Contemporary Issues in International Arbitration and Mediation

The Fordham Papers 2007

Arthur W. Rovine
Editor

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Introduction

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The 2008 volume of *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* is the second book of articles written by leading figures in international arbitration and mediation who made presentations at the June 2008 Fordham Law School conference in New York City. As I indicated in my Introduction to the 2007 volume, Fordham plans to have a conference each year and to publish the articles that come from the conference. Martinus Nijhoff is the publisher.

The volumes contain articles on international commercial arbitration, investor-State arbitration, and mediation. In this Introduction, I point to some of the recent significant developments in international arbitration and mediation, as presented in the articles. At the same time, I briefly discuss each of the articles, even if just to summarize, whether or not they reflect important developments in 2008, since the subjects of the articles are each worthy of study, and all address contemporary issues.

For international arbitration, the year 2008 was significant, or potentially significant, in a few ways, at least two of them centered in the United States. The first, addressed by Donald Donovan in his article in Part II, is the U.S. Supreme Court decision in *Hall Street Associates LLC v. Mattel* (128 S. Ct. 1396 (2008)), which held that parties could not expand by contract the scope of judicial review of an arbitral award consistently with the Federal Arbitration Act (FAA), 9 U.S.C. Section 1 et seq. The second important U.S. development, involving a congressional bill known as the Arbitration Fairness Act (AFA), and similar legislation, is addressed below.

In *Hall Street*, the parties had attempted to expand the scope of judicial review in an agreement providing that the decisions of the arbitral tribunal would be reviewable by the U.S. district court for errors of fact and law, in addition to the several statutory grounds permitted under the FAA. But the Supreme Court held that the FAA grounds for review were exclusive. The case attracted attention in the United States, with several *amicus* briefs submitted to the Supreme Court.

The decision raises the question, *inter alia*, whether ''manifest disregard of the law,'' long held to be a ground for arbitral award annulments in the

United States even though the doctrine is not mentioned in the FAA, and is a judicial doctrine, remains a valid ground for *vacatur*. The Supreme Court did not decide the question definitively, and it remains for the lower courts to further develop the issue. Not surprisingly, the lower courts are already divided, and the issue may come back to the Supreme Court.

Hall Street also raises the ever-present and vexing problem of the enforcement of international arbitration awards in a worldwide complex of varying rules for set-asides. The United Nations Commission on International Trade Law (UNCITRAL) Model Law contains limited grounds for annulment of awards that are the same as the grounds permitting refusal of enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. But Article V(1)(e) of the New York Convention recognizes possible refusal of enforcement if the award has been set aside in ''the country in which, or under the law of which, the award was made.''

The Model Law has it right, but while the number of countries having adopted the Model Law is substantial and continues to grow, those countries are still in the minority. According to Jernej Sekolec, former head of the UNCITRAL Secretariat, and the UNCITRAL statistics, some 60 countries have adopted legislation based essentially on the original Model Law, or the Model Law that includes the 2006 amendments thereto.

These figures include a few areas listed within countries, such as Hong Kong, Macau, Scotland, and Bermuda, an overseas territory of the United Kingdom. Additionally, six states in the United States (California, Connecticut, Texas, Illinois, Louisiana, Oregon, and Texas) have enacted legislation based on the Model Law. The numbers are impressive, but it will take some time for Model Law enactments to catch up to the more than 140 parties to the New York Convention, though, of course, the latter had quite a head start.

Another approach, of course, is an amendment to the New York Convention along the lines of the Model Law, but such an amendment does not appear to be a practical possibility at this time.

Another recent key judicial development, in England, as discussed by Sophie Nappert in Part II, was the reference by the House of Lords to the European Court of Justice (ECJ), in *West Tankers Inc. v. RAS Riunione Adratica di Sicurta SpA and others* ([2007] U.K.H.L. 4, [2007] 1 Lloyd's Rep. 391), of the question whether an anti-suit injunction related to arbitration proceedings is compatible with the EU Judgments Regulation of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Under the EU Judgments Regulation, the court first seized of a matter has priority. The relationship of anti-suit injunctions to this rule is difficult enough. But suppose a party seeks an anti-suit injunction where the court proceedings were begun in breach of an arbitration agreement. While

arbitration is not within the ambit of the Judgments Regulation, does the exclusion of arbitration cover litigation cases concerning arbitration, even if the case was brought in breach of an arbitration agreement?

As noted by Nappert in her postscript, on February 9, 2009, the ECJ delivered its judgment in the *West Tankers* case: Riunione *Adriatica Di Sicurta SpA (RAS) v. West Tankers Inc.* (Case C-185-07), determining that anti-suit injunctions in aid of arbitration are incompatible with the Judgments Regulation, despite the exclusion of arbitration from the scope of the Judgments Regulation. It was held that since the question whether the proceedings were commenced in breach of an arbitration agreement is a preliminary issue that fell within the scope of the regulation, it was for the court to decide the question of the application of the arbitration agreement.

The ECJ decision, in my view, is extremely important, and thus my mention of it in this Introduction. It raises questions on the relationships generally between the judiciary and arbitration tribunals in the context of the EU and perhaps elsewhere, on the nature and function of anti-suit injunctions, on ways to protect the arbitral function, and whether there should be a further level of uniformity with respect to anti-suit injunctions throughout the world if they relate to arbitration and, if so, how that might be accomplished.

Philippe Pinsolle, in his article in Part II, focuses on the recent evolution of French arbitration law, particularly the recognition of estoppel, the obligation to raise objections as early as possible and possibly to the arbitral tribunal itself, the existence of an ''arbitral legal order,'' and the new consequences of the impossibility of appealing international arbitral awards. He notes that the decisions of both the court of appeal and the French Supreme Court (*Cour de Cassation*) ''generally highlight just how supportive the French courts have been of arbitration, notably in cases rendered in recent years.'' This is important, he notes, because according to International Chamber of Commerce (ICC) statistics, Paris is chosen more frequently as an arbitration venue than any other place.

The most important of the issues mentioned by Pinsolle came with the *Cour de Cassation's* now famous decision in the *Putrabali* case (Société PT Putrabali Adyamulia v. Société Rena Holding, Cass. Civ. 1, June 29, 2007). The *Cour de Cassation* affirmed the existence of an ''arbitral legal order'' independent of any national legal order, meaning, among other things, that an award set aside elsewhere may still be enforced in France.

Unlike the current U.S. position, which holds that once an award is set aside, there is nothing left to enforce, the Paris Court of Appeal, following its usual position, upheld the lower court decision granting recognition and enforcement of the award on the ground that the bases for refusing enforcement in France of an international arbitral award were exhaustively enumerated in Article 1502 of the French Code of Civil Procedure, and a set aside in the country of origin was not one of the listed grounds.

The *Cour de Cassation* confirmed the lower court's reasoning that ''an international arbitral award—which is not anchored in any national legal order—is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.''

That the international arbitral award is an ''international judicial decision'' means that it is a judicial decision *per se* and ''does not need to be blessed by any national court to be recognized and enforced. The recognition of an international arbitral award as an international judicial decision therefore has as an immediate consequence the recognition of an international arbitral order.''

Pinsolle hopes for the success of this doctrine, even as he knows that it will be questioned. He recalls the 1963 French decision (Cass. Civ. 1, May 7, 1963, Gosset, (1963) JCP, Ed. G, Part II, No. 13405, and B. Goldman's note) affirming for the first time the concept that the arbitration agreement could be separated from the underlying contract, how that too was criticized, but today the principle of separability is accepted and recognized as a foundation for the success of international arbitration. Pinsolle hopes for ''the eventual equal success of this conception of arbitral legal order.''

Hilmar Raeschke-Kessler, in his article in Part II, reviews recent Austrian, German, and Swiss judicial decisions involving international arbitration. The most significant of the recent cases he focuses on are Swiss decisions involving public policy, both procedural and substantive. The Swiss Supreme Court considers as core elements of procedural public policy the independence and impartiality of the arbitral tribunal, the equal treatment of the parties by the tribunal, and due process. A violation of any of these elements results automatically in the annulment of an arbitral award. In the broader terms used by the Swiss Court, procedural public policy is violated if the award appears to be incompatible with the values recognized by a state bound by the rule of law (''incompatible avec les valeurs reconnues dans un État de droit'').

An arbitral award is contrary to substantive public policy if it violates ''fundamental principles of substantive law in a way which may not be reconciled with the legal system (l'ordre juridique) and its determining values.'' The key principles are *pacta sunt servanda*, good faith, the prohibition of an abuse of rights, discriminating or spoliating measures, and the protection of persons who are legally incapable. Examples of criminal actions that violate substantive public policy are bribery or corruption, trade in human beings, and forced labor.

Then comes international public policy, by which the Swiss Supreme Court equates Swiss international public policy with a transnational public policy that is universally valid (portée universelle). The Court used an anti-trust case (BGE 132 III 389 = ATF 132 III 389) to indicate that Swiss international public policy is separate from any substantive national law and

is just a ''security valve'' (soupape de sécurité) that protects only the most elementary principles that ideally should be protected by any state.

Since Swiss anti-trust law and European anti-trust law under the EU Treaty differ substantially, it follows that EU anti-trust law could not be part of Swiss international public policy. However, the key here is that any violation of EU antitrust law found by a member state court would lead to the non-enforcebility of the arbitral award in that state because it would violate EU international public policy.

Still again, difficult unresolved questions confront the international arbitration community, questions that have been always there. How much of what is included in the notion of ''public policy'' will differ from country to country, thus leaving potentially uneven and uncertain the enforcement of awards, notwithstanding the Model Law and no matter how widespread its adoption? Public policy can and does encompass both procedural and substantive norms, as well as different territorial levels, such as the European Union, or the North American Free Trade Agreement (NAFTA), whose law may or may not be enshrined in the public policy of a particular EU or NAFTA member, as that member defines what and what is not public policy.

Turning to investor-State matters, my Introduction to the 2007 volume makes mention of arbitral ''precedent'' or ''persuasive authority,'' and the many cases in which investor-State tribunals have cited prior awards, treating them as common law judges might treat prior judgments, and in that process beginning to develop slowly a common law of investor-state issues.

John Beechey and Antony Crockett, in their article in Part I, indicate that investor-State awards have precedential value in another sense, that is, the new generation of BITs has been influenced by investor-State awards. They say that ''It is clear that many of the new generation features discussed in this article have been prompted by developments in investment arbitration jurisprudence, notably in the context of the NAFTA.'' He points out, however, that ''It is not necessarily always the case . . . that host-State experience with investor-State dispute resolution . . . will lead to detailed or sensible policy making, or even new treaty language.''

Gabrielle Kaufmann-Kohler refers in her introduction to Part I to ''the influence which arbitral awards have exercised on the drafting of the new [BIT] treaties'' as being ''particularly striking.'' She states that ''It is particularly noteworthy in the light of the present debate about the influence of earlier arbitral awards on later awards, or, in other words, about the precedential value of arbitral decisions. If the latter influence—of awards on awards—is still questioned, the former—of awards on treaties—appears well established.''

My own view is that there is not much question left with respect to the influence of awards on awards. Prior investor-State awards rendered pursuant to BITs are frequently cited by parties in their written submissions, discussed at oral hearings, and cited by tribunals in their awards. Members

of tribunals act very much like common law judges in many (not all) investor-State cases. That is, as I noted in the 2007 Introduction, with respect to prior awards, tribunals are often ''accepting in whole or in part, differentiating, distinguishing, not contradicting if possible—and in the end, through a now seen hand of the legal market, developing a coherent body of law.''

Investor-State tribunals may not accept the reasoning or conclusions of prior awards, but over time it is becoming more difficult simply to ignore them. They are certainly not precedents in the sense of being legally binding, but in my view they may well be precedents in the sense of serving as persuasive authority. Of course, there is no hierarchical structure in the system, and the facts of most cases may well be perceived as different in relevant ways from prior cases. If the facts are not seen as different in relevant ways, then in that sense prior awards may be persuasive in some cases though not in others. The quality of the award may also render it persuasive in some cases.

Most host states and investors do seem to want some level of predictability, certainty, consistency. Good decisions, as judged by the arbitral community, will remain mainstays, while poor decisions will not. That is how the law develops and will develop in this field. In any event, prior awards are often cited by tribunals who decide these cases and by the parties that appear before them, and that is likely to be a continuing pattern in the shaping of investor-State law.

One of the noticeable and well-remarked upon patterns in international arbitration, both commercial and investor-State, as well as in mediation, is a slowly developing harmonization, perhaps even a growing uniformity, of procedure and substance. Rapid electronic communication, much greater accessibility of awards, and the perceived utility in more uniform approaches are the drivers of the pattern. Arbitrators, advocates, businesspeople, and governments all normally support greater harmonization.

