

# INTERNATIONAL ARBITRATION NEWSLETTER

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## FIRM NEWS

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### Germany Designates Latham & Watkins International Arbitration Co-chair Sebastian Seelmann-Eggebert to ICSID Panel

The Government of the Federal Republic of Germany designated [Sebastian Seelmann-Eggebert](#) to the ICSID Panel of Conciliators. Sebastian is a partner in the Hamburg office and longtime Co-chair of the International Arbitration Practice Group. He advises and represents companies, individuals and States in disputes with a particular focus on investment arbitration. Under the ICSID Convention each Contracting State may designate four persons to the Panel of Arbitrators and the Panel of Conciliators, respectively. The appointment recognizes Sebastian's deep experience in investment disputes. The designation is for a period of six years, through December 2019.

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### Choice of Venue in International Arbitration: A Book to Guide Tactical Venue Decisions

Choice of Venue in International Arbitration, published by Oxford University Press, is now available. [Claudia Salomon](#), Latham & Watkins International Arbitration Co-chair, co-edited this far-reaching survey, with contributions from practitioners from every major global seat. The book examines the relative merits of different arbitral venues, offers a comparative analysis of the relative challenges arising in venues around the world, and addresses not only the practical realities but also the history and development of these seats. Practitioners will find the text a reliable tool during negotiation and drafting stages for tactical consideration of venue.

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## NEWS IN BRIEF

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### EU Commission to Publish Investment Portions of EU-US Trade Deal and to Call for Comments

by [Jan Erik Spangenberg](#)

#### EU Trade Commissioner Karel de Gucht to consult the public on the investment provisions of a future Transatlantic Trade and Investment Partnership (TTIP).

According to a 21 January 2014 European Commission Press Release,<sup>1</sup> the draft text for the investment portion of the TTIP will be published in early March. The draft will then be open for public debate and comments for three months. The decision follows the increased public interest in the trade talks with the US and public discussion of investor-to-State dispute settlement (ISDS) since negotiations with the US launched.<sup>2</sup>

The Commission's decision was preceded by the November 2013 publication of a Fact Sheet on Investment Protection and Investor-to-State Dispute Settlement in EU agreements.<sup>3</sup> In this Fact Sheet the Commission set out goals for improving existing investment protection mechanisms. In particular, the Commission is concerned with existing provisions on indirect expropriation and the fair and equitable treatment standard, which it considers to be "not clearly defined in international law" and to interfere with the right of the State to regulate in a non-discriminatory way the protection of public interest.<sup>4</sup> The EU also intends to prohibit parallel claims, to implement provisions for the quick dismissal of frivolous claims and to implement the UNCITRAL Rules on Transparency.<sup>5</sup>

If and how these goals will be implemented in the draft text remains to be seen. The publication of the draft and the call for public consultation will certainly trigger further public debate on investment protection and ISDS.

## Canada Ratifies the ICSID Convention

by [Daniel Harrison](#)

**On 1 November 2013, Canada became the 150th State to ratify the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention).**

The ICSID Convention came into force in Canada on 1 December 2013. For Canada, ratification of the ICSID Convention has been approximately seven years in the making, having signed the ICSID Convention on 15 December 2006. This interval between signature and ratification followed from delays in securing the agreement of each Canadian province and territory to ratification, as required by the Canadian federal constitution.

The ICSID Convention establishes a procedure for the resolution of investment disputes between a Contracting State and nationals of another Contracting State (provided there is an agreement to do so). Of practical significance for investors, arbitration under the ICSID Convention is entirely delocalised. There is no seat of arbitration and consequently the procedural law of the place of arbitration has no application and no courts have supervisory jurisdiction. A second major advantage of ICSID is that the system is self-contained. It provides only limited grounds for annulment of an award, which is decided by a committee appointed by the president of the World Bank. Moreover, the Contracting States are obliged to comply with an ICSID arbitral award as if it were a final judgment of a court in that State.

Before 1 December 2013, disputes involving Canadian investors or Canada were traditionally heard under the ICSID Additional Facility Rules or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The ICSID Additional Facility Rules are discrete arbitration rules that can be applied to disputes that otherwise fall outside of the jurisdiction of the ICSID Convention. Like UNCITRAL arbitration, disputes heard under the Additional Facility Rules are subject to the procedural law of the seat of arbitration and the supervisory jurisdiction of the courts. Nor do awards rendered under these arbitral rules benefit from provisions on enforcement equivalent to those contained in the ICSID Convention.

