International Commercial Dispute Resolution

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The year 1996 had several significant developments in the field of international dispute resolution. These developments occurred in three general areas: (1) international organizations and arbitration centers; (2) national legislation dealing with international arbitration; and (3) national court decisions dealing with international arbitration. In the first area, the United Nations Commission on International Trade Law (UNCITRAL) circulated the latest text of the "UNCITRAL Notes on Organizing Arbitral Proceedings" (UNCITRAL Notes), the London Court of International Arbitration circulated a discussion draft revision of the London Court of International Arbitration Rules (LCIA Rules), and a new regional center for hemispheric arbitration was established, the Commercial Arbitration Center for the Americas, adopting rules for arbitration and for mediation. Second, two major trading countries, England and India, adopted new arbitration statutes, and a third, Japan, passed a law permitting non-Japanese lawyers to represent clients in international arbitrations taking place in Japan. Finally, significant national cases dealt with an arbitrator's duty to disclose potential conflicts, with the court's discretion, to support arbitration after an unnecessary delay in proceeding, and with the existence of a valid arbitration clause. In addition, I have selected one case which deals with the enforceability of a double damages statute in a rather curious manner.

I. International Institutions and Centers

The UNCITRAL Notes project dates back to 1993 and is meant to be a source of ideas and resources for international arbitrators. It is not intended to impose a regime, to add requirements that are in addition to those found in existing laws, rules, and practices, nor to harmonize or summarize existing law. The current text of the UNCITRAL Notes covers nineteen general areas of arbitration practice. The text lists areas in which an international arbitrator may be expected to act in the organization of arbitral proceedings and suggests possible approaches. Once the UNCITRAL Notes have received final approval from the Commission, the Secretariat

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will edit the final version to ensure conformance with the various official languages and with other UNCITRAL texts, particularly as regards the use of technical terms. Following this editing process, the text will be published and widely disseminated to arbitral organizations, centers, and professional associations.[1]

Two centers, one of them venerable and one of them new, have proposed new sets of international rules. The London Court of International Arbitration, perhaps the oldest international arbitration center, has circulated a Discussion Draft of proposed revisions to the LCIA Rules. Some of the most significant features of the proposed revisions include: (1) A new article which provides for the application for interim relief in the form of a provisional order. These orders have contractual weight only, and are not enforceable as awards. The parties' rights to seek interim relief from a court are not to be deemed abridged by the inclusion of this article; (2) A provision which permits a truncated tribunal, that is to say, two arbitrators of a three-person panel where the third arbitrator has failed or refused to participate in the proceedings, to conduct the arbitration and issue an award. The commentary on this article indicates that it is a very controversial provision within the LCIA; and (3) Two articles have been modified to allow the LCIA Court of Arbitration to have the final word on the fixing of arbitrators' fees. It was felt that the freedom given to arbitrators in this regard under the present rules sometimes has resulted in exorbitant fees.[2]

The other institution which has adopted new sets of rules is one which came into existence in 1996: The Commercial Arbitration and Mediation Center for the Americas, jointly administered by the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, The Mexico City National Chamber of Commerce, and the Quebec National and International Commercial Arbitration Centre. The CAMCA Arbitration Rules are closely modeled on the International Arbitration Rules of the American Arbitration Association. CAMCA has also adopted a set of Mediation Rules, one which follows very closely the Mediation Rules of the American Arbitration Association. The founding of CAMCA was based in part on the North American Free Trade Agreement (NAFTA) provision which encourages the use of alternative dispute resolution. CAMCA is governed by a twelve-person council composed of representatives from the three NAFTA countries, and chaired by an appointee from one of the four member institutions on a rotating basis.

II. National Legislation

In addition to the activities of international bodies, national legislatures have enacted significant laws concerning the conduct of international arbitration. In England and Wales, the United Kingdom Parliament has enacted the English Arbitration Act 1996, which act is to become operative once the new rules of the Supreme Court of England and Wales are in place, which is expected to be on or after January 1, 1997. The Act contains several significant additions to English arbitration law, which undoubtedly will find their way into the laws of present and former commonwealth countries. The Act contains an express requirement that arbitrators must act fairly and impartially, avoiding unnecessary delay and expense. While these concepts have been present in case law, they have not previously been expressly set out in statute. The Act applies whenever the seat of the arbitration is in England and Wales or Northern Ireland. While continuing to require that the arbitration agreement be set out in writing, the definition

1. Vol. 1, No. 2 LCIA WORLDWIDE ARB. NEWSL. (Oct. 1996) at 9.
2. *Id.* at 10-19.

of writing has been expanded to include unsigned writings, oral agreements memorialized in writing by a party or the arbitrator, or alleged in writing by one party in a written submission which is not denied by the other party. The arbitral tribunal is empowered to decide all procedural and evidentiary matters, subject only to the agreement of the parties. An arbitral award is subject to challenge on the basis of jurisdiction, "serious irregularity," and to appeal on a point of law. Only the last is not mandatory, and appeal on a point of law may be excluded in an international arbitration by agreement of the parties.