At least some standardization is viewed with particular favor on procedural matters such as discovery, where the civil law and common law differences have been narrowing. On substantive matters as well, greater harmonization is often encouraged. An example is the interpretations by NAFTA's Free Trade Commission (FTC), which are legally binding. On the other hand, overriding interpretations and trends of particular kinds may be strongly criticized as steps in the wrong direction. Michael Reisman and Rocío Digón, in their article in Part I, state that ''tribunals have single-handedly created an expanded definition of fair and equitable'' and in so doing, have eclipsed expropriation. Their article also indicates at the same time the pattern of investor-State panels citing prior awards, using more than once the term ''case law.'' Their critical conclusion is as follows:

> The finding of indirect expropriation and the subsequent determination of compensation may not be an easy task for tribunals, but we question whether the solution to the difficulty is the expansion of the fair and equitable treatment standard apparent in some recent case law. The immediate effects of the case law, some of which are already visible, include the following: (1) a lack of coherent reasons for expanding the standard, (2) a departure from finding expropriation—either direct or indirect, and (3) the misappropriation of the measure of damages expressly reserved for expropriation in most BITs to breaches of fair and equitable treatment. Together, these effects threaten to destabilize the investment law regime in this area.

A further trend we may well see more of in the development of investor-State arbitration law is the recommendation of interim measures against states, as discussed by Yves Fortier in his articler in Part I. Interim measures against states are accepted in the cases, although questions of their scope and application may be difficult. Nevertheless, that their general acceptance is growing is clear. For example, in 2006, International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rule 39 was amended to permit requests for provisional measures on an expedited basis as soon as a dispute is registered with ICSID, that is, before the tribunal is constituted.

One of the central concerns in investor-State arbitration law and practice is whether the recommendation of interim measures against a State should be awarded with a somewhat lighter touch and with greater hesitancy than against an individual or a private non-governmental party. Fortier gives his provisional view as follows:

> It may therefore be that although the binding nature of an interim measure recommended by an ICSID tribunal is no longer seriously in question, the sovereign character of a State party to an arbitration may, in practical terms, influence the manner in which a tribunal disposes of an application for interim measures.

Still another area in which investor-State arbitration law and practice is likely to witness growth is that of submissions by a non-disputing State party, which is a party to the treaty under which the arbitration is submitted, but is not the respondent State in the arbitration. This topic is analyzed by Andrea Menaker in her article in Part I.

NAFTA's Article 1128 and its FTC provide vehicles for expression of state views, with the FTC interpretations, as noted, being legally binding. Other investment treaties, including BITs, contain similar provisions. NAFTA tribunals normally accept FTC interpretations as binding on them. Similarly, as Menaker points out, 'with a few notable exceptions, where the

NAFTA parties' agreement was evidenced through Article 1128 submissions, tribunals have ruled consistently with the parties' shared interpretation.''

Class arbitrations and consolidation are the subject of Part III of the volume, with papers by Michael Marks Cohen, Frédéric Bachand, Dana Freyer and Gregory Litt, and John Fellas. Cohen analyzes primarily U.S. domestic cases, trying to find ways to accomplish consolidation.

Cohen examines the ''default rule'' in New York, which the Second Circuit announced in *Nereus* —that the courts had the power to consolidate arbitrations involving common issues of law and fact, under similarly worded arbitration agreements, provided that none of the clauses expressly *prohibited* consolidation. But the Ninth Circuit disagreed, saying that consolidation of arbitrations could not be ordered by a court unless it was expressly or impliedly *authorized* by the relevant arbitration clauses (''the *Weyerhauser* default rule'').

Cohen points out that some states and arbitration institutions enacted rules adopting the *Nereus* default position. But the *Weyerhauser* default rule was widely accepted, with the result that consolidation without the consent of all the parties was deliberately omitted from the UNCITRAL Model Law and from the 1996 amendments to the English Arbitration Act. Shortly before that, in 1993, in the *Boeing* case, the Second Circuit itself adopted the *Weyerhauser* rule, though it subsequently held that the *Nereus* approach might well still authorize consolidation of multiparty arbitrations arising under the same arbitration clause. The circuit court also ruled that *Boeing* did not affect consolidation of labor arbitrations.

Still further, with respect to the *Bazzle* case from South Carolina, Cohen states that the U.S. Supreme Court in 2003 breathed ''new life into the consolidation of arbitrations.'' Several cases seeking consolidation have been brought in the last five years, and the courts have referred all of them to the arbitrators for decision.

Bachand addresses the question whether courts should enforce no-class-arbitration clauses. The difficulty is whether—and if so, to what extent—class action waivers in arbitration clauses jeopardize access to justice. In a well-known 2007 case from Canada involving Dell, the global computer manufacturer and seller, the Supreme Court of Canada acknowledged that no-class-action arbitration clauses may be abusive, depending on the circumstances of the case, but refused to hold all class action waivers to be invalid. Since the plaintiff failed to prove that Dell's no-class-action clause was abusive, the Court enforced it by requiring that the claim be arbitrated on an individual basis.

In *Dell*, over a two-day period, hand-held computers that normally retail at $379 and $549 were mistakenly offered for $89 and $118, and Dell refused to honor orders placed by customers at the lower price. The plaintiffs then began a class action on behalf of all aggrieved customers. The value of the claim—per member—was at least $1,200 plus interest.

Bachand notes that the arbitration clause provided for arbitration conducted under the aegis of the National Arbitration Forum (NAF), which means that Dell's customers had access to a neutral forum where they could obtain a final and binding decision much faster than if the case proceeded on a class-wide basis in court. And they could do so at low cost since the NAF rules provide that plaintiffs normally pay a fairly modest filing fee. ''In such circumstances,'' asks Bachand, ''can it really be said that upholding the class-action waiver will effectively deny to the plaintiff his or her right of access to justice? Would it really be unreasonable to require the plaintiff to assume the responsibility of bringing this relatively simple claim to NAF arbitration?''

Bachand concludes that

> Because the fundamental right of access to justice generally prevails over the principle of freedom of contract, a solution that risks unduly restricting freedom of contract ought be preferred over a solution that effectively risks leaving plaintiffs without any redress. For that reason, a blanket prohibition on class action waivers seems, on balance, to be the least problematic of these two flawed solutions.

Dana Freyer and Gregory Litt discuss the desirability of class arbitrations in Part III. They are accepted in the United States, with the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Services (JAMS) having issued class arbitration rules and administering cases thereunder. The ICC, on the other hand, says a clear no to class arbitration, stating in 2005 that ''implementing class action systems has adverse consequences for business and consumers that outweigh the perceived benefit to society,'' including ''exposure to 'legal blackmail.''' The International Court of Arbitration has not issued rules for class arbitration.

The authors state that

> On both the international and domestic fronts, public policy and due process concerns are among the greatest obstacles to the acceptability of class arbitration. Many of the same procedural concerns that implicate due process also inform the debate over whether class arbitration is consistent with the conventional notion of arbitration as a prompt, inexpensive proceeding. . . . The path toward rethinking time and costs in arbitration has already been paved, to some extent, by the large, complex individual arbitrations that have become commonplace. Coming to terms with broader concerns over policy and justice may not be as easy.

Freyer and Litt maintain that ''the ICC's strident policy statement—in which it expresses strong opposition to class actions on behalf of its business constituents—is a statement about class actions generally, not class actions in arbitration in particular.'' They say it would be a mistake for the international arbitration community to avoid discussion of these issues since ''the convergence of class actions and international arbitration does shine some new light on old questions and require a further look.''

In their article, the authors raise a great number of difficult legal and procedural questions concerning international class arbitrations that need to be thought through. The answers are not obvious to anyone, and there is little experience from which to draw guidance. As the authors say, ''The debate is just beginning, and its implications for the arbitration world could be enormous.''

John Fellas, in his article in Part III, reviews key U.S. cases, the AAA's Supplementary Rules for Class Arbitration, and also refers to questions raised by class arbitration. He notes that the great majority of the class arbitrations administered by the AAA have been domestic cases and that class arbitration is not likely to affect typical international commercial arbitration cases, including international licensing, distribution, or joint-venture agreements. But he says that ''there are certainly likely to be cases where similar or identical contracts are entered into across national borders, such as in the employment, partnership, credit card context, or other consumer contexts, where we are likely to see more class actions in the international context.''

Part IV addresses issues of intellectual property and information technology in international arbitration. Tom Halket analyzes the myriad and complex web of questions of choice of law in international intellectual property disputes. The difficulties begin at once, since, generally speaking, in international arbitration as opposed to court litigation, there are more jurisdictions whose law could be applicable to one aspect or another of intellectual property (IP) arbitral proceedings.

There are, of course, different types of IP, including patents, copyrights, trademarks, trade secrets, etc., some of which have no validity except under the law of the state under which they arose, while some have international effect by treaty or because they arise under contract. In some states there are public policy defenses to an IP claim, while in some states patent validity is not arbitrable at all.

Halket notes that, in his experience, most parties do not expressly provide for any choice of law other than the substantive law of the contract. His article analyzes the extraordinary difficulties with the interplay of choice of law, IP considerations within the legal framework of various jurisdictions whose IP may be at issue in the arbitration, and the complexities of all that in the context of international commercial arbitration.

How an international arbitration panel decides on the validity of IP is addressed by Joel Lutzker in his article in Part IV. He points to the advantages of arbitration, but also notes that in many countries, arbitral awards on validity are unenforceable, or are enforceable for some types of intellectual property, but not for others. Thus, the arbitration of IP validity presents certain difficulties for the parties and arbitrators.

As does Halket, Lutzker points out that since IP rights often stem from government-issued rights and may thus be viewed as involving important public rights and interests, arbitration of IP validity issues may be prohibited or of limited enforceability under the national law of many countries. In some countries, courts have no jurisdiction to consider invalidity issues in infringement disputes.

Lutzker analyzes the complex legal issues involved in the arbitration of validity issues, as well as the mechanics of the arbitration, the latter including matters such as selection of an arbitrator or panel, choice of law, discovery, presentation of issues, and evidence, and the form of the award.

The conclusion is that when countries display a reluctance to permit arbitration of the validity of government-issued rights, by carefully crafting the scope of the arbitration and expressly limiting it to *inter partes* effect, this reluctance ''may potentially be overcome.'' And when the validity of intellectual property is arbitrated, given the unique attributes of the issues likely to arise, ''care should be taken in crafting the procedures that will be adopted for carrying out the arbitration so as to maximize its efficiency and utility.''

Using information technology effectively in international arbitration is the topic addressed by Erik Schäfer in his article in Part IV. He focuses on the possibilities of cooperative storing and exchanging data, saying that despite the required tools and infrastructure often being in place at counsels' law firms, the systems for jointly storing and exchanging data are rarely used in arbitration for exchanging information with the adversary and arbitrators.

Regarding the adversary, the obvious causes are the lack of trust in the other side, not wanting to give up a perceived advantage, and the practical problems of agreeing on the processes to be followed, especially in an adversarial setting. In the absence of an administering institution to provide the required technical facilities, the parties would have to agree on setting up technical solutions, and their use and cost issues, at a time when their attention is on the dispute and procedural tactics. Agreement is hardly likely.

As for the arbitrators, there are also serious problems. Schäfer points out that arbitrators do not often posses a sophisticated IT infrastructure and the resources required to run it efficiently. Even if they had the necessary technical infrastructure as members of a firm, they would need to recover the costs of using the IT infrastructure and the costs of support personnel.

But the parties may not be inclined to assume these costs. And many arbitrators may not wish to deal with the technical details of setting up and controlling electronic file sharing facilities which all parties would trust. There may also be a generational factor at work here, with older arbitrators being less interested, though that is certainly not always the case.

Schäfer also addresses concerns relating to the legal status of electronic documents, issues concerning safeguarding authenticity or privacy, and then moves on to ''equal and fair treatment.'' Basically, this concern is the issue of an inequality of strength resulting from one party using powerful information technology (IT) techniques to present its case while the other does not, perhaps because they do not have the financial resources.

The issue of inequality is obviously not new. One party may be represented by a talented lawyer, while the other party is not. One party may be represented by counsel who is a native speaker of the language used in the arbitral proceedings, and the other party is not. Inequalities in the parties' available financial resources are frequent. Yet there is not much the tribunal can appropriately accomplish in this context, since any steps to offset a party's greater strength might easily be seen as assisting the weaker party and violating the tribunal's obligation to remain neutral and impartial. But Schäfer states that

> A red line needs to be drawn in regard to IT usage that would in all likelihood deprive one party from access to information that is made available to the arbitrators. The arbitral tribunal should be mindful about this type of problem and do what it reasonably can, by steering clear of technical procedural solutions that are likely to have a disproportionate financial impact on a party which clearly can not afford it.