## German Federal Court of Justice Declines to Opine on Validity of Intra-EU Investment Treaties

by [Jan Erik Spangenberg](#)

**The German Federal Court of Justice (Bundesgerichtshof, FCJ), the country's highest court in civil matters, declared in a recent indicative order that it would not rule on the merits of the Slovak Republic's pending challenge against a 2012 interim investment treaty award.<sup>6</sup>**

In the underlying investment dispute, Eureko B.V., a Dutch financial services company, commenced arbitration proceedings against the Slovak Republic in relation to its investments in the Slovak health insurance sector. Eureko claimed that various legislative measures introduced in 2006 constituted a "systematic reversal" of the sector's 2004 liberalization and destroyed the value of Eureko's investment.

The arbitration is based on the arbitration clause contained in the bilateral investment treaty between the Kingdom of the Netherlands and the former Czech and Slovak Federal Republic (the BIT) and conducted under the UNCITRAL Arbitration Rules and the auspices of the Permanent Court of Arbitration. Pursuant to the parties agreement the place of arbitration is Frankfurt/Main, Germany.

The Slovak Republic challenged the Tribunal's jurisdiction and raised further jurisdictional objections, in particular that the arbitration agreement was superseded by the Treaty of Lisbon. The Slovak Republic argued that under this treaty EU Member States had agreed to submit disputes exclusively to the European Court of Justice (the ECJ).

In a 20 October 2010 Award on Jurisdiction, Arbitrability and Suspension, the Arbitral Tribunal dismissed the Slovak Republic's objections.<sup>7</sup> The Slovak Republic challenged this decision before the competent Frankfurt Court of Appeals (*Oberlandesgericht Frankfurt am Main*) pursuant to Section 1040(3) of the German Code of Civil Procedure (*Zivilprozessordnung*, or ZPO). According to this provision, an arbitral tribunal's decision on jurisdiction may be separately challenged in court. The arbitral tribunal, however, may continue the arbitration while the challenge is pending.

In its 10 May 2012 decision, the Frankfurt Court of Appeals rejected the challenge and held that the ECJ did not have exclusive rights to the interpretation of EU law and that the arbitration agreement in the BIT was valid, referring inter alia to the Vienna Convention on the Law of Treaties.<sup>8</sup> The Slovak Republic filed an appeal against the Frankfurt Court of Appeal's

decision at the FCJ. While the court proceedings were still pending, the Arbitral Tribunal proceeded on 7 December 2012 to render an award on the merits, ordering the Slovak Republic to pay €22 million in damages to Eureko.

In its 19 September 2013 decision, the FCJ held that, as a consequence of the rendering of the arbitral award, the Slovak Republic's challenge of the award on jurisdiction had become inadmissible. The need for legal recourse had fallen away because the challenge against the award on jurisdiction would not affect the (final) arbitral award that had been rendered in the meantime. Even if the Court were to declare invalid the award on jurisdiction, the final arbitral award would stand (unless challenged separately). The challenge of an arbitral award was permissible only under Section 1059 ZPO (which broadly corresponds with Article V of the New York Convention). These provisions would be elided if the challenge to a tribunal's decision on jurisdiction would survive the final arbitral award.

For now, the FCJ decision clarifies the relationship between different challenges available against an arbitral award on jurisdiction under German law. The FCJ may have further opportunity to comment on the issues raised by that case once the Slovak Republic's challenge against the final award reaches it.

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## Argentina Settles Investment Treaty Awards

by [Daniel Harrison](#)

**Argentina has reportedly agreed to settle five outstanding investment treaty awards. These comprise four International Centre for Settlement of Investment Disputes (ICSID) awards, which were originally awarded to CMS Gas Transmission Company, Azurix Corp, Vivendi Universal SA and Continental Casualty Company, as well as an UNCITRAL award in favor of National Grid plc.**

With the exception of the Azurix award, the awards had been acquired by US creditors. Under the terms of the settlement as reported by the Argentinian press on 9 October 2013, the beneficiaries of the awards will receive Argentine sovereign bonds due to mature in 2015 (Boden 2015 bonds) worth 85 percent of the value of the awards and sovereign bonds due to mature in 2017 (Bonar 10 bonds) worth 55 percent of the interest due on the awards. The beneficiaries will be obliged to reinvest 10 percent of the amount originally claimed (*i.e.* above the amount awarded) in Argentine Saving Bonds for Energy Development (BAADE bonds). Commentators have remarked upon the central role of sovereign bonds in the settlement, in light of the controversy surrounding Argentinian sovereign bonds in recent years.

Argentina is currently seeking up to US\$3 billion in loans from the World Bank and the assistance of the US Government in its appeal petition relating to a recent US Supreme Court decision to award damages of US\$1.33 billion to certain holders of Argentinian bonds.

