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Notes

1 Alison Ross, 'Embattled over Brattle – Spain's challenge to Alexandrov divides co-arbitrators' *Global Arbitration Review*, 24 October 2017, see also Tom Jones, 'Pakistan challenges entire tribunal over Alexandrov expert ties' *Global Arbitration Review*, 29 November 2017.

2 German Federal Court of Justice, decision dated 2 May 2017, Docket No I ZB 1/16, WM 2017, 1305.

3 For details on the grounds for setting aside arbitral awards under German law; see Stefan Rützel, Gerhard Wegen and Stephan Wilske, *Commercial Dispute Resolution in Germany* (2nd ed) (CH Beck, 2016), 179–185.

NORTH AMERICA

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ICC award gives rare glimpse into $7bn San Onofre dispute

While absolute confidentiality is not always the default rule in all international arbitral proceedings, parties to such proceedings routinely agree not to disclose the particulars of a case, absent some legal compulsion. Accordingly, there are few arbitration awards in major international disputes that find their way into the public domain.

When Southern California Edison ('Edison'), the City of Riverside, California, and San Diego Gas & Electric (SDG&E) lodged a $7bn claim against a Japanese nuclear component manufacturer and its affiliate for alleged design defects and an alleged failure to repair the component, the expectation was that this case would be subject to the common obligations of confidentiality over the proceedings and the award. However, as utilities regulated by the California Public Utilities Commission, Edison and SDG&E were required to publish the award with only limited redactions to protect truly confidential or proprietary information.

As a result of the public nature of the award, arbitration practitioners now have access to the nearly 1,100-page opinion of the tribunal, as well as the concurring and dissenting opinion of the claimants' party-appointed arbitrator. The availability of this award provides unique insights into the presentation and resolution of an extremely complex case between energy industry titans involving the design, manufacture and warranty of a nuclear component.

Case summary

The claimants alleged that they were forced to decommission the San Onofre Nuclear Generating Station as a result of design defects in a component they purchased from the Japanese manufacturer. The claimants also contended that the manufacturer failed to design an adequate repair for the component in a timely manner, thereby breaching its warranty obligations. The claimants sought direct and consequential damages associated with the closure. In addition, the claimants sought to set aside both a limitation of liability provision in the underlying contract that capped damages at approximately $137m and a contractual waiver of consequential damages. The claimants contended that the limitation of liability and waiver of consequential damages were inapplicable under a variety of theories under California law, including that the California Commercial Code permitted such recovery when a limited or exclusive remedy fails to fulfil its essential purpose. According to the claimants, where there was a warranty calling for the exclusive remedy of repairing or replacing the component and the vendor neither repaired nor replaced the component, all available remedies under the California Commercial Code become available, thereby nullifying the limitation of liability and consequential damages waiver.

The case had broad implications for manufacturers. If the claimants were successful in avoiding the liability cap and waiver of consequential damages, manufacturers would no doubt take notice and adjust pricing based on a recalibrated risk allocation between them and their customers.

Limitations of liability and consequential damage waivers are industry-standard clauses, particularly in the nuclear industry, where many components are 'one-off' designs. No manufacturers would supply these components if they had to bear the risk of catastrophic failures (not resulting from fraud or gross negligence).

The arbitration focused on the design process of the component in great detail, as well as the viability of the repair proposed by the manufacturer. The International Chamber of Commerce (ICC) tribunal concluded that the manufacturer did not breach its warranty obligations because it offered a viable repair for the component and likewise offered to replace the component. Instead of pursuing either option, Edison determined to decommission the plant.

The tribunal concluded that claimants' decommissioning decision was made 'for their own economic reasons' and the closure was not attributable to the respondents.

The tribunal upheld the liability cap and the waiver of consequential damages, and awarded the respondents 95 per cent of their fees and costs (approximately $58m) as the prevailing party. Although the tribunal did award the claimants damages, capped at the limitation of liability, its decision to award the respondents their fees and costs essentially halved the claimants' recovery to less than one per cent of the claimed amount.

Note

1 The Tribunal's award can be found online at www.trbas.com/media/media/acrobat/2017-06/69959475133380-08180242.pdf last accessed 19 January 2018.

INSTITUTIONS, ASSOCIATIONS AND PROCEDURE

To define or not to define: proposing a harm-based approach to regulation of third-party funding

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Definitions are important. As preconditions for regulation, they serve the fundamental purpose of determining the scope of the phenomenon that might be subjected to such regulation. Without a clear delineation of the scope of phenomena, attempts at regulating are destined to fail for lack of an object. In the field of international arbitration, multiple attempts have been made at defining one particular phenomenon: third-party funding (TPF), a concept suspected to raise ethical and procedural issues in potential need for regulation.

Such definitional efforts have proven to be arduous, as exemplified most recently in the latest International Council for Commercial Arbitration-Queen Mary Task Force Draft Report on TPF (the 'Draft'). Section IV of Chapter 3 of the Draft, titled 'Survey of Existing Definitions' provides an extensive account of definitions in national legislations, codes of conduct, arbitral institutions' rules, the IBA Guidelines and arbitration literature, among others. The bottom line, however, seems to be that there is no common understanding of TPF and thus of what this phenomenon encompasses.

Despite the tremendous efforts undertaken by members of the arbitration community, fundamental questions remain unanswered. Is TPF of a nature that can be defined precisely and comprehensively as a subject matter? And, if a definition were possible, is there enough empirical evidence related to this particular phenomenon to analyse the issues that this concept is said to raise? Lastly,