Schäfer also raises the question of why identical metadata in each party's case management system should not be shared by spreading cost and work appropriately. He concludes that there are too many obstacles, and such sharing is not feasible at this time, but there are steps that can be taken. He recommends that in the short term, transmitting and using information in electronic format may be greatly increased by the use of central ''filing cabinets'' or ''document repositories'' that are accessed via the Internet through a Web browser.

In the long term, Schäfer recommends what he calls Collaborative Case Management (CCM), saying that ''CCM would rely on an online file repository with its relational database. Superimposed would be software with an interface allowing for visual organization of information in a way we know from decision trees, flow charts, or mind-maps.''

Schäfer's article is replete with illustrations of technical problems and possible solutions. Ultimately, his goal for international arbitration is to use IT to assist in a change to a more collaborative approach, at least in certain areas. He concludes that, in his view, ''such a collaborative approach will increase efficiency and quality, and may— if used intelligently—enhance the principles of fair and just proceedings.'' In my view, highly competitive law firms representing major parties in dispute are not ready at this juncture for a more collaborative approach. But perhaps that day will come.

Irene Warshauer, in her article in Part IV, discusses the topic of e-discovery in arbitration. She cites the provisions of the institutions that expressly mention e-discovery, including the International Centre for Dispute Resolution (ICDR) and the International Bar Association (IBA), as well as discovery provisions in which e-discovery is not mentioned, but is permitted, such as UNCITRAL and the Center for Public Resources (CPR). She notes that the CPR is working on a protocol on disclosure of documents in arbitration that includes provisions relating to e-discovery. Warshauer goes into detail on the provisions and case law involving the U.S. *Federal Rules of Civil Procedure.*

Her conclusion is that ''While it is unlikely that most international arbitrations will involve the exhaustive discovery discussed in some of the above cases, parties and counsel should be aware of the intricacies of electronic discovery and the potential consequences in sanctions and costs of discovery.''

I think it is not yet completely clear to what extent e-discovery will be a major problem in international arbitration. Such discovery is not favored by some arbitrators and advocates from both civil law and common law systems, and many parties resist the expense and time required, and having to give up their electronic documents to the opposing party.

I have recently served as an arbitrator in three straight major international arbitrations in which there was massive document discovery requested and obtained in each case by major law firms representing major parties, and yet no one said anything about e-discovery in any of these cases. The parties or their counsel clearly did not want it. Other international arbitrators have informed me that their experience was similar in many, but not all, cases.

Yet, having said that, it is clear that e-discovery is certainly here to stay. Quite obviously, many international transactions, if not most, are entered into by means of electronic documents, both ordinary e-mail and other e-documents. As long as that is true, parties will want to see them, at least in particular cases. The tasks of identifying, preserving, retrieving, and producing e-documents will continue. While the perception of the problem may be somewhat exaggerated with respect to international arbitration, it would be prudent to heed Warshauer's conclusion.

Part V of the volume includes several articles on international mediation. Perhaps the most significant development in 2008 in international mediation, as discussed by F. Peter Phillips in his article in Part V, was the enactment, on May 21, 2008, by the European Parliament of a directive to encourage the use of international mediation.

The directive applies to cross-border disputes involving civil and commercial matters, and attempts to make uniform, throughout the European Union, the legal status of certain attributes of mediation. The directive excludes disputes concerning family law and community law, administrative actions, matters in which the state may be liable, and any efforts by the judiciary to settle matters before them.

Phillips briefly summarizes the history of the directive and points out that under the directive, the members of the European Union must, within 30 months of its passage, enact their own laws whose provisions are consistent with the directive's provisions, with each state free to do so pursuant to own laws.

Most importantly, the directive requires states to provide for enforcement of agreements that result from mediation, though the sirective does not address the question whether an agreement to mediate is enforceable. And it would appear that the directive does not sufficiently protect confidentiality, thus discouraging settlement negotiations pursuant to its terms.

John Richardson addresses questions of confidentiality in mediation in his article in Part V. He reviews international approaches with respect to confidentiality, as well as confidentiality rules at common law and codified common law, *ad hoc* rules for court-directed mediation in the United States, California's statutory scheme, and uniform laws in the United States, Canada, and the European Union.

After reviewing the many mediation rules and cases, Richardson concludes that ''efforts at making uniform law are proceeding slowly because the role of mediation and its relation to judicial proceedings are not generally agreed, and the consequences of a mediation privilege preventing discovery and/or admission as evidence of information from a mediation are not fully accepted as being consistent with traditional legal process.''

Judith P. Meyer and Michael Leathes make the case for professional licensing of mediators. They point to the Netherlands Mediation Institute in the Netherlands, the Singapore Mediation Centre/Singapore International Arbitration Centre, and the AAA/ICDR. The three organizations now sponsor The Hague-based International Mediation Institute (IMI), a public-interest foundation, which ''aspires to turn mediation into a true profession on a global scale.''

The IMI's mission, as described by Meyer and Leathes, ''is to establish a set of globally applicable, transparent standards for mediators that will raise

professional practice standards and enable those who use the services of a mediator to establish the professional competence of that mediator with a high degree of confidence.'' The IMI does not intend to provide mediation services itself or to compete with or replace any mediation provider or existing certifier.

After a review of historical trends and the web of mediation services, Meyer and Leathes present their view of what has been missing in the following terms:

> Although the market now demands mediator subject-matter expertise, it has naively never thought to require process expertise. Perhaps that is because the lawyers who hire the mediators on behalf of the clients understand the law but do not always comprehend the subtlety of mediator skills or styles. Mediators have talked for decades about self-policing, about ethical standards, about best practices, about the qualities of a good mediator, but we have never talked about competency certification or, even more daring, a competency assessment system.

The authors then provide details on how one would receive IMI certification if the draft plans now being considered are adopted. There are, not surprisingly, criticisms of the IMI effort, all of which are set forth in the authors' article, including the criticism that competency standards in mediation cannot be codified, especially across all jurisdictions and in all circumstances. But the IMI effort has also met with widespread approval and will certainly continue. In the world of mediation, it is not likely to be ignored in the coming years.

F. Peter Phillips contributed a second presentation at the June 2008 Fordham conference and a second article to Part V of this volume on mediation, both on commercial mediation in China. This article, based on CPR experiences in encouraging commercial mediation in China, suggests what Phillips calls ''some lessons learned from those experiences'' and concludes that ''Western concepts of mediated negotiation may have fundamental cultural limitations that require participants in the process to be open to shifting their understanding of the mediation process itself and of dispute resolution generally.''

It appears that the CPR training effort in China ran into difficulties from the outset. Phillips describes what he refers to as ''contrasting paradigms: Fisher and Confucius.'' Western mediators, according to Phillips, rely on Roger Fisher's and William Ury's ''Getting to Yes,'' which focuses on the parties interests rather than their negotiating positions. In the Fisher paradigm, success in negotiations means satisfying the interests of the parties rather than one negotiator defeating the other.

But, says Phillips, conciliation in Chinese culture is founded on the concept of interpersonal and social harmony, not the pursuit of individual interests. The source of this model is the teaching of Confucius. Phillips goes into substantial detail on this. Yet, the end result is quite often a decision by the mediator with which the parties are expected to comply. The paradigm is not ''What do the individual parties want to gain; let's see if both of them can gain or lose an equal amount.'' The paradigm instead is ''What might we do to render harmony to a disharmonious event?'' And in Chinese tradition, the ''mediator'' decides the matter.

But Phillips points out that times are changing for mediation in China.

> There is a sharp generational distinction in the modern Chinese business and legal community. There was a big difference between the way the older people were responding to the CPR training and the way the younger people were responding. Young Chinese are not as responsive to the party, or to Chinese custom, as their elders, and their ambition is palpable and Western-focused.

In view of what appears to be changes in current Chinese practice, it would seem that while the focus of mediators might well shift toward a ''Fisher'' paradigm, as Phillips calls it, the question of an arbitrator serving both arbitral and mediation functions in the same dispute is likely to remain a source of discomfort for many Western advocates, arbitrators, and mediators. It is not clear that the cultural gap in this instance will be narrowed any time soon.

Ian Hanger, QC, speaks of raising the mediation standards in Australia. After reviewing a serious and sometimes humorous, but always diverse, array of mediation services, Hanger, like Meyer and Leathes, turns to accreditation. He cites a federal government-sponsored initiative to introduce voluntary accreditation of mediators, beginning on January 1, 2008. In summary form, to become and remain an accredited mediator, candidates must pass an assessment after 38 hours of training by an accredited body; then accreditation is maintained by serving as a mediator for 25 hours over a two-year period and in the same period attending 20 hours of continuing professional development.

Hanger states that mandatory mediation clauses have become almost routine in new legislation. In most states of Australia, litigants are now required to participate in compulsory conferences before commencing an action for personal injuries. The conferences as often as not involve a mediator. But Hanger is not completely optimistic about this. He says that

> Forcing reluctant parties into mediation may well cheapen the cost of justice and improve the speed of delivery, but that does not necessarily improve or even equate to the quality of service that might be rendered

> by a court. I have a concern that the familiarity of the legal profession with mediation processes in certain areas is breeding contempt.

Hanger has a preference for well-prepared intake conferences, which he describes in detail with cases from his own experience, with all the relevant people in the dispute thoroughly prepared for what the mediation will entail.

He concludes that mediation is now in the mainstream of dispute resolution methods in Australia. Whereas it used to take some three years for a case to reach trial in his State, now, the courts are finding it difficult to fill their lists (dockets), and this ''is due largely to the effects of mediation.'' Yet, in the same period, courts have more rigorously managed litigation, thus making the system quicker and cheaper. ''It is my impression, says Hanger, ''that fewer cases now settle at mediation than occurred five years ago, and I attribute that to the fact that litigants are presented with an earlier credible trial date.'' But there is nevertheless a concern that ''young barristers are gaining insufficient experience in the art of advocacy because of the popularity of mediation, and this may be a matter that needs to be addressed by the respective bar associations in the years ahead.''

It is likely to be a long time before mediation becomes so popular around the world that young barristers generally gain insufficient experience in the art of advocacy. Australia and New Zealand are exceptions to the rule that says dispute resolution structures normally take the form of litigation, then arbitration, then mediation. There can be, and are, of course, combinations of these three, as well as other forms. And mediation is surely growing in popularity, growing at a terrifically rapid pace. But as the Hanger article illustrates, when it comes to mediation, his country is ''ahead of the curve.''

Patricia Barclay addresses questions involving mediation techniques in mergers and acquisitions (M&A) transactions. Her article seeks to explore whether the use of mediators or mediation techniques could improve the outcomes in some M&A cases and reduce the number of ''bad'' deals that go through.

Barclay states that, generally, discussions about the use of mediation in deal making revolve around using mediators to break a negotiation impasse, to facilitate discussion of ancillary matters, such as staff benefits, or to resolve disputes where a deal involves the implementation of interrelated contracts over a period of time. Barclay's approach is personal. She wants the mediator, in particular one with a business background, to encourage people to address their concerns and the needs of the business. The mediator ''would try to create solutions from within to which staff would naturally feel more supportive and which would be much more likely to be situation specific.''

Edna Sussman addresses issues in enforcing mediated settlement agreements (MSAs). The problem is difficult, and the solution elusive. For example, the UNCITRAL Model Law on International Commercial Conciliation leaves enforcement of MSAs in the hands of the local jurisdiction. Similarly, the EU Mediation Directive leaves the enforcement mechanism to be employed to the member States. And the same result was reached by the drafters of the U.S. Uniform Mediation Act. states that ''While mediation is seen as a benefit to the parties, there is concern that a summary enforcement mechanism would undercut mediation's value of voluntariness and self-determination.''

One method for enforcing an MSA is as a contract, but of course there may be several defenses against the enforcement of the contract's terms. Sussman goes through many U.S. cases in which MSAs have and have not been enforced as contracts. A real showing of mutual consent to be bound by definite terms is required. The precise language will be critical. Oral MSAs may also be enforced, except where local law requires a writing. Coercion and duress may be defenses, though they are often not accepted by the courts. Incompetence or incapacity, or lack of authority, may be other defenses, as may fraud or mistake.

Enforcement as a judgment is another approach. Sussman points out that if a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The EU Mediation Directive contemplates this possibility.

A third approach is the entry of an arbitration award based on the MSA, so as to render the award enforceable under the New York Convention. The UNICTRAL Arbitration Rules, the UNCITRAL Model Law, the ICC, and ICSID rules, among others, contain provisions permitting ''agreed awards,'' or ''awards on agreed terms.'' And the arbitration rules of Brazil, China, and Hong Kong authorize the arbitrator to attempt mediation or conciliation in the course of the arbitration proceeding. Whether the award is enforceable if the arbitrator is appointed after the mediated settlement of the dispute, such as under the Stockholm rules, is less certain.