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## Argentina and Ghana Settle Arbitration Over Detained Argentinian Warship ARA Libertad

by [Jan Erik Spangenberg](#)

**Ghana satisfies Argentina by publishing Ghanaian Supreme Court judgment.**

The Republic of Ghana and the Republic of Argentina have settled the arbitration over the detention of the warship "ARA Libertad" which Argentina commenced in accordance with Annex XII of the United Nations Convention on the Law of the Seas (UNCLOS). The historic Argentinian frigate was detained by Ghanaian port authorities in October 2012, pursuant to a court order of the High Court of Accra.<sup>9</sup> The US investment company NML Capital obtained this court order in an attempt to enforce a judgment rendered against Argentina in relation to sovereign bonds in the US District Court for the Southern District of New York in 2006.

In December 2012, the International Tribunal for the Law of the Seas (ITLOS) issued an order for immediate release of the ship pursuant to Argentina's application to prescribe provisional measures under Article 290(5) UNCLOS. Following its release, in mid-December the ship set sail for Argentina.

In February 2013 the arbitral tribunal was constituted in the arbitration, which is administered by the Permanent Court of Arbitration (PCA).<sup>10</sup> At the same time, the domestic Ghanaian proceedings continued. On 20 June 2013, at the request of the Attorney General, the Supreme Court of Ghana reversed the High Court judgment — which had ordered the arrest of the

ARA Libertad — and delivered a judgment which upheld the customary international position of immunity of warships.

Following the Supreme Court of Ghana's judgment and the release of the ship, the parties signed an agreement in relation to the settlement of the dispute at the Peace Palace on 27 September 2013. Pursuant to the agreement, Ghana has committed to publicize the judgment of the Supreme Court at the international level. To this end, a circular letter of the Permanent Mission of Ghana to the United Nations in New York to all Permanent Missions accredited to the United Nations, and States parties to UNCLOS and an *Aide Memoire* of the Ghanaian Ministry of Foreign Affairs on the judgment of the Supreme Court were published and attached to the agreement. All documents and the judgment of the Ghanaian Supreme Court are also published on the PCA's website.<sup>11</sup> Argentina considered these measures sufficient satisfaction to discharge any injury occasioned by the detainment of the ARA Libertad. Accordingly, on 11 November 2013 the Arbitral Tribunal issued a Termination Order, declaring the proceedings terminated pursuant to Article 22(1) of the Rules of Procedure.

The settlement agreement is an interesting example of measures a State may undertake to compensate an alleged "moral" wrongdoing.

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## The AAA and ICDR Offer a New Optional Arbitral Appeal Process and Update the Commercial Arbitration Rules

by [Hanna Roos](#)

**The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution (ICDR), launched on 1 November 2013 a new procedure that aims to allow parties to submit arbitral awards to a high-level and expedited review within the arbitration process.**

The new procedure provides an appeal proceeding in arbitration on broader grounds than an application for annulment before national courts. Under the Optional Appellate Arbitration Rules (the Rules), an appeal can be made on two grounds: the underlying award is based on errors of law that are material and prejudicial, and/or on determinations of fact that are clearly erroneous. Members of an appeal tribunal will be selected from the AAA's Appellate Panel, or International Appellate Panel in case of international matters. The panel comprises former federal and state judges, and arbitrators with long-standing experience in appeal proceedings.

Notable features of the appeals process include the following:

- The Rules anticipate that the appeals process will be completed within approximately three months.
- The arbitration need not have been concluded under the auspices of the AAA so long as the parties agree to the appeal either by contract or stipulation. The Rules provide sample language for inclusion in the parties' agreement.
- Appeals will be determined with reference to the written documents submitted by the parties, with no oral argument.
- An appellate tribunal may (1) adopt the underlying award as its own, (2) substitute its own award for the underlying award, incorporating those aspects of the original award that are not vacated or modified, or (3) request additional information and notify the parties of its exercise of an option to extend the time to render a decision by no more than 30 days. An appellate tribunal may not, however, order a new arbitration or ask the original arbitrators to correct the award or conduct a review of their own findings.

The appeal procedure aims to attract parties in high-value and complex disputes. Uptake of the service might, however, be limited by the need to procure both parties' consent to the appeal – a party may struggle to secure the other side's consent where the original arbitration agreement does not incorporate the Rules, and the other party is satisfied with the award.

