, the parties to the arbitration are free to determine the number of arbitrators. Where no determination has been provided in the relevant agreement, the number of arbitrators will be set at one. Unless the parties have agreed otherwise, according to Section 13(a) there is no nationality requirement for the arbitrators. As per Section 13(b), the parties may also agree on the appointment procedures for the arbitrator(s). The language to be used in the proceedings is also left to the mutual discretion of the parties.

Section 13(c) provides that, when a party fails to appoint its arbitrator or, in the case of a panel of three, when there is a failure to appoint the third arbitrator, either party may require the chief justice to make the necessary appointment. The chief justice refers to either the Chief Justice of the High Court of the Region, the High Court of the State for domestic arbitration, or the Chief Justice of the Union for international arbitration.

Section 20 grants arbitrators immunity for their acts or omissions provided that they act with due care during the arbitration.

Power of the Myanmar Courts to Intervene

Section 11 grants the Myanmar court the power to intervene in arbitration procedures in both domestic and international arbitration proceedings. Unless otherwise agreed to by the parties to the arbitration agreement, the court may, upon a request, grant an interim injunction, appoint a receiver, pass an order regarding the property in dispute, sell the property, and preserve any evidence. As per Section 11 (d) of the Arbitration Law, the Myanmar court will only deal with matters over which the authorized persons of the parties or the arbitral tribunal has no authority or is unable to handle them effectively. The arbitral tribunal or a party to the proceedings (with the arbitral tribunal's prior approval) may apply to the court for assistance in taking evidence. Typically, this option would only be exercised by the parties or the tribunal due to a peculiar situation, for instance, one where the witness cannot travel to the seat of arbitration, the documents cannot be sent to be exhibited to an arbitration tribunal, or the parties deem it necessary for evidence to be examined by a court.

As per Section 31, the Myanmar court will enforce the interim order of the arbitral tribunal as if it were its own decision. However, in relation to arbitration proceedings conducted outside Myanmar, an interim order for such proceedings is only enforceable in Myanmar if the applicant presents strong evidence that similar types of orders are exercised within the country. The Arbitration Law does not define the term "strong evidence."

Section 32 provides that domestic arbitration will be decided according to the laws currently in force at the time of the proceedings, whereas foreign arbitration will be decided according to the governing laws and rules chosen by the parties.

Enforcement of Domestic and Foreign Arbitral Awards

Any domestic arbitral award will be enforced under the Code of Civil Procedure as if it were a decree issued by the court. The court may decide not to enforce a domestic arbitral award if the respondent demonstrates that the arbitral tribunal was not the competent authority to issue this award (Section 40). Such situations would include where the arbitral tribunal either exceeded its jurisdiction or decided a dispute not falling within the matters under arbitration, or the composition or proceedings of the tribunal do not accord with the arbitration agreement.

Regarding foreign arbitral awards, a party applying for the enforcement of one must do so before the court in Myanmar and produce the following documents:

> (i) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (ii) the original agreement for arbitration or a duly certified copy thereof, and (iii) such evidence as may be necessary to prove that the award is a foreign award.

Furthermore, if the foreign arbitral award is not drafted in English, a translation certified as accurate by the ambassador or consular officer of the party's home country will also be required. The above-listed documents are necessary for the Myanmar courts to accept and decide upon an enforcement application.

Foreign arbitration awards are enforced by court decree under Myanmar's Civil Code of Procedure, and the degree must be made within 90 days of the award's issuance.

The court, according to Section 46, may refuse to recognize foreign awards on the following grounds:

1. One or more of the parties to the arbitration agreement

lacked the competence to conclude such an agreement. For instance, a person representing a company in the dispute was not properly authorized to do so or was not of sound mind;

2. The agreement is invalid under the law governing the arbitration agreement or in a situation where no such governing law was provided, under the law of the country where the arbitration award was passed;
3. Due process regarding notice requirements was not followed. This refers to cases where the notices of appointment of the arbitrator or the arbitration proceedings were not provided to the party against whom the award was being enforced against, thus preventing a party from presenting his or her case before the arbitration tribunal;
4. The award concerns a dispute not falling within the matters under arbitration, or it concerns matters beyond the scope of the arbitration proceedings;
5. The composition of the arbitral tribunal or the arbitral procedures were at variance with the agreement of the parties or, lacking such an agreement, were not in accordance with the law of the country where the arbitration took place; and
6. The award has not yet become binding on the parties, has been set aside, or was suspended by a competent authority of the country where the award was made.

Furthermore, a court may decide not to enforce a foreign arbitral award should its enforcement be contrary to Myanmar public policy or if the grounds of the dispute cannot be settled through arbitration within the country. It would be an extraordinary occurrence for a court to make this kind of ruling.

However, the definition of "public policy" is somewhat ambiguous in the enacted Myanmar Arbitration Law, which is written basically in Myanmar language, and can create confusion. The term used is "*Amyo Thar Akyo Si Pwar*," which does not translate into "public policy" and is not legal parlance in Myanmar, but rather refers to the benefit of society and morality. It, therefore, remains unclear as to whether an act contrary to Myanmar public policy is limited to a violation of substantive law or extends beyond that.

Entry into Force of the Arbitration Law

Finally, Section 58 expressly states that the Arbitration Law only applies to arbitration procedures commencing after the law's enactment.

Conclusion

The implementation of the new Arbitration Law in January 2016 certainly represents a significant step forward in achieving dispute resolution in Myanmar. Additional time is needed to assess whether the Arbitration Law can provide a sufficient foundation for arbitration to be adopted as the best approach for settling commercial disputes in Myanmar and whether arbitration would be best conducted in Myanmar or abroad. ◆

International Law and the South China Sea

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of the Sea. Third, the United States has a national interest in the maintenance of peace and stability, unimpeded lawful commerce, and respect for international law, including freedom of navigation. Lastly, claimants should explore all diplomatic and other peaceful avenues and refrain from the use or threat of force.