Sussman concludes that a UNCITRAL recommendation as to the interpretation of the New York Convention could clarify the applicability of the convention to international arbitration awards entered into with the consent of both parties as a result of a mediation.

After the *Hall Street* case, the second significant development in the United States in 2008 is growing congressional interest in and support for the AFA and similar bills in Congress. The AFA's purpose is to limit certain types of domestic arbitration in the United States, but its wording does not distinguish between domestic and international arbitration and could, depending upon its interpretation and application, damage international arbitration in the United States. The AFA is not addressed extensively in this

2008 volume, but it may well be the subject of an article in a later volume if events so warrant.

The bill provides that pre-dispute arbitration agreements are not valid or enforceable with respect to consumers, employment disputes, and franchises. It further provides that pre-dispute arbitration agreements are void if they concern disputes arising under statutes intended to regulate contracts between parties of unequal bargaining power.

Still further, the AFA would supersede Supreme Court jurisprudence governing ''competence-competence'' and ''separability,'' key doctrines concerning the relationships and authority of arbitration tribunals and the judiciary to decide questions relating to challenges to arbitral jurisdiction.

The potential damage to international arbitration in the United States is obvious, given the international significance and widespread acceptance of these doctrines. The AFA may or may not be enacted into law in 2009, but efforts are being made now to carve out international arbitration from its provisions and perhaps to write a new U.S. federal statute governing international arbitration.

One of our Fordham conference mediation participants and article writer, Edna Sussman, is leading an effort to have the American Bar Association oppose the enactment of any federal, state, or territorial legislation or regulations that (1) could have a negative impact on the efficacy and utility of arbitration as a dispute resultion mechanism for the conduct of international business, or (2) is made applicable to international arbitration practice if such legislation or regulation is inconsistent with established international commercial arbitration practice, or (3) would alter the current law as to the allocation of authority or timing of review between the courts and arbitral tribunals as to the jurisdiction of arbitral tribunals in international disputes, or (4) would void pre-dispute arbitration agreements in business-to-business international transactions.

The foregoing leaves a lot of room for interpretation by the Congress and the judiciary. My preference would be a simple carve out. That is, if the AFA or any similar legislation or regulation is enacted, it should be stipulated therein that it has no application to any arbitration agreement falling within the ambit of (1) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (2)bilateral or multilateral investment treaties to which the United States is a party, or (3) U.S. statutory and case law on international commercial arbitration and international investor-state arbitration.

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I hope that the annual Fordham Conference on International Arbitration and Mediation, along with the annual *Fordham Papers* volumes, consisting of articles by leading figures in international arbitration and mediation, based on their presentations at the conference, will be useful to all participants in and students of these fields. The idea is to discuss and

analyze trends as well as particularly significant events each year. Thus, the focus is on contemporary issues. My further hope is that those who read the articles in these volumes will not just learn from them but will continue, at least in some measure because of them, to make contributions to the field or, if just starting, will begin to make contributions.

Contributors

Conference Coordinator

Arthur W. Rovine has been serving as an arbitrator in NAFTA, ICSID, and ICDR cases since his retirement from the law firm of Baker & McKenzie as of July 1, 2005. He is also the director of the International Arbitration Conference at Fordham University Law School, the editor of *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers,* an adjunct professor of law at Fordham Law School, and chairman of the International Law Committee of the Association of the Bar of the City of New York. He has been a member of the Council on Foreign Relations since 1987.

After joining Baker & McKenzie in 1983, Mr. Rovine represented many major clients in international arbitrations, including a large number of investor-State cases at the Iran-United States Claims Tribunal in the Hague and the U.N. Compensation Commission in Geneva. He also handled cases before the International Chamber of Commerce in Paris, the American Arbitration Association in New York, the Stockholm Institute, *ad hoc* arbitrations, and international litigations in U.S. federal courts. Mr. Rovine handled many claims for and against governments, including investment disputes with Iran and Iraq, and representation of the government of Egypt in a major case against Iraq at the U.N. Compensation Commission.

Mr. Rovine's arbitration and litigation private-sector clients included Rockwell International, General Dynamics, Fluor Corporation, Deloitte Touche Tohmatsu International, Touche Ross International, Combustion Engineering, John Brown Engineering, Nuclear Electric Insurance, Singer, and many others. During this period Mr. Rovine was the president of the American Society of International Law (2000-2002) and the chairman of the International Law Section of the American Bar Association (1985-1986). Mr. Rovine was also a member of the board of editors of the *American Journal of International Law* (1977-1987).

Prior to joining Baker & McKenzie in 1983, Mr. Rovine served in the Office of the Legal Adviser in the U.S. Department of State from 1972 to 1983. He established the *Digest of United States Practice in International Law* (1972-1974), and was then named Assistant Legal Adviser for Treaty Affairs (1975-1981). In that capacity he was responsible for the international law,

constitutional law, and U.S. foreign relations law issues involved in many treaties, agreements, and legislation, including the Algiers Accords with Iran, the termination of the Mutual Defense Treaty with Taiwan, the Taiwan Relations Act, the Panama Canal Treaties, the Egypt-Israel Peace Treaty, several human rights treaties, succession of States with respect to treaties, and the president's treaty powers. Mr. Rovine was then appointed the first U.S. agent to the Iran-United States Claims Tribunal in the Hague from 1981 to 1983. In that capacity, and working with the Iranian agent, European arbitrators, and the Dutch government, he helped establish the tribunal, adapt the UNCITRAL Rules for the tribunal, and helped develop tribunal administrative procedures, privileges, and immunities, payment mechanisms, etc. Mr. Rovine then argued cases at the tribunal on behalf of the U.S. government.

Prior to his government service, Mr. Rovine served as counsel at the ICJ in the *South-West Africa Cases* against South Africa (representing Ethiopia and Liberia) and in the *Namibia Advisory Opinion* (representing the International League for the Rights of Man as *amicus curiae*). Both of these cases involved apartheid issues and practices in South Africa.

Conference Presenters

Frédéric Bachand has been a professor of law at McGill University since 2003 and is particularly interested in the judicial and extrajudicial resolution of civil and commercial disputes, whether they occur in a domestic or international context. He holds doctoral degrees from Université Panthéon-Assas (Paris II) and Université de Montréal, as well as an LL.M. from the University of Cambridge. Professor Bachand currently teaches courses on evidence in civil matters, civil procedure, extrajudicial means of dispute resolution, and NAFTA Chapter 11 arbitration. He is also the co-director, with Professor Thomas E. Carbonneau of Penn State University, of the McGill Summer Programme in Arbitration. In addition to having clerked for Justice Gérard V. La Forest of the Supreme Court of Canada, he practiced for several years with the law firm of Ogilvy Renault, primarily in the field of international commercial arbitration. He is the author of *L'intervention du juge Canadien avant et durant un arbitrage commercial international*, pref. Ch. Jarrosson (Paris: LGDJ, 2005/Cowansville: Éditions Yvon Blais, 2005)—for which he was awarded the 2005 Henri Capitant Thesis Prize, the 2006 Walter Owen Book Prize, and the 2007 Fondation du Barreau du Québec Treatise Prize—as well as numerous articles that have appeared in Canadian, American, and European publications. His work has also been favorably cited in several Canadian court decisions, including three leading decisions of the Supreme Court of Canada on commercial arbitration. Professor Bachand has been a guest speaker at numerous

conferences, including international conferences held in Germany, Russia, Turkey, Vietnam, France, and the United States. He is a member of the NAFTA Advisory Committee on Private Commercial Disputes, a member of the Case Management Committee of the Canadian Commercial Arbitration Centre, an editor of the *Stockholm International Arbitration Review,* and he maintains a bilingual Web site on consensual arbitration in Quebec (http://www.mcgill.ca/arbitration/). He has been a member of the Quebec Bar for more than ten years and frequently acts as a consultant.

Patricia Barclay studied law at Edinburgh University and is admitted as a solicitor in Scotland. She took a post-graduate degree in law at Oxford University before embarking on a career primarily in life sciences, which has taken her all over the world. She held a number of positions with Pfizer in the United Kingdom and the United States before becoming general counsel at Vanguard Medica (now Vernalis) a position she subsequently held at the Ferring Group in Denmark and Solvay Pharmaceuticals in Belgium. She has accordingly been involved in decision making at the highest level in very different companies. She has extensive experience in the negotiation of complex international licensing and cooperation agreements, mergers and acquisitions, the management of IP, public affairs, and the establishment and development of internal services and departments. She has hands-on experience of the pharmaceutical, animal health, medical device, chemical, and consumer goods sectors.

Patricia has undertaken mediation training with the International Institute for Conflict Prevention and Resolution, Pepperdine University and Core. She is a member of the Association for Conflict Resolution, Mediators Beyond Borders and of the WIPO mediation panel. In 2007, she established Bonaccord, which offers business-oriented mediation and facilitation services to all types of companies but with a particular interest in those disputes with an international/cross-cultural or technological angle, and provides part-time or occasional general counsel services to young life science companies. As well as working directly with young life science companies, Bonaccord also provides consultancy services to a number of major law firms. In addition, she also tutors in IP for Edinburgh University and is working with them to develop courses in IP and entrepreneurship.

John Beechey is recognized internationally as one of the world's leading arbitration practitioners. John qualified as a solicitor in England and Wales in November 1977. He became a partner at Clifford Chance LLP in May 1983 and was responsible for the development of the firm's international arbitration practice. He retired from Clifford Chance LLP to take up the chairmanship of the ICC International Court of Arbitration in January 2009. He represented parties in over 90 international arbitrations and advised in connection with many other disputes that were settled prior to a hearing.

John is a fellow of the Chartered Institute of Arbitrators and a former vice president and current member of the board of the LCIA; he was also a

member of the executive committee of the board of the AAA and of the ICDR Dublin Advisory Committee, past chair of the AAA International Arbitration Committee and holder of the board's Leadership Award; he served as a British representative on the ICC Commission; as a member of the ICC UK Arbitration Committee; and remains a member of the Council of the ICC World Business Institute. He was elected president of the International Arbitration Club by his peers in 2002 and held office until December 2008.

John has been appointed to, and currently serves on, arbitral tribunals pursuant to ICC, UNCITRAL, AAA/ICDR, LCIA, and ICSID rules. John is an accredited mediator for the Centre for Dispute Resolution and the AAA. He was a member of the IBA Working Group responsible for drafting the IBA Rules on the Taking of Evidence in International Commercial Arbitration in 1999 and of the Working Group on Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitrations published in 2004. John has given lectures and seminars on topical arbitration issues at conferences all over the world.

Michael Marks Cohen, currently of counsel to Nicoletti, Hornig & Sweeney, has been in private practice in New York City since 1970, specializing in admiralty law, marine insurance, commodities trading, and international arbitration. He has appeared as an advocate and served as an arbitrator on tribunals of the Society of Maritime Arbitrators, the North American Grain Export Association, the International Chamber of Commerce and the American Arbitration Association. He taught the admiralty course at Columbia Law School for more than 30 years. A Titulary Member of the Comite Maritime International, he is an elected member of the American Law Institute, which honored him with the John Minor Wisdom Award. Mr. Cohen is an associate editor of American Maritime Cases and a co-editor of the *Digest of the Award Service of the Society of Maritime Arbitrators*. He was formerly the editor of several volumes of *Benedict on Admiralty*.

Antony Crockett is an associate in the London office of Clifford Chance LLP where he practices in the areas of international commercial arbitration and public international law. Antony holds a B.Sc. and LL.B. (Hons) from the University of Melbourne and an LL.M. from the London School of Economics and Political Science. Prior to joining Clifford Chance, Antony completed an internship at the United Nations Office of Legal Affairs (Vienna), within the UNCITRAL Secretariat. In 2008, Antony represented the Arbitration Committee of the IBA as an observer delegate to Working Group II of UNCITRAL, which is currently engaged in work to revise the 1976 UNCITRAL Arbitration Rules.

Rocío Digón received her J.D. from Yale Law School in 2008. Previously, she received an LL.M. in public international law at Leiden University in 2005 while on a Fulbright Fellowship to the Netherlands, and her B.A., summa cum laude, from Amherst College in 2003. Her professional

experience includes serving as assistant legal counsel at the Permanent Court of Arbitration in The Hague and as legal assistant at White & Case LLP in Washington, DC. She is a senior fellow of Humanity in Action. Her most recent publication is ''The Decision on Liability in LG&E v. Argentina'' in *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (Guillermo Aguilar Alvarez and W. Michael Reisman eds., 2008).