The launch of the new Rules follows shortly after the AAA updated its Commercial Arbitration Rules (AAA Rules), which took effect on 1 October 2013. The amendments to the AAA Rules aim to enable arbitrators to manage proceedings more effectively. One change that could potentially have significant ramifications relates to the tribunal's power to order production of documents. While previously the AAA Rules gave the arbitrators a broad discretion on document production issues, the new AAA Rules provide that the documents requested must (1) not otherwise be readily available to the party seeking the documents, (2) be relevant and material to the outcome of the disputed issues, and (3) that the request must be reasonable. The language used in the new AAA Rules has broad similarities to the wording used in the International Bar Association Rules on the Taking of Evidence in International Arbitration, an instrument that is frequently used in international arbitration and which is seen as the benchmark for document production issues in the international arena. While it remains to be seen how the amended AAA Rules will be interpreted in practice, it is thought that the amendments to document production issues will bring the AAA Rules in line with international standards.

## The Supreme Court of Lithuania Seeks Clarification from the European Court of Justice in *Gazprom v. Lithuania*

by [Hanna Roos](#)

The Supreme Court of Lithuania made on 10 October 2013 a preliminary reference to the European Court of Justice (ECJ) regarding the enforcement of a Stockholm Chamber of Commerce (SCC) award made in arbitration proceedings between Gazprom and the Lithuanian Ministry of Energy.

The dispute concerns Lithuania's main natural gas provider, Lietuvos Dujos, in which the parties are joint shareholders. The Supreme Court's reference asks whether the enforcement of an award containing an anti-suit injunction – which the SCC award grants against Lithuanian court proceedings initiated by the Ministry of Energy – would be inconsistent with the Brussels Regulation.

The ECJ's 2009 judgment in *Allianz SpA v. West Tankers Inc* (Case C-185/07) held that an EU Member State cannot restrain a party from commencing or continuing proceedings before another Member State's court because each Member State court is entitled to rule on its own jurisdiction. The Lithuanian Supreme Court's question to the ECJ is whether analogous rules should be applied in the case of an arbitral award.

Specifically, the Lithuanian Supreme Court has asked whether an EU Member State court can refuse to:

- Recognise an arbitral award that contains an anti-suit injunction, on the grounds that the award limits the jurisdiction of the national court to rule on its own competence;
- Enforce an arbitral award that contains an anti-suit injunction, if it orders a party to limit their claims in another EU Member State court; and/or
- Recognise an arbitral award that limits the right of the national court to rule on its own jurisdiction, for the purpose of ensuring the supremacy of EU law and full effectiveness of the Brussels Regulation.

A positive answer would have wide-reaching implications for arbitration in Europe. The ECJ is expected to take approximately two years to rule on the questions.

## International Tribunal for the Law of the Sea Rejects Amicus Curiae Submission and Orders Release of Greenpeace Ship

By [Jan Erik Spangenberg](#)

On 22 November 2013, the International Tribunal for the Law of the Sea (ITLOS) issued an order against the Russian Federation on the Kingdom of the Netherlands' request for the prescription of provisional measures in the "Arctic Sunrise" Case.<sup>12</sup>

In its second ever decision on provisional measures related to the detainment of a ship, ITLOS ordered the Russian Federation to immediately release the ship and ensure that all persons who had been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation.<sup>13</sup>

The case concerns the boarding and detention of Greenpeace International's ship "Arctic Sunrise" on 19 September 2013. At that time, the ship was engaged in protests against Russian oil exploration activities and oil platforms in the Pechora Sea, within Russia's exclusive economic zone. The ship was boarded by Russian security forces, who detained the ship and towed it to Murmansk, also detaining the personnel aboard the ship.

On 4 October 2013, the Netherlands, whose flag the "Arctic Sunrise" was flying, instituted arbitral proceedings against the Russian Federation under Annex VII to the Convention for the Law of the Sea (UNCLOS). On 21 October 2013 the Netherlands filed a request for the prescription of provisional measures with ITLOS. Upon receipt of the request, the Embassy of the Russian Federation in Germany stated to the Tribunal in a note verbale that upon the ratification of the UNCLOS the Russian Federation had made a reservation in relation to "disputes [...] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction." Accordingly, Russia would not accept the initiated arbitration proceedings and would not participate in the proceedings at ITLOS.

