# Time for change

Arbitral institutions and the arbitral community are committed to preserving the advantages of arbitration. Franz Schwarz and John Trenor of **WilmerHale** review proposals to make arbitration better, fairer and more efficient

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**These are exciting times for international arbitration. Arbitration has firmly established itself as the primary mechanism for international dispute resolution, and is widely regarded as providing significant advantages over national courts for resolving cross-border disputes: it allows for procedural flexibility, involves neutral decision-makers (which the parties themselves can choose) and produces internationally enforceable awards.**

With increased popularity, however, arbitration also comes under increased scrutiny. In order to meet the expectations of international commerce and to preserve its advantages over traditional forms of dispute resolution, arbitration has to remain efficient and cost-effective. To do so, it must continue to evolve.

The immediate future marks an extraordinary period of change for international arbitration. Several major international instruments and institutional rules are currently under review, and courts in major jurisdictions are at present considering issues of significant importance for the arbitral process. In addition, the business community is calling for further change to address several perceived weaknesses of the arbitral process, in order to preserve the many advantages that international arbitration has. Some of these developments are described in this article.

## Enforcement of arbitral awards

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted in 1958 (the New York Convention) under the auspices of the United Nations. It has undoubtedly been one of the most important factors to allow international arbitration to prosper. In essence, the New York Convention provides for the enforcement of arbitral awards in all of its signatory states, with only very limited grounds to resist such enforcement. With over 140 signatory states, arbitral awards enjoy far greater international mobility than the judgments of any national court.

Yet while the 50th anniversary of the New York Convention later this year is cause for celebration, it may also provide a timely opportunity to reassess whether it still meets the demands of modern arbitration practice. Specifically, some commentators argue that the New York Convention is, in places, too broadly drafted, leaving significant room to signatory states to interpret and apply it according to their own agenda. While many states use that interpretative freedom in an arbitration-friendly manner, some apply unduly broad interpretations to grounds for refusal, which effectively undermine the spirit and purpose of the Convention to create a uniform regime for the international enforcement of arbitral awards. In that context, a review of the New York Convention is likely. It will be a difficult and time-consuming process, prone to further compromise, but nevertheless an important one: ensuring that the New York Convention, based on the experience of the past five decades, preserves the mobility of international awards as fully as possible.

## Judicial intervention

Related to the enforcement of awards is the question of judicial review at the seat of arbitration. The grounds for setting aside arbitral awards under the United Nations Commission on International Trade Law (UNCITRAL) Model Law essentially mirror the grounds for refusal of the enforcement of foreign awards under the New York Convention. With the UNCITRAL Model Law having been adopted in more than 60 countries, a uniform system of judicial review of awards is developing.

Arbitration-friendly jurisdictions are on the forefront of limiting judicial review of arbitral awards, and this trend can be expected to continue. For example, on 25 March 2008 the US Supreme Court decided, in *Hall Street Associates LLC v Mattel, Inc*, that the grounds for judicial review of an arbitral award as listed in the Federal Arbitration Act, 9 USC §§ 1, *et seq*, are 'exclusive', and cannot be expanded even by agreement of the parties. In this case, the policy choice of having only very limited review of awards takes precedent over party autonomy.

In the other direction, the Swiss Supreme Court has very recently confirmed that parties can, by agreement, exclude any judicial review of arbitral awards. While approaching the subject from different angles, the underlying theme is one of restricting judicial review to the appropriate minimum. From opposite sides of the spectrum, these trends will be replicated elsewhere.

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The issue of judicial intervention in the arbitral process is also currently pending before the European Court of Justice, in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA*. This case, which has already attracted a lot of attention, regards the power of courts in the EU to issue anti-suit injunctions against parties bound by arbitration agreements. More precisely, the issue referred by the House of Lords (in 2007) to the ECJ in the *West Tankers* case is whether an English court may grant an anti-suit injunction prohibiting a party to an arbitration agreement from pursuing litigation in the court of another EU member state that has jurisdiction under EC Regulation 44/2001. This Regulation provides a comprehensive set of rules for the allocation of jurisdiction among the courts of EU member states.

English courts have long granted anti-suit injunctions restraining parties to an arbitration agreement from pursuing litigation in other countries. Indeed, courts in many other common law countries, including the United States, Bermuda and Singapore, issue such anti-suit injunctions to protect the parties' underlying contractual decision to resolve their disputes by arbitration rather than litigation. Common law courts generally view such anti-suit injunctions as directed at the parties.

In sharp contrast, courts on the Continent manifest much more reserved civil law traditions, which take objection to the ultimate effect of a court's anti-suit injunction to deprive another court of its jurisdiction. The ECJ has previously issued two decisions significantly restricting the power of a member state court to issue an anti-suit injunctions outside the arbitration context. In *Gasser GmbH v MISAT Srl* [2003] the ECJ held that a member state court on which exclusive jurisdiction has been conferred under the Regulation cannot issue an anti-suit injunction

- prohibiting a party from pursuing litigation before a court of another member state if that court has been first seized. In *Turner v Grovit* [2004] the ECJ held that a member state court cannot issue an anti-suit injunction prohibiting a party from pursuing litigation in another member state even if the proceedings had been commenced in bad faith. The premise of these earlier decisions, as noted by the House of Lords, was that the courts of each member state must trust the courts of other member states to apply the Regulation correctly.