Donald Francis Donovan concentrates his practice in international disputes before courts in the United States, international arbitration tribunals, and international courts. Mr. Donovan has argued international law, arbitration law, commercial law, and other issues before the ICJ (most recently in *Avena and Other Mexican Nationals (Mexico v. U.S.*), the U.S. Supreme Court (most recently in *Medellín v. Texas*), other international courts, and federal and state courts throughout the United States. He regularly conducts arbitrations in venues throughout the world under the auspices of the world's leading arbitration institutions, and he regularly sits as arbitrator in international cases, including under the auspices of the ICC, the ICDR, and ICSID.

Based on surveys of other practitioners, Mr. Donovan was recently identified as one of the eight leading international arbitration practitioners in the world by *Chambers Global* (2008), which called him ''one of the world's leading practitioners in both investment treaty and commercial arbitration.'' He was also ranked among the six leading international arbitration practitioners in the United States in *Chambers USA* (2007); the two (with his partner David W. Rivkin) leading international arbitration practitioners in the United States in *Expert Guides to the World's Leading Lawyers: Best of the Best USA* (Euromoney 2007); and the 25 leading litigators in the United States in *Expert Guides to the Leading Lawyers: Best of the Best USA* (Euromoney 2008). In June 2006 (again with his partner Mr. Rivkin), Mr. Donovan was awarded the first ''Chambers Award of Excellence in International Arbitration.'' Later that year, for his achievements in both international arbitration and international human rights, he was awarded the Premio Nacional de Jurisprudencia by the Mexican Bar Association, the first non-Mexican so honored.

Mr. Donovan teaches international arbitration at New York University School of Law, is a visiting Professor at the Centre for Commercial Law, Queen Mary University of London, and serves on the board of trustees of the Foundation for International Arbitration Advocacy in Geneva. He regularly speaks and writes on international arbitration, international litigation, and international law topics. Among other positions, Mr. Donovan serves as vice president and one of three U.S. members of the ICCA; as vice president of the American Society of International Law; and as a member of the board of directors of Human Rights First (formerly the Lawyers Committee for Human Rights). He recently completed a five-year

term as chair of the Institute for Transnational Arbitration, and he has served as chair of the Arbitration Committee of the U.S. Council for International Business (the U.S. National Committee for the ICC International Court of Arbitration) and a member of the ICC Commission on Arbitration. He served as program co-chair of the Centennial Meeting of the American Society of International Law, which took place in Washington, DC in March 2006; as program chair of the 14th Congress of the ICCA, which took place in Montreal in June 2006; and as program chair of ICCA's 15th Congress, which took place in Dublin in June 2008.

Mr. Donovan joined Debevoise & Plimpton, LLP after serving as law clerk to Associate Justice Harry A. Blackmun of the U.S. Supreme Court and as legal assistant to Judge Howard M. Holtzmann of the Iran- United States Claims Tribunal.

John Fellas is a partner in the New York office of Hughes Hubbard & Reed LLP, practicing in the fields of international litigation and arbitration. Mr. Fellas has practiced in both the United States and England, and, as well as being a member of the New York Bar, he is also a solicitor of the Supreme Court of England and Wales. He has served as counsel, and as chair, sole arbitrator, and co-arbitrator, in arbitrations under the AAA, ICC, and *ad hoc* rules. He also serves on the Mediation Panel of the District Court for the Southern District of New York. He has also been retained to act as an expert witness on U.S. law in proceedings in other countries, most recently by the U.S. Department of Justice.

He chairs the annual program, sponsored by the Practising Law Institute, *International Business Litigation and Arbitration*. He has also published many articles in the field, including in the United States, Europe, Korea, India, and New Zealand. He is editor of the book *Transatlantic Commercial Litigation and Arbitration* (Oceana 2004). He has been recognized for his practice in international arbitration by: *Who's Who Legal—The International Who's Who of Business Lawyers* (International Arbitration); *Chambers USA—Guide to America's Leading Business Lawyers* (International Arbitration); *Chambers Global* (International Arbitration); *The Best Lawyers in America* (International Arbitration). In February 2006, *Global Arbitration Review* identified him as one of 45 leading international arbitration practitioners under the age of 45.

He has also been recognized for his practice in commercial litigation by: *Who's Who Legal — The International Who's Who of Business Lawyers* (Commercial Litigation); *New York Super Lawyers* (Business Litigation). He is also listed in: *Who's Who in American Law (Marquis); Who's Who in the East (Marquis).*

He received a B.A. (Hons.) from the University of Durham, England, and both an LL.M. and an S.J.D. from the Harvard Law School.

L. Yves Fortier, C.C., Q.C., is chair and senior partner of Ogilvy Renault LLP in Montreal. He is widely acknowledged as one of the world's leading arbitrators. From 1988 to 1992, he served as Canada's ambassador and

permanent representative to the United Nations in New York. He has also served as special representative of the Secretary-General of the United Nations.

Since 1992, he has acted as arbitrator and mediator in over 200 arbitral proceedings in North America, Europe, and Asia, both *ad hoc* and under the auspices of the ICC, LCIA, AAA, ICSID, SIAC, CAS, as well as other arbitral institutions. From 1998 to 2001, he served as president of the LCJA and is currently judge *ad hoc* of the ICJ in The Hague.

He chaired two U.N. Compensation Commission panels in Geneva in 1993 and 1998, and is a former member of the Claims Resolution Tribunal for Dormant Bank Accounts in Zurich. He is also a member of the ICCA.

He was educated at Université de Montreal (WA.), McGill University (B.C.L.) and Oxford University, as a Rhodes Scholar (B.Litt.). He has received honorary degrees from eight prestigious universities, and has written and spoken extensively in French and English on international arbitration.

Dana H. Freyer is a Partner at Skadden, Arps, Slate, Meagher and Flom LLP. Ms. Freyer heads Skadden's arbitration and alternative dispute resolution practices and is a member of the firm's International Arbitration Group. Ms. Freyer handles all types of U.S. and international commercial litigation and arbitration, including international arbitrations under the UNCITRAL, ICC, ICSID, AAA International, Stockholm Chamber of Commerce, and other arbitration rules. She represents clients in mediations and other ADR proceedings, and she also serves as an arbitrator. She works with clients and other Skadden, Arps attorneys in structuring dispute resolution alternatives to litigation, drafting dispute resolution contract clauses, and developing conflict management and dispute handling systems.

Ms. Freyer also heads the firm's Corporate Compliance Program practice. She advises clients on the development and implementation of ethics, compliance, and corporate governance programs, including management structures and control systems, to prevent and detect violations of law; the management of claims, litigation, and other legal risks; and the organization of their law departments. Ms. Freyer has worked with more than 250 companies in diverse industries on the design and implementation of their ethics and compliance programs, including their training programs and monitoring and auditing systems. Her clients include consumer products, financial services, pharmaceutical, medical device, insurance, banking, chemicals, entertainment, publishing, accounting, consulting, paper and forestry products, and manufacturing companies. She also advised a major insurance company on the management and handling of its major litigation claims.

Ms. Freyer repeatedly has been selected for inclusion in *Chambers Global: The World's Leading Lawyers for Business* (International Arbitration); *Chambers USA, America's Leading Lawyers for Business* and *The Best Lawyers in America.*

She is also listed in *International Who's Who of Commercial Arbitrators* and *Business Lawyers and Who's Who in American Law*. She has been named by *Euromoney* as one of the world's leading experts in commercial arbitration; as one of the 50 top women litigators in America by *The National Law Journal*; and as a leader in dispute resolution in the *Practical Law Company's Global Counsel Dispute Resolution Handbook*. She also was included as one of ''The All-Female Top 30'' arbitrators worldwide in the September 2007 issue of *Global Arbitration Review*. Ms. Freyer lectures frequently at professional conferences on issues relevant to international arbitrations, ADR, negotiating and drafting dispute resolution clauses in international commercial contracts, corporate governance and compliance program design, and implementation and other aspects of corporate legal risk management. She also has written numerous articles on issues related to her areas of practice.

Thomas Halket is a chartered arbitrator, partner of the New York law firm of Halket Weitz LLP and an adjunct professor of Law at the Fordham University School of Law. Prior to forming Halket Weitz, he was the partner in charge of the commercial technology practice in the New York office of Bingham McCutchen LLP. He has been an arbitrator and mediator for over 20 years and is a member of panels of the AAA (including the commercial, large complex, large complex technology, and IP and international panels), the Chartered Institute of Arbitrators, the CPR Institute for Dispute Resolution (including the CPR Panel of Distinguished Neutrals and the international panel), the SIAC and the WIPO (including domain name and on-line panels). He is a fellow of the Chartered Institute of Arbitrators, Chairman of its New York chapter and member of its Practice and Standards Committee. He is also chairman of the Technology Advisory Committee of the AAA. He holds a law degree from the Columbia University School of Law and bachelors and masters degrees in physics from the Massachusetts Institute of Technology.

Ian Hanger AM QC has been a barrister since 1968 and took silk in 1984. He now mediates and arbitrates on a full-time basis. He is a member of the Mediation Panel of ICSID; a member of the mediation panel of the CAS; a member of the National ADR Advisory Committee to the Attorney-General of Australia; a member of the Mediation Committee of the Law Council of Australasia; a qualified arbitrator and mediator in the Institute of Arbitrators and Mediators Australia; an arbitrator member of CIETAC.

He has delivered many papers on mediation, both nationally and internationally. He has mediated more than 2,000 disputes.

Professor Hilmar Raeschke-Kessler is a *Rechtsanwalt beim Bundesgerichtshof*, that is, a member of the exclusive bar of the German Federal Supreme Court with 42 members only. He is also an honorary professor at the Faculty of Law of the University of Cologne where he teaches international civil procedure with an emphasis on international arbitration.

Professor Raeschke-Kessler studied law at the Universities of Bonn and Göttingen and completed his legal traineeship (*Referendariat*) in Germany before attending the University of Chicago Law School, where he obtained his LL.M. degree in 1975. In the same year he was admitted to the German Bar and joined the Frankfurt office of Pelter & Riesenkampff (now CMS Hasche Sigle) as an associate, focusing on banking and general commercial law. In 1979, he became partner of Hoffmann, Raeschke-Kessler, Liebs (now Hoffmann Liebs Fritsch Ruhe), a firm practicing primarily in general commercial and environmental law. In 1986, he was elected to the bar of the *Bundesgerichtshof.*

Before the *Bundesgerichtshof,* Professor Raeschke-Kessler represents clients mainly in corporate and commercial matters and in cases related to the enforcement or setting aside of arbitral awards. Since 1985, he also serves permanently as chairman, sole or party-appointed arbitrator in numerous international and domestic arbitrations under ICC, DIS, UNCITRAL, and other regimes. Subject matters are mostly related to post-M&A, telecommunications, public procurement, foreign investment, privatization, and construction. He has been ranked by *Euromoney Legal Media Group* as one of *The Best of the Best* in 2003, 2005, and 2007. His working languages are German, English, and French.

Professor Raeschke-Kessler is, *inter alia*, fellow of the Chartered Institute of Arbitrators, member of the executive committee of the ILA, the ICC—Commission on International Arbitration, vice president of the German branch of the ILA, and board member of the German Arbitration Institution (DIS). He has also been member of the IBA Working Group on the IBA Rules of Evidence and of the IBA Working Group on Conflicts of Interest in International Arbitration as well as past vice president of the LCIA—European Users' Council.

Professor Raeschke-Kessler publishes frequently on issues of international arbitration. Recent papers include ''Corruption in Foreign Investment—Contracts and Dispute Settlement between Investors, States, and Agents,'' in 9(1) *Journal of World Investment & Trade,* 5-33 (Feb. 2008), ''Witness Conferencing,'' in Lawrence W. Newman & Richard D. Hill eds., *The Leading Arbitrators' Guide to International Arbitration* 4, 15-428 (2d ed. 2008), and ''Die Unparteilichkeit und Unabhängigkeit des Schiedsrichters—Ein transnationales Rechtsproblem?'' in *ASA Bulletin*, January 2008, at 3-17.

Gabrielle Kaufmann-Kohler is a professor of private international law at Geneva University Law School and a partner in Lévy-Kaufmann-Kohler. She is the director of the Geneva Master in International Dispute Settlement. Ms. Kaufmann-Kohler is formerly a partner (1996-2007) of Schellenberg Wittmer and a partner (1985-95) and associate (1981-85) of Baker & McKenzie, Geneva and New York. She is admitted to the New York Bar and to the Geneva Bar, and is honorary president of ASA and chair from 2001 to

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Ms. Kaufmann-Kohler practices in the area of international commercial, investment, and sports arbitration. She has handled about 150 international arbitrations, mainly as an arbitrator. She appears on numerous arbitration panels, including the ICC, ICSID, and the AAA. She has chaired the *ad hoc* Division at the Olympic Games from its creation in 1996 (Atlanta) until 2000 (Sydney), and she is regularly ranked among the top ten arbitrators worldwide.