The remainder of the proceedings, including the oral hearing and the examination of a witness, was conducted without the Russian Federation's participation. In its subsequent order on the Netherlands' request for prescription of provisional measures, the Tribunal noted that "the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures," citing the International Court of Justice's jurisprudence in the Fisheries Case (*Germany v. Iceland*), the Nuclear Tests Case (*Australia v. France*), the Aegean Sea Continental Shelf Case (*Greece v. Turkey*) and the United States Diplomatic and Consular Staff in Teheran Case (*USA v. Iran*).<sup>14</sup> In particular, the Tribunal quoted from the ICJ's decision in the Military and Paramilitary Activities in and against Nicaragua Case (*Nicaragua v. United States of America*) that: "[a] State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment".<sup>15</sup>

Ultimately, the Tribunal found that the conditions for the prescription of provisional measures under Article 290(5) UNCLOS were met, *i.e.* that (1) a dispute concerning the application of UNCLOS existed between the Netherlands and Russia, in particular in relation to the rights, jurisdiction and duties of the coastal State and other States in the exclusive economic zone (Articles 56, 58 UNCLOS) and the freedom of the high seas (Article 87 UNCLOS), (2) the jurisdiction of the arbitral Tribunal under Annex XII was *prima facie* met, and (3) the urgency of the situation required the prescription of provisional measures. Taking into account the rights claimed by the parties, the Tribunal ordered the release of the ship and the detained personnel upon the posting of a bond for €3.6 million.

The Netherlands has meanwhile posted the bond, and Russia has released the majority of the arrested personnel.<sup>16</sup> The "Arctic Sunrise" however, remains detained to date.

The proceeding also gave ITLOS an opportunity to set precedent on the admission of *amicus curiae* submissions. Greenpeace International requested ITLOS' permission to file submissions as *amicus curiae* and attached a copy of its submissions to the request. While the Netherlands stated that they "did not have any objection to such petition," the Tribunal decided that Greenpeace International's request should not be accepted and that its submissions would not be included in the case file.<sup>17</sup> The Tribunal's decision on Greenpeace International's request (the reasons for which were not published) is in line with the Seabed Disputes Chamber's rejection of an earlier *amicus curiae* application by Greenpeace International and the World Wildlife Fund for Nature in the advisory opinion proceedings on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.<sup>18</sup> In that case, however, ITLOS published the *amicus curiae* submission on its website, stating that the submission was not part of the official case file. As a result, and in the absence of any specific rules on *amicus curiae* submissions at ITLOS, their admissibility remains somewhat unclear.<sup>19</sup>

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## Institution Updates: Jerusalem Arbitration Centre Opens and the Permanent Court of Arbitration Hosts Its First Arbitration in Hong Kong

by [Hanna Roos](#)

On 18 November 2013, the ICC inaugurated the Jerusalem Arbitration Centre (JAC), which is dedicated to the resolution of Israeli-Palestinian commercial disputes. On a separate note, the first hearing in an arbitration under the auspices of the Permanent Court of Arbitration (the PCA) in Hong Kong was held in the premises of the Hong Kong International Arbitration Centre (HKIAC) in July 2013.

The JAC opened following the signing of a tripartite agreement between the ICC Court and the ICC Palestine and Israeli national committees, and has received the approval of Israeli and Palestinian officials. The centre aims to offer the first neutral dispute resolution mechanisms for Palestinian and Israeli businesses, which are often reluctant to submit to each other's courts, and in this way to strengthen commercial relations and enhance long-term economic growth in the region.

French arbitrator Yves Derains has been named President of the JAC Court. The JAC will administer arbitrations under its own rules adapted from the ICC Rules. The default rules provide for Paris as the seat, but East Jerusalem as the place of arbitrations, with the parties expressly waiving the right to set aside an award in the French courts. JAC Awards will be enforceable in Israel under the New York Convention and in Palestine under the Palestine Arbitration Act 2001, which is based on the UNCITRAL Model Law.

On a separate note, the first hearing in an arbitration under the auspices of the PCA in Hong Kong was held in the premises of the HKIAC in July 2013. The investment treaty dispute was heard under the 2010 Cooperation Agreement between the

PCA and HKIAC, one of a number signed by the PCA with arbitral institutions around the world to permit the institutions to hold hearings in administered arbitrations in each other's premises. The PCA has also concluded a so-called Host Country Agreement with Hong Kong. It establishes a legal framework under which the PCA can administer proceedings on an ad hoc basis with a maximum degree of procedural autonomy from national court rules. The PCA has over twenty pending cases involving parties from Asia and expects the number to grow.