In 2014, the State Department issued a detailed legal and technical analysis of China's claims of islands and waters in the South China Sea as part of its longstanding "Limits in the Seas" series. U.S. Dep't of State, Maritime Claims in the South China Sea, Limits in the Seas No. 143 (Dec. 5, 2014), https://www.state.gov/documents/organization/234936.pdf.

Speakers included Richard C. Visek, the Acting Legal Adviser; Robert K. Harris, an Assistant Legal Adviser in the Office of East Asia and Pacific Affairs; and Oliver M. Lewis, an Attorney Adviser in the Office of Oceans, International Environmental and Scientific Affairs. Susan L. Karamanian, Associate Dean for International and Comparative Legal Studies and Burnett Family Professorial Lecturer in International and Comparative Law and Policy at George Washington University Law School, moderated the discussion. "L" is the informal short name within the U.S. State Department for the Office of the Legal Adviser.

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China's Transition to a Market Economy Status Nullified by New U.S. Trade Remedies Legislation

By Dharmendra N. Choudhary

A fervent debate has been raging about China's future status after December 11, 2016, when the 15-year transition period stipulated under paragraph 15(a)(ii) of China's WTO Accession Protocol expired. The issue under contention is whether China would be allowed to graduate from non-market economy (NME) (i.e., where exporters' production and pricing decisions are presumed to be controlled by the government) to market economy (ME) country (i.e., no government control in production and pricing decisions) status in U.S. antidumping (AD) and countervailing duty (CVD) proceedings.

China joined the WTO 15 years ago on Dec. 11, 2001. Under paragraph 15(a)(i) of the WTO Accession Protocol, if Chinese producers could demonstrate prevalence of market economy conditions in a given industry, the dumping calculations for all producers of that industry must be made based on Chinese prices or costs. Conversely, paragraph 15(a)(ii) states that if such a showing is not made, importing members could use alternative methodologies for the entire industry under investigation. Finally, paragraph 15(d) enables individual WTO members the discretion to grant market economy status to China or to specific Chinese industries pursuant to their individual national laws, at any time. Taken together, these provisions establish a framework wherein the importing country simply presumes that the price of export goods are controlled or influenced by the Chinese government. The burden of proof to rebut such a presumption and establish the contrary—that the export goods are produced and priced under market economy conditions and without any direct involvement or control of the Chinese government—is squarely placed on the Chinese exporter.

The terms of paragraph 15(d) provide that subparagraph 15(a)(ii) shall expire 15 years after the date of the WTO Accession Protocol, i.e., December 11, 2016. The possibility that this expiry could trigger China's transition to a market economy country is why this date has assumed such a significance.

However, a dispute exists in the legal community whether the expiration of the paragraph 15(a)(ii) provision now requires countries to automatically grant China ME status in all future AD/CVD proceedings or whether countries can continue to apply the NME methodology to China. China prefers an ME status for reasons explained later. Predictably, several U.S. industries have formed a coalition to oppose any change from China's NME status, and several petitioners have published papers on this issue. They argue that, given the ambiguous drafting language of paragraph 15, the U.S. Department of Commerce can continue to consider China a NME even after the expiration of paragraph 15(a)(ii). Commerce will likely make a decision on this issue in the context of an actual AD proceeding.

This article focuses upon a different but related and important issue. Recent amendments to U.S. trade laws under the Trade Preferences Extension Act (Trade Remedies Act), enacted on June 29, 2015, give the Department of Commerce a vast array of new tools that can be applied against a country otherwise designated as ME. The amendments generally afford Commerce more discretion and leverage over certain key issues that are determiners of quantum of AD/CVD duties.

In the context of ME AD cases, the Trade Remedies Act gives Commerce the option to replace the current methodology with a set of tools that are potentially punitive and that may lead to uncertain outcomes. Based on the timing of the Trade Remedies Act amendments, it is widely believed that the real target of these amendments is China, when it eventually transitions to ME status. An overarching concern is that these amendments could potentially nullify the gains of fair treatment and predictability that Chinese exporters otherwise would have enjoyed pursuant to the application of the prescribed methodology for ME AD cases.

While the Trade Remedies Act has spawned a new set of laws, relating to material injury, adverse facts, and a limit on the number of voluntary respondents that equally impact ME and NME countries, discussed below are only such provisions that seem to be especially designed for the purpose of countering China being designated as an ME.

Widened Ambit of a "Particular Market Situation"

At the heart of an antidumping investigation lies a comparison between the price at which a product is sold in the United States (export price) and the normal value of goods. In the case of NME countries, Commerce determines the normal value or fair value of goods based on a convoluted methodology. The normal value of goods is obtained by aggregating the value of all inputs utilized in producing export goods, and the value of each input is determined based on the price data of such input in a surrogate country. A surrogate country is a third country that is held to be

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economically comparable to China based on parity of its per capita gross national income (GNI). This indirect valuation methodology often yields a skewed and distorted normal value of goods and is generally detrimental to NME exporters due to an inherent unpredictability in the choice of surrogate country and surrogate value of individual inputs.

Conversely, for ME countries, Commerce applies simpler and more predictable methodologies, determining normal value based on an exporter's sales prices in the home market (i.e., country of manufacture and export) and, in absence of home market sales, on his third country market sales prices or by a cost construction method. That is why Chinese exporters had been eagerly waiting for December 11, 2016, in order to stake a claim for ME treatment in AD/CVD proceedings.

For ME countries, prior to the Trade Remedies Act amendment, an exporter's home market sales prices could be disregarded only absent a "viable" home market (i.e., home market sales that constitute 5 percent or more of its sales to the United States) or if a "particular market situation" was determined to prevail in the home market.