Her teaching and research activities focus on international arbitration. For a list of numerous publications in the areas of her specialization, see http://www.lk-k.com). Ms. Kaufmann-Kohler is fluent in English, German, French, and Spanish, and she has a reading knowledge of Italian.

Michael Leathes is executive director of the IMI, a non-profit foundation establishing international competency of mediators and promoting mediation worldwide. During his 37-year career, he has held a series of in-house corporate legal roles including general counsel of Pfizer International, legal director of International Distiller & Vintners (IDV) and head of IP at British American Tobacco. He spent some time while in the drinks business as president of IDV's EurAsia region and while in the pharmaceutical industry as secretary-general of the Animal Health Institute, a European trade federation.

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Andrea J. Menaker is a partner in White & Case's international arbitration practice in the firm's Washington, DC office, where she specializes in investor-State and other international arbitration matters. Before joining White & Case earlier this year, Ms. Menaker was chief of the NAFTA Arbitration Division for the U.S. State Department, where she was lead counsel for the United States in investor-State arbitrations arising under the investment chapter of NAFTA. In her role, she also represented the United States in NAFTA investor-State arbitrations against Canada and Mexico, and participated in the drafting of investment and dispute resolution provisions in U.S. bilateral investment treaties and investment chapters of free trade agreements. Ms. Menaker served as an adjunct professor at Georgetown University Law Center for several years where she taught international commercial arbitration. Prior to joining the State Department, Ms. Menaker was a law clerk for Judge Stein of the federal district court for the Southern District of New York, and an associate at Shearman & Sterling, LLP in New York. Ms. Menaker is a frequent speaker and publisher on international arbitration topics, and is an advisory board member for the International Law Institute, a consultative forum member for the British Institute of International & Comparative Law, and a member of the Investment Experts Group for UNCTAD.

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Her areas of expertise include energy and natural resources, joint ventures, concession agreements, Russia, Kazakhstan, and the Caspian region, the Energy Charter Treaty, investment treaty disputes, and disputes against State parties.

Sophie is a regular speaker at conferences and seminars on issues of arbitration and international law. She is also a guest lecturer at McGill University Faculty of Law, Columbia Law School, and Fordham University School of Law, New York.

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Mr. Phillips is a *cum laude* graduate of Dartmouth College and a *magna cum laude* graduate of New York Law School. Prior to joining CPR Institute in 1998, he was associated with the law firms of Cahill Gordon & Reindel and Schulte Roth & Zabel LLP, both in New York City. While in private practice, he was engaged in a wide scope of litigation matters, including employment, securities, commercial contract claims, corporate governance, and insurance insolvency disputes. He is a member of the bars of the states of New York, New Jersey, and California, as well as of the U.S. Supreme Court.

Mr. Phillips is married to actress Elaine Bromka, and they have a son and daughter. He has served as a civil rights commissioner in his home of Montclair New Jersey; a trustee of New York Law School; a member of the board of directors of Opera Nova and the New York Wagner Society; and a member of the Corporation of the American Friends Service Committee. He is also an active member of the Cornwall (NY) Monthly Meeting of the Religious Society of Friends.

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he served as arbitrator and counsel in many international cases. He was president of the Inter-American Commission on Human Rights of the Organization of American States, vice president and honorary vice president of the American Society of International Law, Editor-in-Chief of the *American Journal of International Law,* and a member of the Eritrea-Ethiopia Boundary Commission. His most recent books are *Foreign Investment Disputes: Cases, Materials and Commentary* (with Bishop and Crawford) (Kluwer Law International, 2005); *International Law in Contemporary Perspective* (with Arsanjani, Wiessner & Westerman) (Foundation Press, 2004); *Jurisdiction in International Law* (Ashgate, 1999); and *Law in Brief Encounters* (Yale University Press, 1999), Chinese Translation, *Shenghuozhongde Weiguan Falu* [Microscopic Laws in Life] (Shangzhou Chubanshe, Taipei, 2001). A Chinese edition of his selected writings, *Understanding and Shaping International Law: Essays of W. Michael Reisman* (published in Guojifa: Lingwu Yu Goujian, Law Press—China, 2007).

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John is a fellow of the Chartered Institute of Arbitrators, a member of the AAA Commercial Panel, and has served as a mediator for the N.Y. Supreme Court County Commercial Division and the Southern and Eastern Divisions of New York. He served as a mediator and judge on the third ICC International Commercial Mediation Competition. John is a member of the New York City Bar ADR Committee (and is chair of the subcommittee on the Uniform Mediation Act) and is also a member of the IBA Mediation Committee (serving as co-chair of the subcommittee on the UNCITRAL Model Law on International Commercial Conciliation.

John is active as a moderator and speaker, and has been a member of the New York Bar since 1974. He has a B.A. from Trinity College, a J.D. from Fordham Law School, and an LL.M. (Taxation) from New York University and is a chartered accountant in Canada. He is bilingual in French and English, and is fluent in German and Italian.

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Mr. Schäfer graduated from the University of Freiburg/Germany. He also studied abroad. Having completed his bar examination in 1987, he worked as counsel at the secretariat of the ICC International Court of Arbitration (1988-1992) before first joining the patent department of a

company as in-house counsel and then the Dresden office of a law firm (1993-1996). Since joining Cohausz & Florack in 1997, his main areas of practice have been commercial arbitration and all aspects of IP including transactional work for exploiting innovations, trademarks and names, or copyrights. His court litigation practice mainly focuses on contractual, trademark, unfair competition, copyright, R & D, and licensing matters. Since 1994 he has acted as counsel and arbitrator in national and international arbitrations on a frequent basis. He is trained as mediator.

Mr. Schäfer has been a speaker and panelist at conferences covering topics such as licensing, research and development, arbitration, and mediation. He chairs the Task Force on IT & Arbitration of the ICC Commission on International Arbitration where he also co-chairs the Task Force on Expertise in ICC Dispute Resolution. Mr. Schäfer speaks and writes English, Spanish, French, and German. He has conducted arbitral proceedings as chairman or sole arbitrator in all these languages.

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Ms. Sussman serves on many of the leading panels including: AAA—commercial, environmental and energy arbitration and mediation panels; ICDR—commercial and energy arbitration and mediation panels; CPR—commercial, international, franchise, energy oil and gas, arbitration, and mediation panels; U.S. Council of International Business (for ICC International Court of Arbitration)—registered mediator and arbitrator; Permanent Court of Arbitration in the Hague—emissions trading arbitration panel; Chinese European Arbitration Centre—arbitration panel; Energy Arbitrators List Around the World, administered by the ICDR—arbitration panel' FINRA (formerly NASD and NYSE)—arbitration and mediation panels; U.S. district courts (S.D.N.Y., E.D.N.Y.)—mediation panels; New York State Supreme Court, New York and Westchester Counties—mediation panels; and U.S. bankruptcy courts (S.D.N.Y., E.D.N.Y., D. Delaware)—mediation panels.

Ms. Sussman serves as chair of the Publications Committee of the New York State Bar Association's Alternative Dispute Resolution Section, chair of the Alternative Dispute Committee of the Energy Bar Association, vice chair

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Ms. Sussman is a graduate of Columbia Law School and Barnard College. She has published and lectured extensively on the arbitration and mediation process ands on energy and environmental issues. Her recent publications include ''The Reasons For Mediation's Bright Future, New York State Bar Association,'' *NY Dispute Resolution Lawyer,* October 2008; ''The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development,'' 14(3) *ILSA Journal of International & Comparative Law* (2008); ''Reshaping Municipal and County Laws to Foster Green Building Energy Efficiency and Renewable Energy,'' 16(1) *New York University Law School Environmental Law Journal* (2008); ''Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements,'' I*nternational Bar Association's Mediation Law Committee Newsletter,* April 2006; ''Complexities of Designing a U.S. Federal Carbon Regime,'' *Energy Law 360,* July 2007; ''Building Stock Offers Opportunities to Foster Sustainability and Provides Tools for Climate Change Mitigation and Adaptation, American University Washington College of Law,'' 7(3) *Sustainable Development Law & Policy Journal* (2007); ''RGGI: New York Addresses Climate Change with the First Mandatory Greenhouse Gas Program,'' 78(4) *New York State Bar Association Journa* (May 2006).

Irene C. Warshauer is an arbitrator, mediator, and attorney, practicing as the Law Office of Irene C. Warshauer, in New York City. She is formerly, of counsel, Fried & Epstein, LLP, partner, Anderson Kill & Olick, P.C., associate, Chadbourne & Parke. She is an experienced sole arbitrator, panel chair, or panel member in over 80 matters involving commercial business, securities, breach of contract, employment, insurance, brokerage disputes, franchise-related claims, and torts. Since 2002, over 50 percent of her practice has been as a neutral in arbitration of large securities-related claims and customer broker claims, employment (wrongful termination), franchise agreements, and general commercial claims. Additionally she has served as a mediator of more than 150 matters, including a class action involving governmental entities, software supply contract with a large investment banker, distributorship disputes, employment disputes (race, gender, and ADA discrimination, and sexual harassment), franchise agreements, securities (broker dealer, customer, and employment matters) and breach of contract claims.

She has over 35 years experience as a litigator and negotiator. She has represented parties in a wide variety of commercial cases, including Fortune 100 and Fortune 500 corporate policyholders to recover insurance coverage for officers and directors insurance for securities class actions, fiduciary bond insurance for theft of corporate assets, etc., involving primary, excess,

and umbrella insurance over $2 billion. The underlying cases involved chemical, communication, electronics, computers, steel manufacture, and superfund sites, and required knowledge of those industries. She served as national counsel for asbestos defendants in charge of directing and coordinating more than 35 local counsel in over 100,000 cases.

Mrs. Warshauer serves on many leading panels including: AAA—complex case, commercial and mediation panels; ICDR—commercial panel; CPR—commercial, franchise, e-discovery, and mediation panels; FINRA (formerly NASD and NYSE)—arbitration and mediation panels; U.S. District Courts (S.D.N.Y., E.D.N.Y.)—mediation panels; U.S. bankruptcy courts (S.D.N.Y., E.D.N.Y.); New York State Supreme Court—New York County mediation panel; New Jersey Superior Court—mediation panel.

Mrs. Warshauer is a member of the American Bar Association (ADR Committee; Tort Trial & Insurance Practice Section of the ABA Committee); NYC Bar (Arbitration Committee; ADR Committee; Judiciary Committee); New York State Bar Association (Sections: Dispute Resolution, Federal and Commercial Litigation and Torts and Insurance Practices); Association for Conflict Resolution.

She graduated from the University of Michigan and Columbia Law School. She has taught arbitration, mediation and ethics, and has lectured and published on ADR, e-discovery, and insurance coverage issues.

List of Abbreviations and Acronyms

AAA	American Arbitration Association
ABA	American Bar Association
ACCTM	American College of Civil Trial Mediators
ACR	Association for Conflict Resolution
ADR	alternative dispute resolution
AFA	Arbitration Fairness Act
ALI	American Law Institute
ASA	Swiss Arbitration Association
AZPO	Austrian Code of Civil Procedure
BIT	bilateral investment treaty
CAFTA-DR	Central America-Dominican Republic-United States Free Trade Agreement
CAS	Court of Arbitration for Sport
CCOIC	China Chamber of International Commerce
CCM	Collaborative Case Management
CCPIT	China Council for Promotion and International Trade
CEDR	Centre for Effective Dispute Resolution
CIETAC	China International Economic and Trade Arbitration Commission
CPLR	New York Civil Practice Law and Rules
CPR	International Institute for Conflict Prevention and Resolution (Center for Public Resources)
DIS	German Arbitration Institution
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EEOC	Equal Employment Opportunity Commission
FAA	Federal Arbitration Act
FET	Standard international minimum standard

FINRA	Financial Industry Regulatory Authority
FIPA	foreign investment protection agreement
FMV	fair market value
FTC	Free Trade Commission
GATS	General Agreement on Trade in Services
GZPO	German Code of Civil Procedure
IAM	International Academy of Mediators
IBA	International Bar Association
ICJ	International Court of Justice
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICANN	Internet Corporation for Assigned Names and Numbers
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
IISD	International Institute for Sustainable Development
IMI	International Mediation Institute
IP	intellectual property
IT	information technology
JAMS	Judicial Arbitration and Mediation Services
LCIA	London Court of International Arbitration
M&A	mergers and acquisitions
cMAI	multilateral agreement on investment
MFN	most-favored nation
MSA	mediated settlement agreement
NAF	National Arbitration Forum
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
PCT	Patent Cooperation Treaty
PILA	Swiss Private International Law
PSLRA	Private Securities Litigation Reform Act of 1995 Securities Litigation SLUSA Uniform Standards Act of 1998
SAA	statement of administrative action

SIAC	Singapore International Arbitration Centre
SOI	statement of implementation
SPIDR	Society for Professionals in Dispute Resolution
UMA	Uniform Mediation Act
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Part I

Investor-State Arbitration

Overview of Investor-State Arbitration Articles

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The awakening of international investment arbitration from an almost dormant area to one of the liveliest fields of international dispute resolution today has not gone unnoticed, and this colloquium is testament to this trend.