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## Tribunal Dismisses the ICSID Case *KT Asia v. Kazakhstan* for Absence of an Investment

by [Hanna Roos](#)

A tribunal established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID ) has dismissed a US\$1.5 billion claim brought by KT Asia Investment Group B.V. (KT Asia) against the Republic of Kazakhstan.<sup>20s</sup>

The tribunal ruled that the claimant was an investor within the meaning of the Kazakhstan-Netherlands bilateral investment treaty, but had not made a qualifying investment in BTA Bank, Kazakhstan's largest commercial bank in which KT Asia owned a 9.96 percent shareholding. The tribunal found that the claimant failed to satisfy each limb of the tripartite definition of investment – contribution (fresh or subsequent), duration and risk:

- **Fresh Contribution:** The question was whether KT Asia had made any injection of capital or other contribution during the acquisition of the BTA shares. No fresh injection was found as KT Asia never paid for the shares in the bank. The shares were transferred to the claimant by two BVI registered companies controlled by Mr. Ablyazov, a Kazakh national and former energy minister who also controlled KT Asia. The agreed price was significantly below market value and paid with loans taken by Mr. Ablyazov from the two BVI companies, intended to be repaid once KT Asia had sold the shares via an imminent private placement. Indeed, KT Asia was set up as a pure shell company to hold the shares temporarily. No security was provided for the loans. The loans were never repaid and the BVI companies were soon liquidated by Mr. Ablyazov.
- **Subsequent Contribution:** KT Asia argued that no payment is required where the investment is transferred from one company to another in the context of an internal group restructuring, as this amounts to a subsequent contribution. The tribunal found that there was no corporate group. There was no holding company, no single individual shareholder connecting the companies that Mr. Ablyazov used as "his pockets" to shift assets, and no consolidation for financial or tax purposes. Indeed, the whole purpose of the structure was to conceal Mr. Ablyazov's beneficial ownership of 76 percent shares in BTA Bank, and to make it look as though the various companies holding blocks of shares in the bank were independent of each other. This was done to sidestep the Kazakh rule that shareholdings exceeding 10 percent had to obtain consent from the relevant authority.
- **Duration:** The tribunal underlined that a satisfying investment must be made for a certain duration, interpreted in case law as two to five years in minimum. KT Asia's investment failed the test because its shares were intended to be held only until a sale of the shares through a private placement, to take place a few weeks after KT Asia acquired them. Even though this sale never materialised due to an economic downturn, the tribunal found it crucial that the investment was never intended to involve a longer term allocation of resources.
- **Risk:** The tribunal noted that to qualify as an investment, an allocation of resources must finally involve a level of risk. It confirmed that, generally, an investment through the acquisition of equity in a corporation entails the risk that the value of the equity decreases. However, as KT Asia had made no contribution for the shares, it incurred no risk of a financial loss. Indeed, the company was not capitalized and had no resources, and KT Asia was shielded from financial risk by the lending arrangement and subsequent liquidation of the lenders.



## *London Steam Ship Owners Mutual Insurance Ltd v. Kingdom of Spain and another*

by [Daniel Harrison](#)

**In *London Steam Ship Owners Mutual Insurance Ltd v. Kingdom of Spain and another* [2013] EWHC 3188, Spain and France failed in their attempt to resist enforcement of an arbitral award.**

In November 2002, a ship carrying 70,000 tonnes of oil sank off the coast of Spain, causing significant oil pollution to the Spanish and French coasts. The legal ramifications of the resulting ecological disaster included civil claims against the ship-owners and their insurers (the Insurers). Spanish and French State entities (the Claimants) brought claims in the Spanish courts against the Insurers, of €4.3 billion and €67.5 million respectively, under Article 117 of the Spanish Penal Code 1995, which provides an injured party with a direct right against an insurer.

The Insurers accepted partial liability pursuant to the Convention on Civil Liability (CCL), which imposes strict liability on ship-owners to compensate victims of oil pollution damage up to a prescribed amount. The Insurers rejected the remainder of the claim on the grounds that the Claimants were bound, under the terms of the insurance contract between the ship-owners and the Insurers (the Contract), to bring their claims in arbitration. The Insurers did not participate in the Spanish proceedings and instead sought relief in arbitration in London.

The Insurers obtained declaratory relief from the arbitral tribunal that: (i) the Claimants were bound by the arbitration clause to refer the civil law claims to arbitration; (ii) actual payment of the insured liability by the insured member was a condition precedent to the Insurers' liability under the "pay to be paid" clause in the Contract; and (iii) in any event, the Insurers' liability would not exceed the amount of US\$1 billion (the cap in the Contract). The Insurers then applied to the High Court to enforce the terms of the arbitral award and to enter judgment under section 66 of the Arbitration Act 1996. Amongst other things, the Insurers did so with a view to ensuring that the arbitral award would have primacy over any potentially inconsistent judgment that could be rendered in the Spanish court proceedings.