The U.S. law does not identify the term "particular market situations," but several examples are set forth in the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreement Act (URAA) of 1994, by which the U.S. government introduced several changes pursuant to the multinational WTO agreement on trade issues including AD and CVD. Under the SAA, "particular market situations" include:

1. where a single sale in a foreign market constitutes 5 percent of sales to the United States;
2. where there are such extensive government controls over pricing in a foreign market that prices in that market cannot be considered competitively set; and
3. where there are differing patterns of demand in the United States and a foreign market. For example, if significant price changes are closely correlated with holidays that occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.
4. The above instances are mere illustrations.

The Trade Remedies Act expands the scope of a "particular market situation." Amendments in this regard encompass changes to the definition of "Ordinary Course of Trade" (19 U.S.C.S. § 1677 (15)); "Normal Value" (19 U.S.C.S. § 1677b(a)(1)(B)(ii)(III)); and "Constructed Value" (19 U.S.C.S. § 1677b(e)).

The ramifications of this expansion could be a potential game-changer for China whenever it does become an ME country, as follows:

1. The recent amendments confirm that, in market economy AD cases, Commerce retains the ability to reject home market sales prices, its default choice for normal value, by invoking a "particular market situation."
2. The amendments also enable Commerce to reject a normal value based on an exporter's third country price, if the Department simply determines that a "particular market situation" exists, which also covers instances of "particular market situation" in the *home* country. Prior to this amendment, a third country price could be rejected on this ground only if a "particular market situation" existed in such third country.
3. The amendments expand the scope of a "particular market situation," enabling Commerce to disregard not only sales prices of finished goods but also costs of production in a country if a particular market situation exists such that "the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade." In order to effectuate its widened power, Commerce would need to examine broader economic considerations, including the government's role in allocating resources and granting subsidies to material inputs and other non-material inputs like energy, instead of focusing solely on the facts surrounding the sale of the merchandise under consideration.

As such, in ME AD cases, the mischief of a "particular market situation" in the home country has been widened, which enables Commerce to reject not only the home market sale price of merchandise under consideration, but also two additional metrics of normal value—third country sales prices of merchandise under consideration and the constructed cost value of such merchandise.

Read together, these amendments result in a legal framework where Commerce could conveniently deny the substantive benefits of an ME country status to China in AD/CVD proceedings. Commerce would merely need to establish that a "particular market situation" exists either in China or even within the specific industrial sector. Given the undefined nature of this term, Commerce could easily claim prevalence of "particular market situation" in China on grounds of government subsidies or even alleged pervasive government controls. Armed with this threshold finding, Commerce could then proceed to reject not only the exporter's home market prices but also its third country prices, as well as constructed costs of production. Consequently, in the event Commerce were to make a determination of a "particular market situation" in a *de jure* ME China, it could potentially resort to the convoluted surrogate country and surrogate value methodology, applied in NME AD proceedings, for determining normal value of goods in China.

At this point, Commerce has yet to make a determination invoking the amended law regarding a "particular market situation" anywhere. However,

it is feared that the widened ambit of a "particular market situation" portends ill for China, whenever the country succeeds in ascending to the ME status.

The recent amendments have introduced certain NME tools that also could be applied to an ME China, upon invoking a "particular market situation." So, it is pertinent to analyze the recent amendments that affect NME AD cases, as well.

Commerce's Discretion to Reject Cost/Prices Due to Subsidy or Antidumping Order

One amendment in the Trade Remedies Act pertains exclusively to NME countries. Pursuant to 19 U.S.C.S. § 1677b(c)(5), Commerce has been granted wide discretion to disregard price or cost values without any further investigation, once the Department determines that either broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.

While codifying Commerce's existing practice on this issue, these changes nevertheless expand the boundaries of its discretion. While determining the surrogate values of inputs in NME AD proceedings, Commerce has had a long-standing policy to disregard the price/cost data that were suspected to be distorted by either subsidy considerations or linked to an antidumping Order. For instance, while deriving surrogate values based on import data reported under a tariff heading, Commerce excluded import data reported from generally subsidized countries—India, Thailand, Indonesia, and South Korea—and if the imported goods were subject to an AD Order in the surrogate country. The amendment maintains this policy.

The real intent of this particular amendment seems to be to cover the price/cost of inputs purchased by NME producers from certain market economy countries. The portion of inputs purchased from a market economy country (ME inputs) is valued based on the actual price data, provided the input was produced in a market economy country and the payment was made in a market economy currency. However, when such a market economy country happened to be one of the generally subsidized countries such as Thailand, India, Indonesia, or South Korea, Commerce did a further analysis based on the three-part test enunciated by the U.S. Court of International Trade in *Fuyao Glass Indus. Grp. v. United States,* 29 CIT 109, 114 (2005). In *Fuyao Glass*, the court held that Commerce must justify its belief or suspicion of price subsidization with specific and objective evidence. Under the standard applied in that case, Commerce was required to show that "(1) subsidies of the industry in question existed in the supplier countries during the POI; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier not to have taken advantage of such subsidies."

As such, in analyzing the viability of price of ME inputs, Commerce and the Court had to adhere to this three-part test protocol to determine whether the supplier producing such inputs in the generally subsidized country could have benefitted from subsidies. This analysis required Petitioners to present specific evidence of subsidies and link it with the supplier industries. As such, *Fuyao Glass* test did not always yield a favorable outcome for Petitioners. Even though the two 2014 Court opinions on this issue—*Gold East Paper (Jiangsu) Co. v. United States*, 991 F. Supp. 2d 1357, 1367 (Ct. Int'l Trade 2014) and *CS Wind Vietnam Co. v. United States*, 971 F. Supp. 2d 1271, 1294 (Ct. Int'l Trade 2014)—ultimately resulted in the same outcome (i.e., rejection of price data of inputs purchased from Thailand and South Korea), U.S. domestic industry was less than happy with the two remands on this issue by Senior Judge R. Kenton Musgrave, asking Commerce to do a more thorough analysis consistent with *Fuyao Glass*. If knowledgeable sources are to be believed, this particular amendment was brought in to present Commerce and the Court with a *fait accompli* as soon as the existence of broadly available export subsidies in the supplier country was established as a fact. Consequently, Commerce and the Court shall have no discretion on this issue.