The proceedings of this session deal with topics on investment arbitration, which are at the forefront of new developments and thus of major present interest to practitioners and academics. They include a discussion of the latest trends in the new generation of bilateral investment treaties (BITs), the ever-present subject of interim measures, the intervention of the non-disputing State party in arbitration proceedings, and the evolution of case law in the area of expropriation. Some of the world's best-known specialists in the field were invited to review these topics.

John Beechey, president elect of the ICC and head of the Arbitration Department of Clifford Chance, along with his co-author, Antony Crockett of Clifford Chance, elaborate on the new generation of BITs—whether and how they differ from the ''old'' ones, whether there are any new trends and, if so, in what direction they are evolving.

Two aspects are particularly striking about the new BITs. The first one is the influence that arbitral awards have exercised on the drafting of the new treaties. It is particularly noteworthy in light of the present debate about the influence of earlier arbitral awards on later awards or, in other words, about the precedential value of arbitral decisions. If the latter influence—of awards on awards—is still questioned, the former—of awards on treaties—appears well established.

The second striking aspect of the new treaties is the increasing emphasis placed on public interest, which is visible in substantive and procedural matters as well. From a procedural viewpoint, the treaties now tend to make provision for the transparency of the arbitration proceedings as a means of protecting public interest, which they did not do before. As a matter of substance, several treaties now expressly stipulate that measures akin to expropriation, such as regulatory takings, do not qualify as expropriation nor are they entitled to reparation if taken in the public interest. By

contrast, under old treaties, such measures would often have qualified as expropriation, which, though lawful, would have given rise to compensation.

The second article is authored by Professor Michael Reisman from Yale Law School, whose eminence in public international law is known to any reader, and Rocío Digón of Weil, Gotshal & Manges. The article deals with one of the substantive investment guarantees and is entitled ''The Eclipse of Expropriation.'' As the title indicates, the authors argue that current factors could provide the seeds for the revival of expropriation, which in recent years has receded in favor of other guarantees, especially fair and equitable treatment. Only future cases will tell whether the argument is right.

The third topic, addressed by Yves Fortier, a partner of Ogilvy Renault and an arbitrator who needs no introduction, explores the differences between interim measures in commercial and in investment arbitration. As the duration of proceedings in investment arbitration tends to increase considerably (which is a problem in and of itself), interim measures have gained in practical significance. Are the interim measures sought against a State different from those sought against non-State parties? Does investment arbitration differ from commercial arbitration in this respect as in many others? Indeed, there are differences. As the reader will see, the requirement of urgency in particular raises interesting points of distinction between investment and commercial arbitration.

In the last article, Andrea Menaker, who is now associated with White & Case and was previously in charge of the North American Free Trade Agreement (NAFTA) arbitrations at the U.S. State Department, delves into the experience gathered during those years to discuss the intervention of non-disputing State parties in investment arbitration. This special feature evidences one of the important differences between commercial and investment arbitration. In commercial arbitration, the parties to the contract are the parties to the arbitration. In investment arbitration, one of the parties to the ''contract,'' (i.e., the treaty) is missing in the proceedings. How can this party nevertheless have a say on the meaning of the treaty? How can it contribute to the determination of the parties' intent when they entered into the treaty? These questions go to the core of the differences between treaty and contract interpretation.

In brief, the reader will find in the following pages a collection of articles that provide well-informed insights into some of the hot issues of investment arbitration one should watch in the coming years.

New Generation of Bilateral Investment Treaties: Consensus or Divergence?

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INTRODUCTION

The contextual background to this article may be readily summarized: since Germany and Pakistan entered into the first bilateral investment treaty (BIT) in 1959, more than 2,500 similar treaties have been concluded, over 2,000 of which have been signed since 1990. Just as such treaties have proliferated, there has been a very significant increase in the number of disputes referred to arbitration in reliance upon their dispute settlement provisions, particularly in the course of the last ten years.

While there is a cause and effect relationship, to the extent that the increased coverage of these treaties has led to the very great importance of investment treaty arbitration today, that is not the focus of this article. It is inspired, in part at least, by another cause and effect relationship: the experience of the United States in the context of the North American Free Trade Agreement (NAFTA) and its decision to reassess the drafting of its BITs.[1] In 2004, the United States promulgated its most recent model treaty (U.S. Model). But has the U.S. Model been adopted consistently, in whole or in part, by other States engaged in, or contemplating, a revision of existing BITs or the promulgation of new BITs? For the purposes of this article, references to treaties signed since 2004 are to a ''new generation'' of BITs.

This article considers this new generation of BITs in an attempt to assess whether these treaties evidence a trend towards consensus or divergence—

[1] Barton Legum, ''Lessons Learned from the NAFTA: The New Generation of US Investment Treaty Arbitration Provisions,'' 19(2) *Foreign Inv. L.J.* 344 (2004).

or neither. To what extent have existing provisions been refined in the new generation of BITs; what new rules do they contain; and what, if anything, has been jettisoned? The new generation of BITs is not homogenous; the framing of the terms of these agreements remains the subject of experiment by draftsmen in all parts of the world. There is inevitably a degree of divergence in the results of those efforts, not least attributable to the experience of the United States with NAFTA, and its apparent determination to follow a particular path as a result. The article offers some necessarily speculative observations on the implications of the resultant divergence for investors and for governments.

MAIN FEATURES OF NEW GENERATION BILATERAL INVESTMENT TREATIES

It is useful background briefly to consider the demographics of the new generation of BITs, which numbers slightly more than 100 treaties.[2] The past decade has seen not only an explosion in the number of investment disputes referred to arbitration under these treaties, but also in the number of treaties concluded year after year. Four hundred and thirty-two treaties were signed in the 40 years up to 1990; more than 2,000 have been concluded since.[3] Developed economies continue to be the preponderant signatories to BITs, but there has also been a significant increase in the number of so-called south-south agreements.[4] Germany has signed more BITs than any other country—some 138 as of June 1, 2007.[5] Germany (with China and Morocco) has also led the way so far as the renegotiation of existing treaties is concerned.[6]

UNCTAD has identified five main features of the new generation treaties:[7]

[2] See the year-by-year list of treaties maintained by the International Centre for Settlement of Investment Disputes (ICSID), http://icsid.worldbank.org/ICSID/Index.jsp, (last visited May 28, 2008).

[3] *Id.*

[4] By the end of 2006, there were 680 treaties in existence between developing countries; see UNCTAD, ''Recent Developments in International Investment Agreements,'' *IIA Monitor No. 3,* at 2 (UNCTAD/WEB/ITE/IIA/2007/6, 2007) (2007), *available at* http://www.unctad.org/en/docs/webiteiia20076_en.pdf (last visited May 28, 2008) [hereinafter UNCTAD, Recent Developments].

[5] See, the country lists maintained by UNCTAD, http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1 (last visited May 28, 2008).

[6] Germany has renegotiated 13 treaties while China and Morocco have renegotiated 12 each; see UNCTAD, Recent Developments, *supra* note 4, at 3.

[7] UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (UNCTAD/ITE/IIA/2007/3) (Sept. 2007), *available at* http://www.unctad.org/en/docs/iteiia20073_en.pdf, 71-90 (last visited Mar. 28, 2008).

1. greater precision in the scope of the definition of ''investment'';
2. clarification of the meaning of key obligations;
3. clarification that investment protection should not be pursued at the expense of other public policy objectives;
4. promotion of greater transparency between the contracting parties and in the process of domestic rule making; and
5. innovations in relation to dispute settlement procedures.

This article focuses on the second (*clarification of obligations*), third (*public policy objectives*), and fifth (*innovations in relation to dispute settlement*) of these features on the basis that they constitute useful comparators by which to assess consensus or divergence.

Clarification of the Meaning of Key Obligations

An important trend in new generation BITs has been the addition of language intended to clarify and, in some circumstances, to modify certain of the substantive obligations typically found in these treaties. Many BITs run to less than ten pages. The substantive criteria to be observed by the host State are set out in provisions rarely exceeding one or two short paragraphs in length[8] (although there are a number of examples of more detailed most-favored-nation (MFN) and expropriation provisions). By contrast, the recent BIT between the United States and Uruguay is some 50 pages long, with virtually a full page of text and an annex devoted to an elaboration of the fair and equitable treatment standard.[9]

Fair and Equitable Treatment: In Accordance with International Law?

Turning, first, to fair and equitable treatment and the so-called international minimum standard (the FET Standard), Article 5 of the U.S. Model provides, at paragraph (1), that

[8] *See, e.g.,* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (Dec. 11, 1990), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf (last visited Mar. 28, 2008).

[9] Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (Nov. 2005), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/US_Uruguay.pdf (last visited Mar. 28, 2008).

> [e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

Further paragraph (2) provides that

> [f]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ''fair and equitable treatment'' and ''full protection and security'' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

Then, in order to make the point clear beyond any doubt, in Annex A ''[t]he parties confirm their shared understanding'' that customary international law generally, and as specifically referenced in Article 5 of the U.S. Model

> results from a general and consistent practice of states that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

The language of Article 5 and Annex A has been reflected in every BIT and free trade agreement (FTA) investment chapter concluded by the United States since 2004.[10] The provision has not escaped criticism. Judge Schwebel has described the U.S. Model BIT as: ''an exercise in the regressive development of international law.''[11] He questions whether it is reasonable to assume that when the United States concludes a treaty with a developing country, the parties' respective understandings of the meaning

[10] The list is a long one: it includes (at least): (1) the investment chapter of the FTAs concluded between the United States and Australia, Bahrain, Chile, Jordan, Oman, Morocco, Singapore, Peru, and the six Central American parties to the Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua Free Trade Agreement (CAFTA); and (2) the BITs concluded between the United States and Uruguay (November 2005) and Oman (August 2004).

[11] Stephen M Schwebel, ''The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law,'' in Gerald Aksen, Karl-Heinz Böckstiegel, Michael J Mustill, Paolo Michele Patocchi & Anne Marie Whitesell eds., *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* 815 (2005).

and import of the reference to customary international law coincide.[12] Judge Schwebel suggests that there is, in fact, no reason to assume the existence of agreement within the international community[13] as to the content of customary international law in relation to the minimum standard of treatment or the FET Standard.[14]

There is some evidence available to support Judge Schwebel's position. A number of countries with which the United States has recently concluded treaties containing the Article 5-style provision have subsequently entered into treaties with other States that contain no equivalent qualification on the obligation to accord fair and equitable treatment and full protection and security. Nor do these latter treaties[15] appear to reflect the so-called shared understanding premise on which the U.S. Model is based. Three examples serve to illustrate the point that the practice of States—at least insofar as the lexicon is concerned—is not so ''general and consistent'' as proponents of the U.S. Model might argue:

1. Article 15.5 of the investment chapter of the United States-Singapore Free Trade Agreement, concluded on May 6, 2003, repeats the language found in Article 5 of the U.S. Model. A side letter to that treaty confirms the parties' ''shared understanding'' of the meaning of customary international law. By contrast, Article 4 of the Singapore-Jordan BIT, concluded in May 2004, states simply:

[12] *Id.,* 819.

[13] The NAFTA parties (Canada, Mexico, and the United States) have, of course, agreed on the meaning of the FET Standard in the famous (some would say infamous) note of interpretation issued by the NAFTA Free Trade Commission in July 2001, which stated that Article 1105 (Minimum Standard of Treatment) of the NAFTA prescribes

> the *customary international law* minimum standard of treatment of aliens as the minimum standard of treatment . . . [t]he concepts of ''fair and equitable treatment'' and ''full protection and security'' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard [emphasis added].

[14] Richard Kreindler suggests that notwithstanding NAFTA jurisprudence, the recent trend has been for tribunals to favor a ''plain meaning'' approach to the FET Standard, in preference to deciding by reference to a supposed ''international minimum standard.'' *See* Richard H. Kreindler, ''Perspectives on State Party Arbitration: The Future of BITs—The Practitioner's Perspective,'' 23(1) *Arb. Int'l* 51-52 (2007).

[15] Article 10(1) of the Energy Charter Treaty (which the United States has not signed) imposes the obligation to accord fair and equitable treatment and, by way of a minimum standard states, ''In no case shall such Investments be accorded treatment less favourable than that required by international law, *including treaty obligations*'' [emphasis added].

> Investments and returns of investors of a Party in the territory of the other Party shall be accorded at all times fair and equitable treatment. Such investments shall also enjoy full protection and security.

