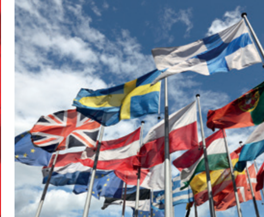
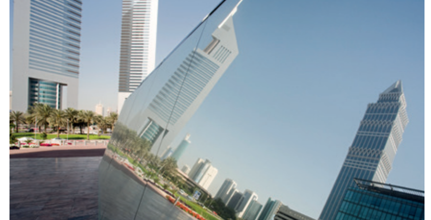
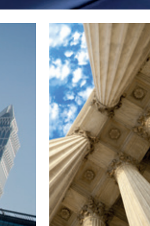
International Arbitration

June 2015



Welcome to the June edition of our International Arbitration Quarterly bulletin.

In the first article of this edition, Senior Associate Andrew Williams reviews the much-anticipated decision of the Court of Justice of the European Union (**CJEU**) in the case of Gazprom[1]. In particular, he looks at the extent of its impact on the controversial West Tankers judgment in relation to the validity of anti-suit injunctions under the Recast Brussels Regulation.

Next, we have an article about failure to pay the advance on costs in ICC arbitrations. Partner Chris Lockwood considers the decision in *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd and Costa Rica SRL*[2], in which the Northern Ireland High Court was asked to lift a stay in favour of arbitration and allow court proceedings to continue where the parties had failed to pay the advance on costs required by the ICC in the arbitration.

In our third article, Associate Jessica Crozier considers trends in the UAE courts' approach to enforcement of arbitration awards.

Finally, Partner Chanaka Kumarasinghe reviews the recently introduced Arb-Med-Arb (**AMA**) Clause available under Singapore's AMA Protocol, the relationship between the SIAC and SIMC and its future. This article has also been sent to our contacts in Singapore as a separate briefing and is now included here for the wider International Arbitration Quarterly audience.

Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

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1 (C-536/13)
2 [2015] NIQB 23

Anti-suit injunctions: West Tankers survives judicial challenge – for now

A much-anticipated decision of the Court of Justice of the European Union (CJEU) has stopped short of overturning the controversial West Tankers judgment, deferring a decision on the validity of anti-suit injunctions under the Recast Brussels Regulation (the Recast Regulation). Whilst this will disappoint many, the CJEU's decision does offer some support for parties whose attempts to arbitrate are frustrated by 'torpedo' proceedings, as well as holding out the possibility that West Tankers will be revisited in the future.

In our January 2015 Dispute Resolution bulletin (http://www.hfw.com/Dispute-Resolution-Bulletin-January-2015), we reported that a decision pending in the case of Gazprom[1] before the CJEU looked set to reverse the controversial 2009 West Tankers decision.

At the time, a written opinion (the **opinion**) concerning Gazprom delivered by Melchior Wathelet, a CJEU Advocate General, departed from the CJEU's stance regarding anti-suit injunctions issued in support of arbitration, as set out in West Tankers. Whilst the Gazprom dispute (like West Tankers) was subject to the old Brussels Regulation, the opinion offered a significant indication of how the CJEU might approach anti-suit injunctions differently under its recently introduced replacement, the Recast Regulation.

It was hoped by many that the CJEU would take the opportunity presented by the opinion to restrict parties' ability to frustrate an arbitration by bringing legal proceedings in a Member State court in contravention of an arbitration agreement – the so-called 'torpedo' actions facilitated by West Tankers.

The CJEU has now issued its final judgment in the Gazprom case which, whilst endorsing part of the opinion and offering some support to EU-based arbitration, has not gone as far as some had hoped.

Background

In brief, the CJEU (then the ECJ) ruled in West Tankers that it was contrary to the Brussels Regulation for a Member State court to issue an anti-suit injunction restraining a party from commencing proceedings in another Member State court, even where that party would be in breach of an arbitration agreement by bringing those proceedings.

This decision was much-criticised, not least because the Brussels Regulation appeared explicitly to exclude arbitration from its scope. Much of this criticism found expression in the opinion which, if accepted in full by the CJEU, would have effectively overturned West Tankers.