However, by enabling Commerce to reject the ME input prices based merely on the existence of broadly available export subsidies, this issue has now been settled with respect to those NME exporters who may be procuring their inputs from an ME country where broadly available subsidies or specific instances of subsidy benefits could be demonstrated. In such instances, pursuant to the new *per se* general subsidy rule, Commerce will simply disregard the market economy price and value inputs by applying a surrogate value data.

The scope of price/cost values "subject to an antidumping order" are not quite clear. For instance, it is unclear whether Commerce could reject the market economy price of an input if such input were subject to an antidumping order in a third country. While such an expansive interpretation may appear illusory and illogical to even pursue, it has posed a real conundrum for NME exporters, who are ensnared in U.S. AD/CVD proceedings. There are good reasons to be worried on this score. Article VI:6(b) and (c) of GATT 1994 provides for imposition of AD/CV duties based on material injury to the industry in a third country. This provision could be cited in support of unreasonably stretching out the scope of "subject to an antidumping order" to include an AD Order operative in a third country as well.

Consequently, before procuring an ME input, a NME producer would first be required to engage a consultant to thoroughly examine whether the input in question is subject to or could potentially be subjected to an AD Order in any country around the world. While this issue will be settled in the course of an actual AD proceeding, for now, NME producers and exporters are already struggling to find a probative answer to this question before consummating their

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Haya Rashed Al-Khalifa

By M. Salman Ravala

Haya Rashed Al-Khalifa is a lawyer and diplomat from Bahrain who, amongst other appointments, served as the President of the 61st United Nations General Assembly from 2006–2007 and as Bahrain's first female Ambassador to France from 2001–2004. She currently serves as a Council Member of the American Arbitration Association, as a Member of the Advisory Council of the International Mediation Institute, and as a Chairperson of the Board of Trustees of the AAA-Bahrain Chamber for Dispute Resolution

M. Salman Ravala: You have had an illustrious legal career—from private practice to government service to key leadership roles on the world stage. Tell us how your focus on international law began.

Ms. Haya Rashed Al-Khalifa: It was in the early years of my law practice that I was fortunate to get a few international arbitration cases. That initial stream of cases involved parties from various nations: Bahrain, China, France, Saudi Arabia, and even the United States. Not only did they allow me to have a deeper understanding of international business disputes, but also specifically analyze threshold issues like choice of law and arbitrability. This was exciting for me because I speak three languages, have diplomas in public and comparative law, and I was fortunate to get cases relating my studies.

Ravala: Even within the field of international law, you specialize in several areas. Tell our readers briefly about each of those and what you like most about each such practice area.

Ms. Haya Rashed Al-Khalifa: My primary focus is on arbitration, banking and finance, and contracts law. While each is unique in its own way, the underlying commercial theme of these areas is very interesting to me. Analyzing legal theories, developing case strategies, and helping my clients from that context is rewarding. The law is evolving and is open to many interpretations, which pushes me to keep learning every day. My cases force me to have an understanding of not just local law or statutes but also laws of other jurisdictions and systems—I'm always in comparative analysis mode. A legal concept may exist in common law, and it's my job as the lawyer to translate that concept or set of laws into civil law, for example. It is like a garden with many flowers, and, if you can understand different sets or principles, or, in our case, legal cultures and set of laws, the end result can be very enriching and fulfilling.

Ravala: Being one of the first women to practice law in Bahrain, what challenges, if any, did you face while pursuing your goals?

Ms. Haya Rashed Al-Khalifa: I come from a very conservative background so when I first presented the idea of going to law school and becoming a lawyer to my family, I was surprised at the level of support they provided me. The system unfortunately was not so supportive, as you can imagine. Whereas it took my male counterparts one or two months to obtain their law license, it took me over a year to do the same. People were

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discouraging and questioning what I was doing thinking of the field of law. I did not know any better at that time, so I remained quiet, politely responding in defense when I could, and focusing my energies on learning the art and practice of law. I wanted to use my actions to show the community that it was not about men or women, but about hard work, talent, and dedication. I still remember when I started my firm. It was just me and another woman. In the beginning, we only had small cases, but we quickly developed a track record of winning and soon bigger clients started coming to us. While practicing, we also observed many marital cases and how decisions by male judges in the cases were inadequately addressing women's needs. That is when we decided that, in addition to practicing law, we have to do something for our community and society. We started presenting lectures and offering workshops, which eventually reached local legislators and even judges. The government of Bahrain took notice of my efforts and has been extremely encouraging. We were able to pass milestone legislation affecting women's rights, and the government has even appointed me to various positions representing the country on the world stage.

Ravala: How did you come about your role at the United Nations?

Ms. Haya Rashed Al-Khalifa: The perception about the Middle East remains disquietingly negative. The King and the government leadership wanted meaningful change to showcase to the world that Bahrain is committed to inclusivity and pluralism. I had already served as Ambassador to France, Belgium, Switzerland, and Spain, and, with my previous appointment as Bahrain's Permanent Representative to UNESCO, the combination of experience, preparation, and some good luck all fit in perfectly to help me become the first Arab and Muslim woman to serve as the President of the United Nations General Assembly.