The Claimants resisted enforcement on three grounds.

First, the Claimants challenged the substantive jurisdiction of the tribunal, on the basis that the dispute was purportedly not within the scope of the arbitration clause. The court considered whether the claims could be characterised as a third party seeking to enforce a contractual obligation under an insurance contract or advancing an independent right of recovery under the relevant statute (in this case the Spanish Penal Code). The court decided that the content of the right would be the most important factor in identifying the correct characterisation, and found that the content of the right in this case was contained in the Contract. Therefore, it was found to be a contractual claim and the challenge to the jurisdiction of the tribunal failed on this ground.

Second, the Claimants argued that the claims were not arbitrable, since they were brought under a criminal statute and they related to public policy, namely protection of the environment. This challenge also failed on the basis that the claims were, in substance, claims to enforce a right under contract and were monetary claims of a civil nature.

Third, the Claimants resisted enforcement on grounds of State immunity. However, the Court found that there was a valid exception to the Claimants' prima facie State immunity from jurisdiction of the English courts. Specifically, immunity had been lost since the Claimants had agreed in writing to submit the relevant dispute to arbitration. The Court stated that the Claimants could not "seek to take the benefit of the insurance contract without accepting its incidents and limitations." The Court also stated that, when a third party makes a claim under an insurance policy containing an arbitration clause, they become a person claiming under or through a party to the arbitration agreement and thereby a party to the arbitration agreement for the purposes of the Arbitration Act 1996.

## Singapore Court of Appeal: Award Debtor's Challenge Upheld

by [Eleanor Lam](#) and [Tina Wang](#)

**Highest court allows challenge of domestic international award on ground of joinder objection.**

In a landmark decision *PT First Media TBK* (formerly known as *PT Broadband Multimedia TBK*) v *Astro Nusantara International BV and others* [2013] SGCA 57, the Singapore Court of Appeal (the nation's highest court) (CA) allowed an award debtor to challenge the enforcement of "domestic international awards" (*i.e.*, international commercial arbitral awards made in the same territory as the forum in which recognition and enforcement is sought) on the basis of the arbitral tribunal's improper exercise of its power in respect of joinder of third parties to an arbitration.

The underlying dispute related to an unsuccessful joint venture between Indonesian conglomerate Lippo Group and Malaysia's Astro Group for provision of television services in Indonesia. Terms of the proposed joint venture, including an arbitration agreement, were contained in a subscription and shareholders' agreement dated 11 March 2005 (SSA) signed by, inter alia, the appellant PT First Media TBK (First Media) and the 1<sup>st</sup> to 5<sup>th</sup> respondents to the appeal. However, the 6<sup>th</sup> to 8<sup>th</sup> respondents, which were companies belonging to the Astro group and which had provided funds and services to the proposed joint venture, were not parties to the SSA.

The parties were unable to conclude the proposed joint venture due to the failed fulfilment of conditions precedent set out in the SSA and Astro commenced arbitration under the auspices of Singapore International Arbitration Centre (SIAC) seeking recovery, inter alia of sums invoiced by the 6<sup>th</sup> to 8<sup>th</sup> respondents (Arbitration). By virtue of an award on preliminary issues made by the SIAC tribunal (Jurisdictional Award), the 6<sup>th</sup> to 8<sup>th</sup> respondents were joined as parties to the arbitration on the basis of rule 24.1(b) of the SIAC Arbitration Rules (2007) (2007 SIAC Rules). The said rule provided that the tribunal shall have the power to allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration.

Although First Media could have challenged the Jurisdictional Award under Article 16(3) of the Model Law (which, with the exception of Chapter VIII, is given the force of law in Singapore pursuant to section 3(1) of the Singapore International Arbitration Act (Cap. 143A) (IAA)), First Media had chosen not to do so. In the absence of such challenge, the Singapore High Court issued enforcement orders in respect of all awards made in the Arbitration. First Media appealed to the CA against the enforcement orders issued by the High Court.

The key issue for the CA to determine was whether an application to set aside an arbitral award on jurisdictional grounds under Article 16(3) of the Model Law is the sole route available to raise objection against a domestic international arbitral award on the grounds of lack of jurisdiction, or whether a party can raise a jurisdictional objection by resisting enforcement proceedings under section 19 of the IAA. The CA found that both routes are available and First Media was not prevented from objecting to the SIAC tribunal's jurisdiction at the enforcement stage by its election not to initiate an application to challenge the preliminary ruling on jurisdiction. In reaching its decision, the CA considered the legislative history to the relevant provisions of the IAA together with rules governing statutory interpretation in Singapore and the United Nations Commission on International Trade Law (UNCITRAL) Model Law. The CA held that First Media could take (a) an "active" route and elect to challenge the Jurisdiction Award and set the award aside on jurisdiction in the supervisory court, while the arbitration was still pending or (b) a "passive" route and assert its jurisdictional objection as a defence to enforcement proceedings.