The issue in *West Tankers*, according to the House of Lords, is whether the Regulation, which expressly excludes arbitration, applies to a proceeding to protect a party's contractual right to resolve a dispute through arbitration. The House of Lords offered its own view that the Regulation does not preclude a member state court from issuing an anti-suit injunction under the circumstances, given the arbitration exclusion in the Regulation. Commentators, however, are divided on how the ECJ is likely to decide the issue and on the practical ramifications of any such decision on London as an arbitral situs.

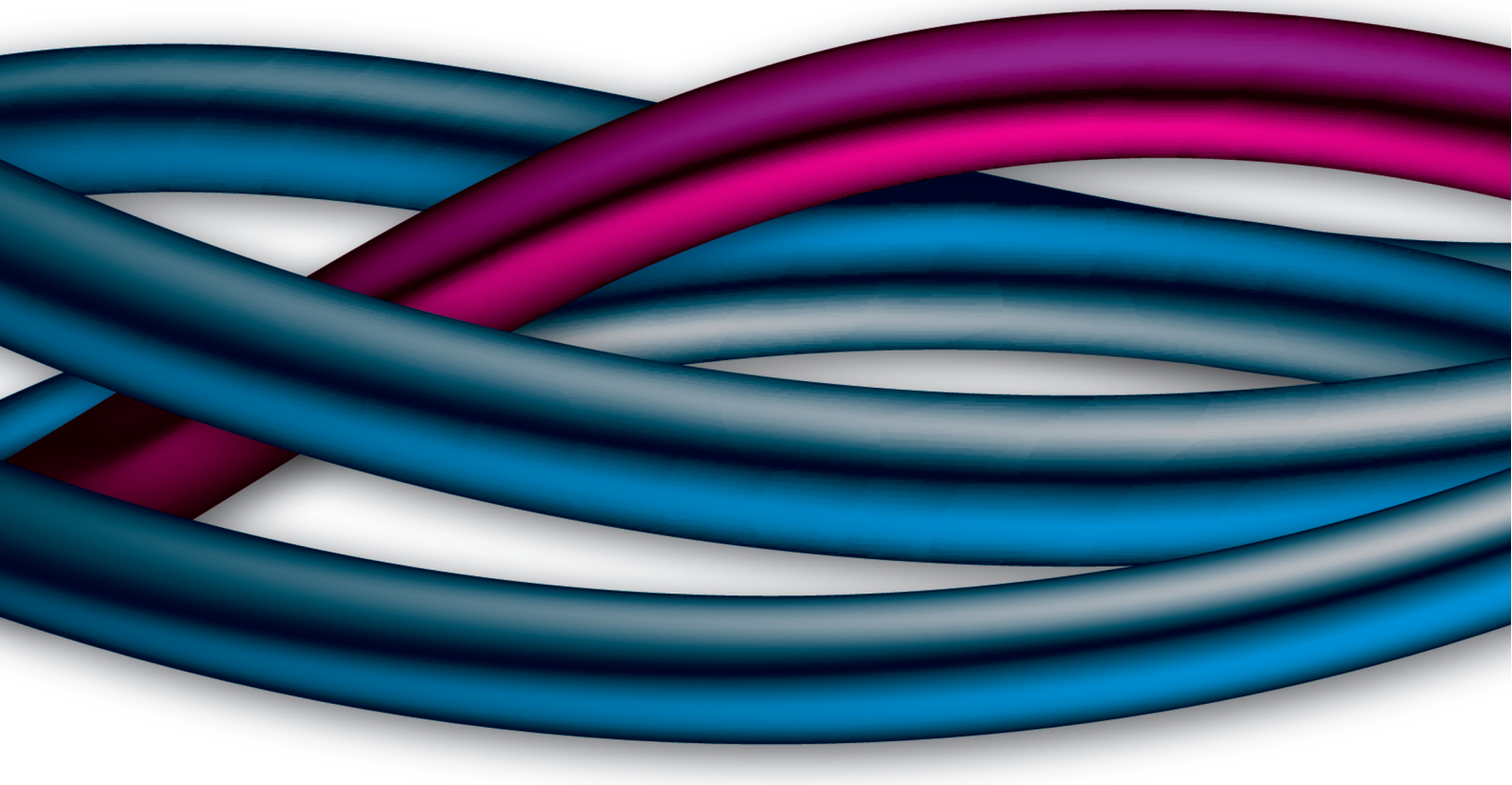
## UNCITRAL Model Law

Another important development is presented by Working Group Two of UNCITRAL, and its review of the UNCITRAL Model Law on International Commercial Arbitration. These rules, first introduced in 1976, are widely used in ad hoc arbitration; however, the working group felt, and the arbitration community widely agreed, that some important changes would have to be made to keep the rules in tune with the model practice of arbitration, and the demands of international business.