Ravala: Give us some insights into the job duties and day-to-day work responsibilities of the President of the General Assembly.

Ms. Haya Rashed Al-Khalifa: As many readers will be familiar, the United Nations General Assembly debates and related meetings run from approximately 10:00 a.m. to 7:00 p.m. every weekday starting in late September and ending in early October for about four weeks. The President also has to attend meetings with the Assembly's many Vice Presidents, Chairs of the six Main Committees, and members of the United Nations Security Council. The President and her team start the day very early, planning for that day and week, dividing work, attending committee meetings, preparing and presenting reports, delivering speeches, and ensuring all targets are met within allotted deadlines. Of course, working diplomatically and fairly with each Head of State and their country's delegation is also an important part of the job. Managing cultures and personalities of 192 different member nations, networking with world leaders, and attentively listening, all with the end result of producing tangible results that could positively impact our world, was difficult at times, but we made significant progress during my term.

Ravala: Our world has changed quite a bit since your service at the United Nations. In your opinion, what is one of the most important issues that the United Nation faces today and how do you think it could be resolved?

Ms. Haya Rashed Al-Khalifa: Our very existence as human beings is at risk, and the United Nations must be present in a clear and efficient way. The United Nations has been at the forefront of global disputes and issues since its inception, but our world is changing and the role of the United Nations must be clarified with it. I believe education can play a vital role and the P5 countries, permanent members of the Security Council, can push the entire global body of nations to come together to nurture talent across boundaries by ensuring young people have access to basic education. The United Nations is seen as a beacon of hope for everyone—all of us—and it must use its powers to shine its light and help to uplift the people we serve.

Ravala: One of your biggest platforms has been gender equality. What do you believe are important areas that our global community needs to address in order to reach gender equality?

Ms. Haya Rashed Al-Khalifa: We have to look at gender equality from both a global and local lens. No matter how perfect our ideas of gender equality become, if national and local legislation cannot support those ideas in line with the evolving world, we will always be at a loss. Education is another important component. For us in the Gulf, Islam is a way of life for many. It has beautiful teachings about women's rights, but unfortunately our region, which could be leading conversations about gender equality for the entire world, is lagging in spearheading conversation on this topic. I sincerely hope that everyone reading this interview will do their part in this pursuit of justice towards gender equality.

Ravala: You are involved on the board of numerous organizations, including some leading international mediation and international arbitration organizations. How is board membership different than practice of law?

Ms. Haya Rashed Al-Khalifa: I am Chairperson to the Board of Trustees of the AAA-Bahrain Chamber of Dispute Resolution. I serve as Council Member to the American Arbitration Association, a leading conflict management institution globally, and also serve on the Advisory Council of the International Mediation Institute, amongst other appointments. The key focus by service on boards is to observe market trends, share ideas with other leading law practitioners, and provide practical solutions. We live in a mixed legal culture and my service with these leading organizations is focused on studying, developing, and

advocating for the highest standards of international best practices with cutting edge resources for the international business community that can thrive in the 21st century legal landscape.

Ravala: In your opinion, what are some of the upcoming challenges and trends in arbitration?

Ms. Haya Rashed Al-Khalifa: In late 2016, the International Chamber of Commerce and AAA-BCDR updated its Rules, as have other institutions, which are designed to improve efficiency and transparency in the arbitral process. Diversity is also another important trend that both users of arbitration and arbitration institutions are seriously discussing. Of course, national changes like the impact of the Brexit referendum and the election of U.S. President Donald Trump will have to be observed to see how the legislative framework develops to impact international arbitration globally. In the Gulf, we will have to continue debunking myths in favor of alternative dispute resolution.

Ravala: And, what's next on your list after all these accomplishments?

Ms. Haya Rashed Al-Khalifa: The pursuit of justice and the practice of law have allowed me to take my professional life to new heights. It is really the most noble of professions. I have enjoyed representing my clients and am proud to have served my country regionally and on the global stage. I love my work as a lawyer so I would like to continue working at my law firm to represent my private clients, but service to others is also very important to me. For over 20 years, I fought for gender equality and women's rights, and now I want to fight for youth empowerment and economic stability for the future of our world. Education is very important, and it is our job to equip the less fortunate with tools of success that can make a positive impact on our human race.

Ravala: Diversity in the Bar is growing. What advice do you offer women and minorities who want to challenge the status quo and take leadership roles in their legal careers? Or those young lawyers interested in the field of international law generally.

Ms. Haya Rashed Al-Khalifa: Nothing in the world worth having comes easy, and people will see your talent and hard work over your race, gender, or religion. Focus on your work and practice law with integrity, excellence, and good intentions to reach your goals. There is no elevator for success; you have to take the stairs. Continue reading, writing, and don't wait any longer to start engaging in leadership roles and being physically present in bar associations and the larger legal community. But don't stop when success arrives at your doorsteps. Always remember where you came from and try your best to give back to others. ◆

China's Transition

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raw material purchase transactions with other countries.

In so far as the above amendments enable Commerce to reject market based price data, these are detrimental to Chinese exporters. Moreover, these provisions could continue to be used in the future even after China becomes an ME country, by simply invoking a "particular market situation."

Conclusion

The amendments to US trade law through the Trade Remedies Act of 2015 could potentially be applied to nullify the benefits of an ME country to China should it eventually acquire an ME status. In such a situation, China could continue to remain as a de facto NME country, even if it becomes *de jure* an ME country. This specter renders the current debate surrounding proper interpretation of paragraph 15 of WTO-China Accession Protocol mostly academic and moot. ◆

EU Bail-In Rule and Its Impact on U.S. Contracts

By Anastasia Herasimovich

As part of European banking reforms adopted in response to the global financial crisis, Article 55 of the EU Bank Recovery and Resolution Directive (BRRD) authorizes European regulators to "bail-in" any failing European Economic Area (EEA) financial and credit institution by writing down, converting into equity, or otherwise modifying certain liabilities. In a bail-in, a financial institution is rescued by forcing its creditors to write off debts owed to them, as opposed to a bail-out, where third parties rescue failing financial institutions (e.g., sovereign states use taxpayer money). In practical terms, from January 1, 2016, Article 55 of BRRD requires certain EEA institutions, including European banks, to include a contractual bail-in provision in many non-EEA law governed contracts, including those governed by U.S. law.