India enacted new arbitration and conciliation laws closely modeled on the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Conciliation Rules. In addition to setting out the provisions of the above referenced rules, the Indian Arbitration and Conciliation Act, 1996 sets out provisions for enforcement of foreign awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. One of the most significant changes in the new arbitration act is the deletion of a provision which had been interpreted by Indian courts as precluding enforcement of an arbitration award as a foreign award where the underlying agreement was governed by the law of India. It is now expected that any award rendered outside India and brought to India for enforcement will henceforth be enforceable as a foreign award.[3]

Finally, Japan has passed a law which ends the previous prohibition on the representation by non-Japanese lawyers of parties in international arbitrations in Japan.[4] The law defines an international arbitration case as one in which the place of arbitration is Japan and in which at least one of the parties has its principal office in a country other than Japan. In such a case, a party may be represented by a foreign lawyer registered to practice in Japan or by a foreign lawyer retained for international arbitration cases in the countries in which they practice. This is true even if the matters to be arbitrated are governed by Japanese substantive law.[5]

III. Court Decisions

In two recent decisions, one American and one English, courts have refused to enforce arbitration because of prolonged, inexcusable delay. In the American case,[6] the court was asked to compel arbitration of a dispute which had arisen more than twenty years earlier. A dispute arose in 1974, and the claimant then filed a claim in arbitration. In 1975, the respondent filed its own demand for arbitration. Both parties then appointed arbitrators, who in turn appointed a chair. In 1986, the chair died. Seven years later the two arbitrators appointed a new chair, who resigned the following year, as did respondent's arbitrator. The claimant then filed a petition to compel arbitration in the U.S. District Court for the Southern District of New York. The court found that Section 4 of the Federal Arbitration Act implicitly authorized the court to adjudicate any procedural issues, including those of timeliness of the claim. In this regard, the court distinguished the situation before the court which involved a petition to compel arbitration, which went to the making and performance of the arbitration agreement from the timeliness of a demand for arbitration, which goes to the underlying claim and is

3. *Id.* at 7-8.

4. 1 Law No. 65 of 1996, 12 June 1996.

5. LCIA WORLDWIDE ARB. NEWSL., *supra*, note 1, at 8.

6. Astro Vencedor Compania Naviera, S.A. v. Gen. Org. for Supply Goods, Cairo, 94-3429, 1996 U.S. Dist. Lexis 602 (S.D.N.Y.) (Jan. 23, 1996).

thus a matter that an arbitrator, rather than a court, should decide. The court noted that nothing in the record could serve to explain the lengthy periods of inactivity. The court rejected the claimant's argument that the respondent failed to reject arbitration until 1994, stating that an express, unequivocal refusal was unnecessary because of the extended period of inactivity. The court also held that the petition to compel arbitration was untimely under the New York statute of limitations for bringing an action based on contract. While not setting out a bright line test, the court noted that the decision was based on the eighteen-year unexplained period of inactivity and the prejudice to the respondent inherent in the delay. The court declined to rule on respondent's claim that the inactivity amounted to a waiver of the right to arbitrate, since such a claim is properly addressed to the arbitrator, rather than to the court.

In a similar fashion, the English Court of Appeal affirmed a lower court decision that the English Arbitration Act gave the court the discretion to refuse to aid an arbitration where there has been "inordinate and inexcusable delay."[7] A dispute arose regarding a settlement which had been reached in 1979. Four years later a claim was made, which was rejected, and negotiations ensued over a period of eighteen months. The parties then entered into a written agreement to arbitrate. For seven years thereafter the parties debated the proper form which the arbitration should take. In September 1991, these discussions broke down. Claimant then notified respondent that arbitration had been validly commenced in 1984. In October 1994, the claimant served respondent with a summons seeking court appointment of an arbitrator. The lower court held that there was a binding agreement to arbitrate, but refused to appoint an arbitrator, citing the claimant's delay. The Court of Appeal affirmed the trial court, holding that Section 10 of the Arbitration Act vested the court with unfettered discretion in refusing to appoint an arbitrator. The court noted that it was unnecessary to establish prejudice to the respondent, so long as there has been "inordinate and inexcusable delay." The Court of Appeal went on to hold that there had been no binding agreement to arbitrate in any event, since there had been no agreement on matters of substance, noting that substantial procedural agreement would be necessary to supersede the written provisions of the standard form agreement.