Gazprom concerned an order by a Stockholm Chamber of Commerce (**SCC**) tribunal for certain claims put before the Lithuanian courts to be withdrawn. There were two parts to Advocate General Wathelet's opinion. The first addressed whether under the Brussels Regulation, a Member State court was compelled to refuse to give effect to anti-suit relief ordered by an EU-seated arbitral tribunal, just as West Tankers held that they are where such relief is issued by another Member State court. In the opinion, Advocate General Wathelet distinguished Gazprom from West Tankers on the basis that the anti-suit injunction had been issued by an arbitral tribunal in the former and a court in the latter. Accordingly, as the West Tankers interpretation of the Brussels Regulation covered only court-ordered injunctions, the facts in Gazprom fell outside its scope.

In addition to this specific question, Advocate General Wathelet went on to address the broader issue of the future of court-ordered anti-suit relief in support of arbitration under the Recast Regulation. The Recast Regulation, he suggested, retrospectively overturned West Tankers anti-suit restrictions so that going forward, all proceedings contesting the validity of an arbitration (including those brought in Member State courts) would be excluded from the Recast Regulation's scope.

It was this second part of the opinion that achieved widespread attention. It raised the possibility that if the CJEU endorsed Advocate General Wathelet's broader thesis, it would signal a more permissive attitude to anti-suit relief under the Recast Regulation, prompting the revival of anti-suit injunctions issued by a Member State court as a viable option for parties seeking to enforce an arbitration agreement against evasive counterparties.

Gazprom – the judgment

Unfortunately for those hoping for a clear change in direction, whilst the decision in Gazprom does contain some support for arbitration, the CJEU declined to follow the broader second argument which would have reversed the position in West Tankers.

Instead, the CJEU confined its judgment to an endorsement of

1 (C-536/13)

It was hoped by many that the CJEU would take the opportunity presented by the opinion to restrict parties' ability to frustrate an arbitration by bringing legal proceedings in a Member State court in contravention of an arbitration agreement – the so-called 'torpedo' actions facilitated by West Tankers.

Advocate General Wathelet's first line of argument – that is, that the Brussels Regulation did not concern the enforcement of awards (including anti-suit awards) issued by arbitral tribunals, which was a matter to be decided under the arbitration laws of each Member State. In practice, this amounts to a statement by the CJEU of the primacy of the New York Convention under the old Brussels Regulation.

As to the broader issue raised by Advocate General Wathelet regarding the retrospective overruling of West Tankers by the Recast Regulation, the CJEU effectively declined to address this. Again in accordance with Advocate General Wathelet's narrower first point, the CJEU distinguished Gazprom from West Tankers on the ground that the former concerned an arbitration award, the latter a court award.

In fact, to a degree the CJEU's decision hinted at support for the continuation of the prohibition in West Tankers by citing it with approval in the context of the principles of (i) mutual trust between Member State courts and (ii) the right of the Member State court first seised of a matter to determine its own jurisdiction.

Conclusion – next steps

Despite this, the judgment is largely positive from an arbitral perspective. The primacy it accords the New York Convention under the Brussels Regulation will continue to apply under the Recast Regulation, which even more explicitly excludes arbitral proceedings from its scope.

This re-emphasises the ability of tribunals to continue with proceedings brought before them even where 'torpedo' proceedings have been commenced in another jurisdiction.

Finally, whilst the CJEU did not go as far as Advocate General Wathelet suggested, it stopped short of definitively ruling out the validity of anti-suit injunctions issued by a Member State court in support of arbitration proceedings under the Recast Regulation. This leaves open the possibility raised by Advocate General Wathelet. Although his opinion did not reverse the position in West Tankers, it would be a source of persuasive authority to a litigant seeking to do so.

It is unlikely that Gazprom will be the last case concerning the availability of anti-suit relief under the Recast Regulation. Rather, the matter has been deferred. It is highly probable that the issues raised by Gazprom and West Tankers will in future come before the Member State and European courts once again.

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Failure to pay advance on costs in ICC arbitration – can court proceedings go ahead?