In terms of timing, Article 55 applies only to (i) new contracts entered into after January 1, 2016; (ii) new liabilities arising under a contract entered into before January 1, 2016; and (iii) material amendments of a contract entered into before January 1, 2016.

As to what contracts and parties the new rules apply, Article 55 of BRRD applies when the following three conditions are satisfied: (i) the contract is governed by the laws of a non-EEA country (e.g., a credit facility, a guarantee governed by the laws of New York); (ii) an EEA financial institution is a party to the contract in any capacity whether as a lender, an administrative or facility agent, a security agent, a trustee, a purchaser of receivables, or an issuing bank, and (iii) the EEA financial institution has a potential liability towards any of its counterparties under this contract, including any obligations to lend, pay, or indemnify in case of a contractual non-compliance or is subject to any potential claims in negligence or misrepresentation. BRRD covers all liabilities of an EEA financial institution, except for liabilities secured by a collateral, a pledge or a lien, deposits for small and medium enterprises below a certain cap, liabilities arising out of a fiduciary relationship, liabilities with a maturity of less than seven days, liabilities to employees, and liabilities to tax/social security authorities.

Bail-in powers have already been used by certain EU regulators. For example, in April 2016, the Austrian Financial Market Authority (FMA) shored up a $US9.1 billion hole in the balance sheet of Heta Asset Resolution AG by insisting on a 53.98 percent bail-in for all eligible preferential liabilities, cutting Heta's senior liabilities by 54 percent and extending the maturities of all eligible debt to the end of 2023. Annabelle Ruthven and Michael Speranza, *Bail-In and Contractual Recognition: The Impact on U.S. and Other Non-EU Counterparties and the Potential Impact of Brexit (Aug. 29, 2016), available at* https://www.kattenlaw.com/Bail-In-and-Contractual-Recognition-The-Impact-on-US-and-Other-Non-EU.

To date, many EEA international banks and other financial institutions have added bail-in language to their U.S. law governed legal documentation forms, which has generally been accepted by borrowers without significant objection. However, the new bail-in powers pose certain practical concerns to financial market players. For example, Brexit may give rise to the question of whether, in agreements that are subject to English (or Scottish or Northern Irish) law that are likely to continue for longer than two years, we should include a bail-in clause. Moreover, it is still unclear what is meant under "material amendment" or covered liabilities for purposes of the new rules since specific definitions are not provided in the legislation. Finally, whether contractual recognition clauses will be enforceable under U.S. state laws is an open question since there is no assurance that bail-in clauses satisfying Article 55 will be enforceable in non-EEA jurisdictions. The "wait and see" attitude is currently dominating the financial market, and any additional guidelines and clarifications by European authorities would be helpful to shed more light on potential issues relating to the implementation of new bail-in rules. ◆

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HIV and Drug Testing of Non-Ethnic Korean Foreign Teachers in South Korea Found Violative of Convention to Eliminate Racial Discrimination

L.G. v. Republic of Korea, CERD/C/86/D/51/2012 (12 June 2015).

Mark E. Wojcik

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), a United Nations convention, was opened for signature in 1965 and entered into force in 1969. As of January 2017, the treaty has 177 State Parties, including the United States, which signed the treaty in 1966 and finally became a party in 1994.

Under the CERD, State Parties "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races…" Pursuant to the CERD, each State Party "undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions…." and will "take effective measures to review governmental, national and local policies." Furthermore, under the CERD, each State Party will "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

The UN Committee on the Elimination of Racial Discrimination, which is composed of independent experts, monitors the implementation of the CERD by the State Parties.

In 2015, in the case of *L.G. v. Republic of Korea*, the Committee found that South Korea violated the CERD with mandatory HIV/AIDS and drug tests conducted on non-Koreans (i.e., foreign nationals who are not ethnic Koreans) who seek to teach and continue to teach English in South Korea.

L.G. v. Republic of Korea involved a national of New Zealand (L.G.), who had been employed in an elementary school in the South Korea as a native English-speaking teacher. Shortly after her arrival in South Korea, L.G. was, as a prerequisite for her job, required to be tested for HIV/AIDS and for illegal drug use. Korean citizen teachers and ethnic Korean non-citizen teachers are not required to undergo such scrutiny. These tests were originally a one-time requirement to register as an alien; however, provincial and municipal education offices in South Korea begun to require annual testing of foreign native-speaker teachers as a condition of renewing employment contracts.

While L.G. initially complied with the demand and underwent HIV and drug testing, she refused to undergo the same testing when required to do so in the following year as matter of principle and in protest against a discriminatory act. She was willing to undergo any tests also required of her Korean fellow teachers, but she would not undergo medical tests required only of foreigners and ethnic Korean non-citizens. On the ground of her refusal to undergo testing, L.G.'s teaching contract was not renewed. She could not remain in South Korea without a work visa.

After exhausting domestic remedies in South Korea to challenge her dismissal, L.G. filed a complaint with the Committee. In her complaint, she asserted that the mandatory HIV/AIDS testing of foreign teachers was put in place not for public health concerns but because of negative beliefs about the moral character of foreign teachers. L.G. alleged that the testing stigmatized and expressed hostility toward non-ethnic-Korean-foreigners and was based on judgmental attitudes that foreign teachers engaged in "immoral behavior."