For example, the existing rules contain no provision addressing the various issues arising in cases between multiple parties. However, such multi-party arbitrations are in practice increasingly frequent and deserve the particular attention of the petitioners. The rules also consistently refer to the 'contractual' relationship of the parties. This may prevent the rules from being used in a broader spectrum of matters, including in particular investment arbitration cases. Although the discussion on this point is not concluded, it can be expected that the rules will be changed to refer to a 'defined legal relationship, whether contractual or not'.

Article 13 of the current rules also does not fully address the difficulties arising from a truncated tribunal – that is, an arbitrator seeking to sabotage the arbitral process by failing to co-operate with their co-arbitrators, or simply by resigning at an inconvenient time or otherwise refusing to participate in the process.

Needless to say, such tactics can impose considerable delays and additional costs on the arbitral process. Seeking to dissuade unjustified resignations and containing their impact, the working group therefore proposes that



arbitrators must obtain the consent of the other members of the panel before their resignation can become effective; and that it is for the tribunal as a whole to determine the effective date of the resignation. Further, those resignations that do not find the consent of the remaining members of the panel shall not prevent the tribunal from continuing with the arbitration and from proceeding to an award. Finally, it is proposed that unapproved resignations will result in the designating party's loss of its right to re-nominate an arbitrator. All of these changes would severely limit a party's room for dilatory tactics, and are likely to be adopted.

Another significant proposal concerns the issue of arbitrator fees. It is currently one of the characteristics of arbitration under the UNCITRAL rules that the arbitrators will fix their own fees, with the attending discomfort for parties resulting from the absence of institutional supervision of such arrangements. If nothing else, a party criticising the demands of the tribunal for increased fees runs risks similar to a guest criticising the chef before the meal is delivered. Under the proposal of the working group, fees must be reasonable (as is currently required by Article 39(1) of the rules). Absent agreement on the fee structure, however, the fees will be set by the appointing authority or, alternatively, by the Secretary General of the Permanent Court of Arbitration.

Indeed, the working group is considering in more general terms to give a more prominent role to the Permanent Court of Arbitration. Currently, where the parties fail to agree on a procedure and/or fail to select an arbitral institution to make a default nomination, the Permanent Court of Arbitration is called to determine an appointing authority that, in a second step, then appoints the arbitrator. This two-step process can, on occasion, take several months. Given the reputation and expertise of the Secretariat of the Permanent Court of Arbitration, the working group therefore proposes that the Permanent Court of Arbitration be directly designated as the appointing authority, thus eliminating the possibility of further delay. This proposal is likely to be adopted, although the parties will be given the opportunity to contract out of that particular structure. All of these changes, when adopted, will build on the past success of the UNCITRAL rules, and only enhance their reputation as the primary point of reference for ad hoc proceedings.

## Review of institutional rules

International arbitration was once praised for its efficiency, in particular when compared to national court litigation. Today, businesses around the world are increasingly concerned with the cost and speed of international arbitration. To an extent, increased cost and time go hand and hand with the increased complexity, and monetary value, of international disputes. High stakes inspire aggressive tactics. However, parties are

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increasingly critical of litigation styles imported from US court proceedings (such as discovery, depositions and very lengthy oral hearings) that require time and add cost to the arbitral process. International business, therefore, calls for more streamlined processes that preserve the advantageous character of international arbitration.

Some of these concerns can be addressed by placing more emphasis on one of the hallmarks of international arbitration: procedural flexibility. What works well in some cases will be inefficient or outright unacceptable in others. It is for the arbitrators to exercise leadership and make sure that the procedure adopted for the particular case that is efficient and fair.

Concerns about cost and speed are also increasing the pressure on arbitral institutions. All major institutions – including the International Court of Arbitration at the International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association — are therefore currently considering a review of their rules. Although that process will take time, it is certain to be guided by the concerns of international commerce. At the same time, smaller regional institutions (such as Stockholm, Singapore and Vienna) are eager to offer a more flexible, customised and efficient service to compete with their larger siblings. As always, a healthy dose of competition is beneficial to the end-user.

The number and significance of recent developments reflects the importance of international arbitration as the primary mechanism of cross-border dispute resolution. Arbitral institutions and the arbitral community are seriously committed to preserving the advantages of arbitration – indeed, many of the changes currently discussed or proposed will serve to make arbitration better, fairer and more efficient than ever.

*Gasser GmbH v MISAT Srl*
[2003] ECR 14
*Hall Street Associates LLC v Mattel, Inc*
No 06-989 (US, 25 March 2008)
*Turner v Grovit*
[2004] All ER (EC) 485
*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA*
[2007] UKHL 4