In a recent decision, the Northern Ireland High Court[1] was asked to decide whether it would lift a stay in favour of arbitration and allow court proceedings to continue where the parties had failed to pay the advance on costs required by the ICC in the arbitration. It lifted the stay based on one of four possible grounds.

Facts

Trunk Flooring Ltd (**Trunk Flooring**) entered into a hire purchase agreement with HSBC Asset Finance (**HSBC**) for a machine to be manufactured by Costa Rica SRL (**Costa Rica**). The machinery failed to operate correctly and losses were said to have been incurred by Trunk Flooring.

The contract contained an ICC arbitration clause but in March 2012, Trunk Flooring commenced proceedings in the Northern Ireland High Court against HSBC and Costa Rica. In February 2013, Costa Rica successfully applied for a stay of the proceedings under section 9 of the Arbitration Act 1996.

Costa Rica then submitted a request for arbitration to the ICC, claiming £100,000 damages. Trunk Flooring counterclaimed for £2 million. Both parties took steps in the arbitration over the following 18 months.

The ICC fixed the advance of costs at US$95,000 but the parties were not satisfied with this and in May 2014, following Costa Rica's consistent refusal to pay its share of the advance,

1 *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd and Costa Rica SRL* [2015] NIQB 23

the ICC invited Trunk Flooring to pay the outstanding amount. In response Trunk Flooring complained that the continuation of the dispute was uneconomical for them and that the amount of the advance was arbitrary and unfair, with the only beneficiary being the ICC.

In September 2014, the ICC issued a notice indicating that the claims were considered to have been withdrawn. Trunk Flooring then applied to the court in Northern Ireland for the stay to be lifted.

The decision

The court was asked to decide whether the parties' refusal to pay the outstanding advance on costs rendered the arbitration agreement null and void, or inoperative, or incapable of being performed.

The court quickly dismissed the argument that the agreement was null and void; this only arose where the agreement was either never entered into or later found to have been void from the beginning. That was not the case here.

The test for whether the arbitration agreement was incapable of being performed was whether, even if the parties were ready, willing and able to perform the agreement, it could not be performed by them.

The court found that the agreement was not incapable of performance, having regard to the Court of Appeal decision in *Paczy v Haendler and Natermann GmbH*[2]. That case concerned an arbitration clause in proceedings for breach of contract where a stay had been granted in favour of arbitration. The claimant later sought to remove the stay on the ground that his poor financial circumstances meant he was unable to commence arbitration proceedings and the defendant had not done so himself. It was held that the words "*incapable of being performed*" did not cover the situation where one party was unable to carry out his part of the agreement. The distinction was between a party being incapable of performing as opposed to the agreement being incapable of performance.

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The court then considered whether the agreement was inoperative. There are two standard circumstances in which an arbitration agreement can become inoperative: repudiation or abandonment. The court did not accept that the agreement had been repudiated, or that any repudiation had been unequivocally accepted.

Turning to the question of abandonment, the court cited the judgment in the Hannah Blumenthal[3] case, in which it was stated that for a party to rely on abandonment, it was enough for them to show that the other party had so conducted themselves as to entitle the party to assume - and they did so assume - that the contract was agreed to be abandoned tacitly. The court found that neither party intended to proceed with the arbitration after the claims were considered withdrawn by the ICC. Therefore the concept of abandonment applied. That being so, the court lifted the stay on proceedings.

Comment

The decision in Trunk Flooring is to be contrasted with decision of the English Commercial Court in *BDMS v Rafael Advance Defence Systems*[4]. In that case, arbitration proceedings were commenced, a sole arbitrator appointed and the ICC then fixed the advance on costs. The respondents expressed reservations as to the claimants' ability to pay any adverse costs order and informed the claimants that they would be applying for security for costs. Until those costs were secured, the respondents said they would not pay their share of the advance. The ICC invited the claimants to pay the respondents' share and warned the parties that if the respondents' share was not paid, the consequence was likely to be the withdrawal of the claim[5]. The respondents continued to fail to pay, which the claimants accepted as a repudiatory breach of the rules and the arbitration agreement. The ICC subsequently treated the arbitration as having been withdrawn.