In its answer, South Korea stated that annual medical testing for HIV/AIDS and for drug use was no longer specifically required of foreign teachers as of 2010 as a condition for contract renewal. L.G. replied that "the mere discontinuance" of the discriminatory policy "was not a complete remedy" for the violations of CERD. L.G. demanded a public apology and financial compensation for losing her job and for "the humiliation and loss of dignity that she was forced to endure as a result of standing up for her rights in the face of the discriminatory treatment that she had suffered."

The Committee found that South Korea had failed to investigate L.G.'s complaint to determine whether racial discrimination was at the root of the requirement to test only non-Korean foreign teachers for HIV/AIDS and drug use. The Committee found that other teachers who were Korean or ethnically Korean were not subject to those medical tests, and L.G. lost her employment in South Korea solely for refusing

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International Arbitration

By Kirstin Dodge and Delissa Ridgway, Co-Chairs, and Sean Stephenson, Publications Vice-Chair, ABA Section of International Law's International Arbitration Committee

From commercial arbitration between companies engaged in cross-border business transactions, to claims brought against States for taking property without payment of compensation, to claims by States against each other for violation of international law or treaties, and much more, international arbitration is an incredibly diverse field, requiring practitioners to be both flexible and sensitive, as the parties, counsel, and arbitrators often come from very different legal and cultural backgrounds.

International arbitration is one of the few ways to obtain a decision in a contested case that is enforceable—in most countries in the world—as a domestic court judgment. Parties agree to resolve disputes in arbitration to ensure that the dispute is heard in a neutral jurisdiction in the language in which they conduct business rather than in one of the parties' home courts and native language. Often contracts and treaties specify which arbitral institution's rules to use when resolving disputes, yet typically the rules leave parties and arbitrators wide discretion to agree on or order proceedings that fit the individual case.

Drawing from this fertile ground, we posed the following questions to practitioners, scholars, and specialists in the field of international arbitration, who are also members of the Section's International Arbitration Committee, to learn their views on current and emergent developments:

What is a top trend in international arbitration?

What is a major challenge in the field of international arbitration?

Where will the field of arbitration be in 10 years?

Their responses reflect the challenges posed to the field of international arbitration in light of criticisms of arbitrations that have been brought by investors against States under treaties established to encourage cross-border investment by protecting foreign investors from various types of State actions. International commercial arbitration has also been under fire by many users who have been frustrated with the time and expense required to obtain and enforce an arbitral award.

"Top trend: Back to the roots, simplify the proceedings; Major challenge: A perceived lack of transparency and independence of the process and the arbitrators, 'secret jurisprudence'—most of the perceived deficiencies of investment arbitration are or will be seen in commercial arbitration as well; and Arbitration in 10 years: Run by state institutions.

—**Manuel Liatowitsch**, *Partner, Schellenberg Wittmer, Zurich, Switzerland*

"I think the growing trend in international arbitration will involve an increasing distance between investment arbitration (which will be under increasing scrutiny in the current political environment, but no huge changes right away) and international commercial arbitration (which will likely suffer reputational damage as a result of criticism (often unwarranted) of other forms of arbitration, both domestic and international).

I also think arbitration will come under increased pressure from international commercial mediation, which has received significant attention as a result of the recent work at UNCITRAL WGII on a new instrument involving settlement agreements. I wouldn't call it a trend, but I also think/hope there will be increased interest in arbitration of internal trust disputes. This is an issue that the trust industry has been aware of for years, but the arbitration world is only now waking up to it.

Challenges in upcoming years will involve questions of legitimacy—the focus will be on investment arbitration, but there will be a knock-on effect for commercial procedures. In ten years, who knows? My crystal ball is hazy!"

—**S.I. Strong**, *FCIArb, Manley O. Hudson Professor of Law, University of Missouri, Columbia, MO, USA*

"Traditional face-to-face (F2F) arbitration has proven to be a poor purveyor of justice for consumers with disputes regarding their purchases, especially in low-dollar disputes and international e-commerce. At the same time, we have seen amazing growth in the power of the Internet to provide means for conflict resolution. Indeed, online dispute resolution (ODR) has grown from a 'cool, interesting idea' to a powerful force in justice that paves the way for consumer protection.

On an international level, we are now at a tipping point in the worldwide adoption of ODR. UNCITRAL's ODR Working Group has just released their final report, urging governments and judiciaries to expand global availability of ODR for consumers. Brazil has just implemented a law that requires mandatory mediation for all consumer cases in the courts and specifically recommends ODR as a fast and cost-effective option. British Columbia is launching an online court based on ODR for civil consumer filings up to US$10,000 in value. The UK's Civil Aviation Authority has also launched an ODR process to resolve consumer complaints against airlines. Moreover, the

new European Union Regulation on Online Dispute Resolution for Consumer Disputes sets up a framework for ODR to handle national and cross-border issues within the EU. The EU has even constructed a government-hosted ODR filing page to make case filing simple for consumers. Cases filed on the EU page are immediately routed to national ADR service providers located in the appropriate geographies.

Although the EU ODR regulation is a major step forward, it only governs consumers and merchants within the EU. The time is, therefore, ripe to build the next generation of global consumer protection via ODR so that all consumers around the world will be eligible for similar redress processes."

—Amy J. Schmitz, *Elwood L. Thomas Missouri Endowed Professor of Law, University of Missouri School of Law, Columbia, MO, USA*

"International arbitration today finds itself at a crossroads. For the last 35 years, momentum for business investment relentlessly pushed towards greater globalization and internationalization. In 2016, the direction abruptly changed. This policy shift does not augur for the end of international arbitration as we know it, but it will inevitably result in change. Simply put, if commerce flows focus primarily on local markets, inevitably the focus of international arbitration will follow suit.