As regards First Media's argument that the tribunal did not have the power to join the 6<sup>th</sup> to 8<sup>th</sup> respondents as parties to the arbitration, the CA found that the CA had the power to review the tribunal's findings on jurisdiction to bring or join non-parties de novo and undertake a fresh examination of the objection. The CA found that the SIAC tribunal had improperly exercised its power under Rule 24.1(b) of the 2007 SIAC Rules by joining those respondents to the arbitration, as the rule did not confer on the tribunal the power to join third parties who were not party to the arbitration agreement in the absence of the consent of such third parties. The CA was influenced, amongst other things, by the recent revisions of the SIAC Rules in 2013, which expressly provide that "third parties" may only be joined to arbitration if they are party to the same arbitration agreement.

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## Endnotes

- <sup>1</sup> European Commission Press Release, 21 January 2014, in [http://europa.eu/rapid/press-release\\_IP-14-56\\_en.htm](http://europa.eu/rapid/press-release_IP-14-56_en.htm).
- <sup>2</sup> See International Arbitration Newsletter, Oktober 2013 in <http://www.lw.com/thoughtLeadership/international-arbitration-newsletter-October-2013>.
- <sup>3</sup> European Commission, Fact Sheet on Investment Protection and Investor-to-State Dispute Settlement in EU agreements, 26 November 2013 in [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf).
- <sup>4</sup> European Commission, Fact Sheet on Investment Protection and Investor-to-State Dispute Settlement in EU agreements, 26 November 2013, p. 7-8 in [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf).
- <sup>5</sup> For a discussion of the UNCITRAL Rules on Transparency see International Arbitration Newsletter, July 2013 in <http://www.lw.com/thoughtLeadership/international-arbitration-newsletter-april-2013>.
- <sup>6</sup> German Federal Court of Justice, Decision of 19 September 2013, File no. III ZB 37/12.
- <sup>7</sup> *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13 (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010. The award is published at <http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf>.

- <sup>8</sup> Frankfurt Court of Appeals, Decision of 10 Mai 2012, File no. 26 SchH 11/10. The decision is published in SchiedsVZ 2013, p. 119.
- <sup>9</sup> Latham & Watkins LLP, International Arbitration Newsletter, April 2013 <http://www.lw.com/presentations/news-in-brief-argentine-v-ghana>.
- <sup>10</sup> The ARA Libertad Arbitration (*Argentina v. Ghana*).
- <sup>11</sup> See <http://www.pca-cpa.org>.
- <sup>12</sup> The “Arctic Sunrise” Case (*Kingdom of the Netherlands v. Russian Federation*), ITLOS Case No. 22, Order of 22 November 2013. A copy of the decision is available at <http://www.itlos.org>.
- <sup>13</sup> The other recently decided provisional measures case is the “ARA Libertad” Case (*Argentina v. Ghana*), ITLOS Case No. 20, Order of 15 December 2012. See International Arbitration Newsletter, April 2013 in <http://www.lw.com/thoughtLeadership/international-arbitration-newsletter-april-2013>.
- <sup>14</sup> The “Arctic Sunrise” Case (*Kingdom of the Netherlands v. Russian Federation*), ITLOS Case No. 22, Order of 22 November 2013, para. 48.
- <sup>15</sup> Ibid, para. 52 and Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 24, para. 28.
- <sup>16</sup> See the Netherlands’ Report on compliance with the provisional measures prescribed by the Tribunal on 22, November 2013 in the case concerning the “Arctic Sunrise”, 2 December 2013. The report is published in <http://www.itlos.org>.
- <sup>17</sup> The “Arctic Sunrise” Case (*Kingdom of the Netherlands v. Russian Federation*), ITLOS Case No. 22, Order of 22 November 2013, paras. 17-18.
- <sup>18</sup> Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS Case No. 17.
- <sup>19</sup> Article 84 of the Rules of the Tribunal addresses submissions by “intergovernmental organizations,” *i.e.* intergovernmental organizations constituted by States to which its member States have transferred competence over matters governed by UNCLOS, *e.g.* the European Union (cg. Article 1 of Annex IX UNCLOS). The article does not relate to non-governmental organizations.
- <sup>20</sup> ICSID Case No. ARB/09/8, Award, 17 October 2013.

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