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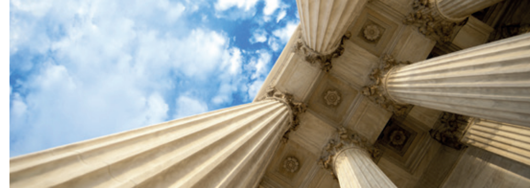
2 [1981] 1 LLR 302

3 [1983] AC 854

4 [2014] EWHC 451 See article in March 2014 edition of Dispute Resolution (http://www.hfw.com/Dispute-Resolution-Bulletin-March-2015)

5 Article 30(4)



In that case, the court found that the respondents were not in repudiatory breach: they were not refusing to participate in the arbitration and their failure to pay their share of the advance did not deprive the claimants of the right to arbitrate. The claimants could have paid, or objected against the withdrawal by the ICC. While the claimants had no obligation to pay the respondent's share of the costs, the rules provided a means for the arbitration to proceed. The claimants had not therefore been deprived of "*substantially the whole benefit of the contract*" and the respondent's refusal to pay was not repudiatory as it did not form part of a wider pattern of repudiatory conduct.

It is noteworthy that in reaching that decision, the court considered two authorities, *Resin Systems Inc. v Industrial Service & Machine Inc*[6] and *TRH Graphic v Offset Aubin*[7]. In both cases, the arbitration agreement was considered inoperative as a result of a party's failure to pay its share of the advance.

A claimant will need to consider its options carefully where the respondent fails to pay an advance fee. Whether that amounts to repudiation or abandonment will depend upon an examination of the facts, including the parties' conduct and whether they have been fully engaged in the arbitration procedure.

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6 [2008] ABCA 104

7 (Cour de Cassation, 19 November 1991, 1992 REV.ARB 462

Trends in enforcing arbitration awards in the UAE

Whilst some uncertainties remain, recent decisions suggest the development of a pro-enforcement approach to arbitration awards in the UAE.

Background

The UAE has two well established systems for the resolution of disputes. Its onshore system is a civil law court system and Dubai has an offshore system based within the Dubai International Finance Centre (**DIFC**). The DIFC is a financial free zone in the UAE. It is a common law system with its own civil and commercial laws.

Both systems have their own arbitration laws. The DIFC's (offshore) arbitration law is based on the UNCITRAL Model Law. Arbitrations seated onshore are governed by articles 203-218 of the UAE Civil Procedure Code (**CPC**). The arbitration provisions of the CPC are set to be replaced with a new arbitration law, also based on the UNCITRAL Model Law. However, the draft laws have remained under consideration for several years and there do not appear to be any immediate plans to enact them.

Enforcing arbitration awards through the onshore courts

The approach of the onshore courts to enforcing foreign arbitral awards is not altogether certain. This is despite the fact that the UAE is a signatory to the 1958 Convention on the Enforcement and Recognition of Foreign Arbitral Awards (the **New York Convention**) and the New York Convention provisions apply both onshore and in the DIFC.

The reason for this uncertainty is partly because the UAE is a young jurisdiction and partly because of parties raising procedural irregularities as a bar to recognition of awards. However, the clear trend is that the UAE courts are recognising more and more foreign arbitration awards. It is hoped that ultimately, the Dubai Court of Cassation (the highest court) will clarify what is a procedural irregularity. This will help demonstrate that the UAE is pro-enforcement which should encourage business and investment in the region.

However, the clear trend is that the UAE courts are recognising more and more foreign arbitration awards.

JESSICA CROZIER, ASSOCIATE

A significant development in this area was a Fujairah Federal Court of First Instance decision in 2010[1] in which two London Maritime Arbitrators Association (**LMAA**) awards were recognised. In it, the court confirmed that:

- UAE courts do not have the power to review the merits of the award(s).
- UAE courts are under an obligation to comply with and apply the UAE's international treaty obligations (i.e.

1 Case 35/2010

the New York Convention), which have been incorporated into UAE law.