This change may well affect international commercial arbitration more quickly than investment treaty arbitration. Highly nationalist domestic policies are often inconsistent with international investment treaties and the Word Trade Organization. These new pro-local national policies may very well result in more international investment treaty arbitration claims arising in the coming ten years.

At the same time, increased public attention to international investment arbitration, including largely unaddressed concerns about investment treaty arbitration, will result in better communication from arbitration institutions and institutional reforms. Some concerns may be addressed through new institutions such as the 'Investment Court' promoted by the European Union in its most recent treaties. But this European-led initiative may be rejected by others, who may well favor the establishment of 'traditional' investor-state arbitration.

Put on your seat-belts. We can all expect more change over the next few years than we have been used to seeing over the last ten."

—Barry Appleton, *Managing Partner, Appleton & Associates International Lawyers, Toronto, Canada*

The International Arbitration Committee is actively engaged in addressing these and other issues related to international arbitration. Our committee promotes activities, educational opportunities, and discussion on the latest developments in arbitration and ways to improve international arbitration as a method of resolving cross-border disputes. Section members can join the committee for free. To learn more and to become a committee member, visit our website at www.americanbar.org/groups/international_law/committees.html. ◆

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HIV and Drug Testing

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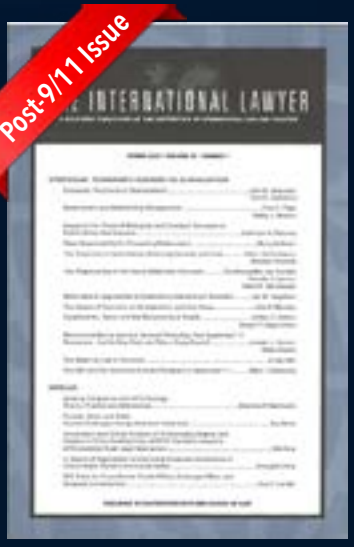
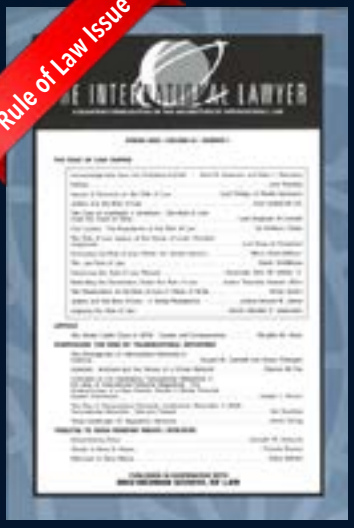
to be tested for HIV/AIDS and for drugs. The Committee held that mandatory testing for HIV/AIDS was against international medical standards for controlling HIV and was ineffective for public health purposes. Moreover, the Committee found that the South Korean government did not put forward any reasons to justify testing only foreign teachers and that "the tests for HIV/AIDS and illegal drugs were viewed as a means of checking the values and morality of foreign teachers of English."

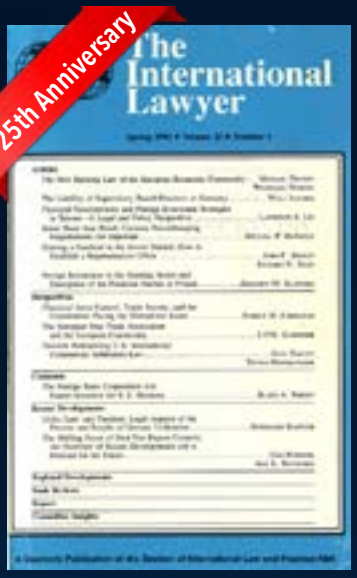
Upon a finding of violations of the CERD, the Committee recommended that South Korea compensate L.G. for moral and material damages caused by the discriminatory testing, including lost wages. The Committee also recommended that South Korea take appropriate measures to review laws and policies relating to the employment of foreigners and that it abolish any policies or practices that would manifest any xenophobia or stigma. The Committee also asked South Korea to give wide publicity to the Committee's decision, including translating it and disseminating copies to prosecutors and judicial bodies in South Korea.

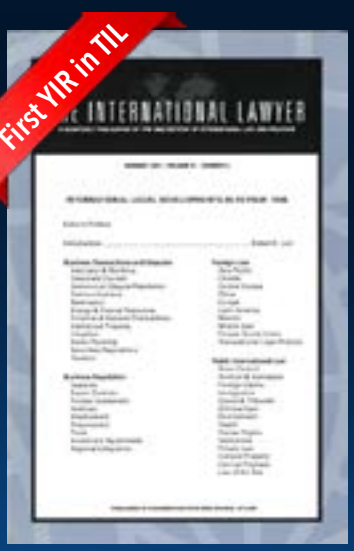
South Korea lost before the Committee even though it had already realized that the practice of requiring annual HIV and drug testing of foreigners was ineffective as a public health measure and as the practice could not be explained other than by racial bias against non-Korean foreigners. The decision is seen to influence developments in other countries where workers face similar discriminatory treatment based on race or national origin. ◆

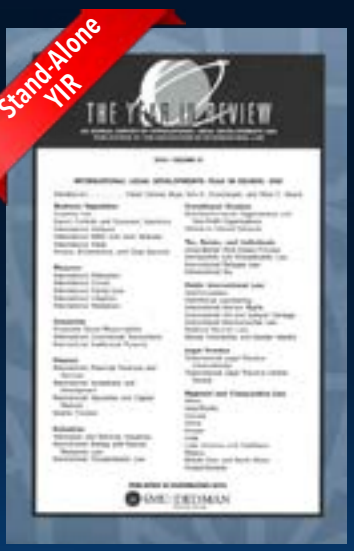
CELEBRATING 50 YEARS OF EXCELLENCE











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