A U.S. court also refused to compel arbitration on the basis that no binding agreement to arbitrate existed.[8] In this case the parties had negotiated the terms of an agreement over a period of a month, by exchange of telexes and faxes containing offers and counteroffers. There was no final signed agreement. When a dispute arose, the claimant argued that the respondent had agreed to arbitration in New York. When the respondent refused to appoint an arbitrator, the claimant brought a petition to compel arbitration in federal district court in New York. The court found that a valid contract existed and then looked to customs and practices in the trade to see whether that agreement embodied an agreement to arbitration in New York. Finding that the agreement lacked notice of agreement to a particular type of arbitration, the court rejected the claimant's argument that the phrase "otherwise as per owners charter party" too indefinite to be an enforceable agreement to arbitrate. The court distinguished other cases in which a specific charter party form or arbitration clause had been identified. The court noted that the revised charter party agreement was not sent to the respondent until some weeks after the vessel had sailed from the loading port.

7. Frota Oceanica Brasiliera SA v. Steamship Underwriting Assoc. Ltd., App. (July 30, 1996).

8. Samsun Corporation v. Khozestan Mashine Kar Co., 95-3523, 1996 U.S. Dist. Lexis 7531 (S.D.N.Y.) (May 30, 1995).

Two recent decisions in U.S. courts wrestled with the problem of an arbitrator's duty to disclose. In both cases the court found no obligation on the part of an arbitrator to discover and disclose certain facts. The first case arose in a dispute arbitrated in Guam. Following the issuance of an award, the losing party challenged the award on the basis that the arbitrator and an expert witness for the prevailing party were both limited partners in an apartment complex in Hawaii.[9] The arbitrator had failed to disclose this relationship. Both the arbitrator and the expert filed declarations stating that neither knew that the other was a limited partner in the investment. The trial court found that the facts created an "impression of possible bias" and vacated the award. The Ninth Circuit Court of Appeals reversed, finding that the arbitrator and expert witness were passive investors in a limited partnership that was unrelated to the arbitration, that neither knew of the relationship, and that there was nothing that either could do to curry favor with the other. The court of appeals also noted that several members of the losing party's law firm were also partners in the same limited partnership.

In the second case, the losing party moved to vacate the award on the basis that the arbitrator had failed to disclose that his former law firm had represented the prevailing party in unrelated matters.[10] The court rejected the position taken by the Ninth Circuit Court of Appeal that the arbitrator's duty to disclose incorporates a duty to investigate.[11] The court of appeal noted that it was undisputed that the arbitrator had no knowledge of the representation. The court expressly held that the arbitrator had no duty to conduct an investigation of prior affiliations. The court distinguished the *Schmitz* case as one involving the National Association of Securities Dealers Code which imposes a duty to investigate on the arbitrator.

Finally, the Sixth Circuit Court of Appeal upheld a lower court decision that the award of double damages pursuant to a state statute was within the arbitrator's authority.[12] The German party had acted as a sales agent for a Michigan manufacturer. When a dispute arose, the sales agent brought suit in federal district court, and the manufacturer moved to compel arbitration pursuant to an arbitration provision in the contract at issue, which contract was governed by Michigan law. An arbitration was held in London at which the sales agent was awarded damages which included an award of double damages made pursuant to a Michigan statute which provided for doubling the amount of commissions owed if the failure to pay were found to be intentional. The manufacturer challenged the inclusion of statutory damages in the award. The district court denied the challenge and confirmed the award, and the manufacturer appealed. The court of appeal rejected the manufacturer's contention that the award should not be enforced as to the doubling of damages as the statute was punitive in nature. Rather, the appellate court supported the arbitrator's reasoning that the damages were compensatory in nature, which the court noted was supported by the legislative history. Moreover, the court noted that the arbitrator had been given very broad powers to make any appropriate award, and thus the damage award was within that power.

9. Apusento Garden (Guam) Inc. v. Superior Court of Guam, 94 F.3d 1346, 1996 WL 502104 (9th Cir. Guam).

10. Al-Haribi v. Citibank, N.A., 85 F.3d 680 (D.C. Cir. 1996).

11. Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994).

12. M & C Corp. v. Erwin Behr GMBH & Co., 87 F.3d 844 (6th Cir. 1996).