- The awards were in accordance with English law.

Further, in 2012, in *Macsteel International v Airmech*[2], the Dubai Court of Cassation confirmed that when considering a request to enforce two DIFC-LCIA awards in accordance with the New York Convention, the CPC provisions were not relevant.

Despite these positive developments, uncertainties about the onshore courts' approach to enforcement do remain. In *CCI v Ministry of Irrigation (MOI) of the Democratic Republic of the Sudan*[3] the Dubai Court of Cassation held that the Dubai courts did not have jurisdiction to recognise a Paris ICC award as the MOI did not have a domicile or place of residence in the UAE and the case related to a commitment made outside the jurisdiction.

However, the Dubai Court of Appeal recently recognised two London arbitration awards arising out of charterparty claims. These were interesting because the court confirmed that the law of the contracts was English law and it was not able to consider whether the contracts had been signed and/or whether the parties who signed them were authorised to do so. These issues are typical of the sort which have previously been raised as procedural irregularities preventing enforcement and so the court's response is helpful.

Enforcing arbitration awards in the UAE through the DIFC courts

An alternative option to enforcing arbitration awards through the onshore courts is to enforce through the DIFC courts. The DIFC courts can enforce both onshore and foreign arbitration awards. The jurisdiction of the DIFC courts is set out in the DIFC Judicial Authority Law (Law No. 12 of 2004). Article 5(A)(1)(e) provides the DIFC Court of First Instance shall have exclusive jurisdiction to hear and determine *"any claim or action over which the [DIFC] Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations"*.

An award issued by a DIFC-LCIA tribunal or other institution or foreign court will, once ratified by the DIFC court, be enforceable within the DIFC, pursuant to Article 42(1) of the DIFC court law.

Recognition or enforcement of an arbitration award, irrespective of the state or jurisdiction in which it was made, may only be refused by the DIFC court on limited grounds which essentially mirror article V of the New York Convention.

If an award is to be executed in Dubai but outside the jurisdiction of the DIFC, it must first be ratified by the DIFC court. Then, if enforcement proceedings are necessary, it may be enforced through the order of an execution judge at the Dubai onshore courts. Article 7(3)(c) of the DIFC Judicial Authority Law confirms that the Dubai courts have no jurisdiction to review the merits of any judgment, award or order of the DIFC courts.

Following the completion of certain procedural formalities with the relevant UAE authorities (such as having the judgment attested by the UAE Ministry of Justice), the order can eventually be enforceable in the execution courts of the other Emirates under Federal Law (and in the courts of the countries that are parties to applicable enforcement treaties, such as the Riyadh Convention).

Recently, in *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*[4], the DIFC court confirmed that it had jurisdiction to hear the claim to enforce a DIAC (onshore Dubai arbitration) award and has held that the DIAC award is recognised as binding within the DIFC.

Currently there are several cases before the DIFC court in which parties are trying to enforce foreign arbitration awards. *X1 and X2 v Y1 and Y2*[5] is one of these matters in which the DIFC court has confirmed it has jurisdiction to recognise a foreign arbitration award and enforce it within the DIFC, despite the fact that none of the parties are based in the DIFC. Although not surprising, as DIFC law is clear on this, these cases have confirmed the DIFC court's approach. It will be interesting to see whether or not it now recognises the award in *X1 and X2 v Y1 and Y2*.

As the approach of both the DIFC and onshore courts develop, it is hoped that commercial parties will gain confidence in them and that this will encourage parties both to do business and resolve disputes there, building Dubai's reputation as a dispute resolution hub in the region.

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2 Appeal for Cassation No 133/2012
3 Civil Cassation Appeal No. 156/2013
4 Claim No.: ARB-003-2013
5 Claim No. ARB-002-2013

The best of both worlds in alternative dispute resolution: Singapore's Arb-Med-Arb Protocol

Dispute resolution clauses: good faith negotiation, mediation and arbitration

A typical dispute resolution clause can provide in some detail for, amongst other things, conditions precedent under which parties have to negotiate in good faith first before commencing arbitration. In our experience there can sometimes be a question of whether such conditions precedent have to be complied with before arbitration is commenced. One worthy clause to consider, where parties are agreeable to consider both arbitration and mediation in Singapore, which offers much more by way of certainty, is the recently introduced Arb-Med-Arb clause (AMA clause), which provides for the application of the Arb-Med-Arb protocol (AMA protocol).

The clause

The standard wording for the AMA clause provides the following:

"All disputes, controversies or differences (dispute) arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) for the time being in force.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the dispute through mediation at the Singapore International Mediation Centre (SIMC), in accordance with the SIAC-SIMC Arb-Med-Arb protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms."

Even if the dispute is not settled at the mediation stage, the process of mediation can narrow the issue and simplify the dispute, and may well streamline the subsequent arbitration proceedings all in turn reducing the associated costs.

CHANAKA KUMARASINGHE, PARTNER

If there is no such clause in the agreement, parties may nevertheless agree to submit their dispute for resolution under AMA protocol.

Steps under the AMA protocol

Broadly, the AMA protocol will take the following steps:

1. A dispute, by way of the usual Notice of Arbitration, is first filed with the SIAC.
2. The SIAC Registrar notifies the SIMC of the commencement of the arbitration.
3. The Tribunal is constituted by the SIAC. After the exchange of the Notice of Arbitration and Response to the Notice of Arbitration, the arbitration proceedings are stayed pending the outcome of mediation at SIMC.
4. Unless the Registrar of the SIAC in consultation with the SIMC extends such time, the mediation will be completed within eight weeks.
5. If a settlement is reached, the parties may request for the terms of the settlement to be recorded by the SIAC Tribunal in the form of a consent award. Such consent award is accepted as an arbitral award and is therefore enforceable as an arbitration award. In the event that the dispute has not been settled, the arbitration proceedings resume.

The SIAC and the SIMC: joint but separate and working together

Located under one roof at the well known Maxwell Chambers in Singapore, the SIMC and SIAC provides a one stop solution for parties who wish to provide in their contracts for a solution which allows for both arbitration and mediation. Singapore is already well established on the international arbitration map, with the SIAC leading the charge with a truly international panel. SIMC also now boasts a similarly impressive international panel of mediators, as well as an extensive panel of eminent

The institutional support from the SIAC and SIMC ensures that the parties are guided through the whole process and in accordance with the rules.

technical experts in diverse sectors of industry.

The arbitrator and mediator in the AMA proceedings are separate people. This enforces the impartiality of the arbitration and mediation proceedings. AMA protocol, however, does allow the parties to agree on the appointment of one individual to conduct the arbitration and mediation proceedings.

The institutional support from the SIAC and SIMC ensures that the parties are guided through the whole process and in accordance with the rules.

The future

Whether the AMA clause and thus the AMA protocol eventually finds its way into general commercial contracts, in whatever industry, remains to be seen. There however remains no reason why it should not. It provides for a real prospect of commercial settlement before a full blown arbitration, which is what every commercial party aims for. Even if the dispute is not settled at the mediation stage, the process of mediation can narrow the issue and simplify the dispute, and may well streamline the subsequent arbitration proceedings all in turn reducing the associated costs. There have been notable cases where the interpretation of certain conditions precedent arbitration clauses, which require a period of good faith negotiation, have been subject to disputed interpretations. This is unfortunate considering that these disputes are not relevant to the substantive issues in dispute between the parties. In contrast, AMA protocol should bring some certainty to this process with the added advantage of institutional support.

This article has also been sent to our contacts in Singapore as a separate briefing and is now included here for the wider International Arbitration Quarterly audience.

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hfw Conferences and events

IBC – Construction Law: Contracts & Disputes Management
London
29 June 2015
Presenting: Michael Sergeant

Cyber Liability Seminar
HFW London
30 June 2015
Presenting: Peter Schwartz and John Barlow

Sanctions Seminar
HFW London
8 July 2015
Presenting: Daniel Martin and Anthony Woolich

Seminar on International Contracting
HFW London
9 July 2015
Presenting: Max Wieliczko and Richard Booth

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