2. The Oman-Switzerland BIT signed in August 2004, the text of which is in French, adopts a similarly plain language approach. It contains no reference to customary international law.[16] By contrast, the FTA concluded between Oman and the United States in early 2006 reflects, in Article 10.5 of its investment chapter, the provisions of the U.S. Model regarding fair and equitable treatment and full protection and security. However, the renegotiated Oman-Germany BIT of 2007 omits any reference to a minimum international law standard (as indeed does the 2008 German Model BIT).[17]

3. Notwithstanding that the U.K. Model Agreement for the Promotion and Protection of Investments[18] (U.K. Model Investment, Promotion, and Protection Agreement (IPPA)) frames the FET

[16] *Article 4 Protection, traitement*

(1) Les investissements et revenus des investisseurs de chaque Partie contractante jouiront en tout temps d'une protection et d'une sécurité pleines et entières sur le territoire de l'autre Partie contractante.

(2) Chaque Partie contractante accordera sur son territoire un traitement juste et équitable aux investissements des investisseurs de l'autre Partie contractante. Aucune des Parties contractantes n'entravera d'une quelconque manière, par des mesures injustifiées ou discriminatoires, le management, l'entretien, l'utilisation, la jouissance, l'accroissement ni l'aliénation des investissements et des revenus des investisseurs de l'autre Partie contractante.

(3) Chaque Partie contractante accordera sur son territoire aux investisseurs de l'autre Partie contractante, en ce qui concerne le management, l'entretien, l'utilisation et la jouissance de leurs investissements, ainsi que les activités qui leurs sont connexes, un traitement non moins favorable que celui qu'elle accorde à ses propres investisseurs. Le traitement accordé aux investisseurs de l'autre Partie contractante, en ce qui concerne leurs investissements, ne sera en aucun cas moins favorable que celui accordé aux investisseurs d'un quelconque Etat tiers.

(4) Si une Partie contractante accorde des avantages particuliers aux investisseurs d'un quelconque Etat tiers en vertu d'un accord établissant une zone de libreéchange, une union douanière ou un marché commun ou en vertu d'un accord pour éviter la double imposition, elle ne sera pas tenue d'accorder de tels avantages aux investisseurs de l'autre Partie contractante.

[17] Germany has no bilateral investment treaty with the United States.

[18] The U.K. Model Agreement for the Promotion and Protection of Investments is appended to Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* [3.05] and appendices (2007).

> Standard in broad terms.[19] The Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the United Mexican States for the Promotion and Reciprocal Protection of Investments signed on May 12, 2006,[20] includes a reference to customary international law in Article 3.[21]

It has been noted elsewhere that the new generation of Chinese BITs does not refer to an international minimum standard either.[22] As China renegotiates its older treaties, it provides, in its new generation BITs, for full investor access to international arbitration. Previously, China had limited recourse to arbitration solely to disputes relating to the amount of compensation to be awarded following an expropriation. This divergence in drafting may give rise to interesting issues as Chinese outward investment further accelerates. It is almost inevitable that there will be claims under the new generation Chinese treaties.[23] The question then arises whether China

[19] Article 2(2) (Promotion and Protection of Investments)

> Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

[20] Available from the U.K. Foreign & Commonwealth Office, http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2006a/mexicaninvest (last visited June 12, 2008).

[21] Article 3(2) (Minimum Standard of Treatment in Accordance with Customary International Law) states that

> [t]he Contracting Parties do not intend the obligations in paragraph 1 above in respect of ''fair and equitable treatment'' and ''full protection and security'' to require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of this Agreement or of a separate international agreement, does not, in and of itself, establish that there has been a breach of the provisions of this Article.

An earlier, but nevertheless ''new generation,'' treaty concluded between the United Kingdom and Mozambique (on March 18, 2004) contains the broader standard; *see* Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Mozambique for the Promotion and Protection of Investments, *available at* http://www.fco.gov.uk/resources/en/pdf/pdf12/fco_cm6308_ippamozambique (last visited June 12, 2008).

[22] Kreindler, *supra* note 14, at 51.

[23] ICSID has registered only one case to date pursuant to a Chinese BIT, namely the claim of a Chinese investor, Mr. Tza Yap Shum, against the Republic of Peru

will take steps (as the United States has done) to promote a particular position with regards to the interpretation of its BITs and other treaties relating to investment arbitration.[24]

One commentator has noted that whatever a particular treaty might provide ''the concept of the right of investors to protection against arbitrariness, denial of due process, etc. . . . is well established.''[25] Yet ''the occasion of that standard in the individual case,'' it is suggested, will necessarily involve a ''fact-specific analysis'' and, outside the NAFTA sphere at least, consideration of the wording used in the relevant treaty.[26] An interesting question that would appear to arise, at least in the context of countries that have signed up to the U.S. Model, is whether the provisions of those treaties would influence a tribunal considering the apparently broader standard, which obtains in those BITs that do not contain any qualification upon the obligation to accord fair and equitable treatment.

Another development in various new generation treaties that may in the future influence this question—and which, perhaps, properly falls under the United Nations Conference on Trade and Development's (UNCTAD's) category (4) ''Promotion of greater transparency . . . in the process of domestic rule-making''—is the introduction of an obligation on the host State to be transparent with respect to laws, regulations, and administrative decisions that may affect investors. The U.S. Model includes two articles providing, first, that the host State is obliged to publicize in advance any measures likely to have an impact on an investor and, second, that investors

under the China-Peru BIT, which was signed in 1994 and which entered into force in 1995. See the list of cases maintained by ICSID, http://icsid.worldbank.org/(last visited June 14, 2008).

[24] For example, the United States has made submissions pursuant to Article 1128 of NAFTA on questions of interpretation of the Chapter 11 investment provisions. *See, e.g., First Submission of the United States of America in the Arbitration under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL [United Nations Commission on International Trade Law] Arbitration Rules between United Parcel Service of America, Inc. and the Government of Canada, available at* http://naftaclaims.com/Disputes/Canada/UPS/UPS_USA1128ReAmicusSub.pdf (last visited June 14, 2008).

More recently, the United States has invoked Article 37(2) of the ICSID Arbitration Rules in order to make a third-party submission in the *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8 (Aug. 3, 2004), annulment proceedings. The submission challenges Argentina's position in relation to the interpretation of Articles 53 and 54 of the ICSID Convention and seeks to ''clarify'' the U.S. position. The submission is available at http://ita.law.uvic.ca/documents/Siemens-USsubmission.pdf (last visited June 12, 2008).

[25] Kreindler, *supra* note 14, at 53.

[26] *Id.,* 52-53.

(and their home States) should be afforded certain administrative review rights with respect to such measures.[27]

The 2008 Norwegian Model BIT[28] includes a similar provision and the commentary to the model notes that similar provisions are found in the General Agreement on Trade in Services (GATS).[29] Such a provision is not found in the German Model BIT of 2008,[30] nor does it appear in the most recent treaties of the Netherlands or Switzerland. A similar provision is, however, to be found in the Kazakhstan-Sweden BIT of 2004 at Article 2 (Promotion and Protection of Investments). It provides, *inter alia*, that

> (5) Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments covered by this Agreement.
>
> (6) Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain [to] or affect investments covered by this Agreement are promptly published or otherwise made publicly known.

Unlike the other four new generation features identified by UNCTAD, a provision of this type appears to impose an additional positive conduct obligation on host States in relation to foreign investors (albeit an obligation very much wrapped up, it would seem, with the existing obligation to accord fair and equitable treatment).

Application of the Most-Favored-Nation Standard to Procedural Rights

More than one investment tribunal has grappled with the question of whether the MFN standard can be invoked by an investor wishing to take

[27] *See* U.S. Model, art. 10 (Publication of Laws and Decisions Respecting Investment) and art. 11 (Transparency).

[28] Norwegian Ministry of Trade and Industry, Draft Model Agreement for the Promotion and Protection of Investments, (Jan. 8, 2008), *available at* http://www.regjeringen.no/en/dep/nhd/Documents/Consultations/Horingsdokumenter/2008/horing—modell-for-investeringsavtaler/-4.html?id=496026 (last visited Mar. 31, 2008).

[29] Article 31(1) provides that ''The Parties shall publish their laws, or otherwise make publicly available their laws, regulations and administrative rulings and judicial decisions of general application as well as their respective international agreements that may affect the operation of this Agreement.''

[30] German Model Treaty 2008 concerning the Encouragement and Reciprocal Protection of Investments, available on request from the German Federal Ministry for Economics and Technology (on file with authors).

advantage of more favorable dispute resolution provisions found in another treaty.[31] In the well-known case of *Maffezini v. Spain,*[32] the claimant invoked the MFN standard in order to rely on a shorter negotiation period available under a third treaty. The tribunal decided to allow this submission on the basis that dispute settlement provisions of investment treaties are

> inextricably related to the protection of foreign investors . . . such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.[33]

The United States has reacted to this development by incorporating, for example, a footnote in its FTAs with Colombia clarifying the parties' intentions that the MFN provisions of the treaty do not apply to dispute resolution mechanisms:[34]

> [f]or greater certainty, treatment ''with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments'' referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.

Conversely, across the Atlantic, the U.K. Model IPPA states in Article 3(3) that ''for the avoidance of doubt it is confirmed that the [MFN treatment standard] shall apply to [the dispute settlement provisions] of this Agreement.''[35]

[31] See the discussion of these cases in Emmanuel Gaillard, ''Establishing Jurisdiction Through a Most-Favored Nation Clause,'' 235(105) *N.Y. L.J.*, June 2, 2005.

[32] Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7 (Jan. 25, 2000).

[33] Decision of the Tribunal on Objections to Jurisdiction, *available at* http://icsid.worldbank.org, at 54 (last visited June 12, 2008).

[34] Although the footnote is not included in the U.S. Model it has been included in the the United States-Peru and United States-Colombia FTAs. *See, e.g.,* art. 10.4 (Most-Favored Nation Treatment) of the United States-Colombia Trade Promotion Agreement, signed November 22, 2006 (not yet in force), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html (last visited May 28, 2008).

[35] *See supra* note 18.

The German Model is silent as to whether the MFN provision extends to procedural matters, stating in Article 3 simply that

> [n]either Contracting State shall in its territory subject investors of the other Contracting State, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State.

BITs recently concluded by Korea,[36] the Netherlands,[37] and Sweden[38] follow a similar approach. Of the new generation treaties reviewed in the course of research for this article, only the Canada-Peru agreement of 2006 follows the approach of the earlier U.S. Draft Model Free Trade Agreement of the Americas (FTAA) and expressly excludes the application of the MFN standard to dispute settlement.[39]

Expropriation

It is useful to look briefly at the question of expropriation, and particularly indirect expropriation, and the increased emphasis some new generation BITs appear to place on the preservation of host-State regulatory discretion. In particular, the expropriation provisions of some new generation treaties contain language clarifying the circumstances in which an ''indirect'' expropriation may be said to have occurred.[40]

Again, the U.S. Model deserves particular attention. Annex B to the model is predicated on the basis that the parties confirm a ''shared understanding,'' the basis of which is that Article 6 (Expropriation and Compensation) is intended to reflect customary international law on the obligations of States with respect to expropriation. First, in relation to indirect expropriation, Annex B states explicitly that an adverse impact on the economic value of an investment does not, without more, establish that a taking has occurred. Secondly, Annex B provides that, ''except in rare

[36] Korea-Lebanon BIT (2006).
[37] Bahrain-Netherlands BIT (2007).
[38] Sweden-Kazakhstan BIT (2004).
[39] Annex B.4 (Most-Favoured-Nation Treatment) states that

> [f]or great clarity, treatment ''with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments'' referred to in [the MFN Article] *does not encompass dispute resolution mechanisms . . . that are provided for in international treaties or trade agreements* [emphasis added].

[40] *See supra* note 7, at 75.

circumstances,'' non-discriminatory regulations introduced by a State that are designed and applied in order to protect legitimate public welfare objectives *do not* constitute indirect expropriations.

In contrast, Article 6 of the Norwegian Model provides, simply, that

> (1) A Party shall not expropriate or nationalise an investment of an investor of the other Party except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provision shall not, however, in any way impair the right of a Party to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The commentary to the Norwegian Model explains that Norway considered that formulations of the expropriation standard used in other BITs (among them, apparently, the U.S. Model) go *further* than the current position under international law.[41] The Norwegian provision is derived from Protocol 1 to Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The commentary states that the ECHR and general international law provide appropriate standards for the protection of private property and that deviation from these standards could be understood to indicate an intention to impose a higher standard. The commentary also explains that the ECHR standard is clearer than other formulations by virtue of the availability of European and Norwegian case law interpreting and implementing that standard.[42]

The Norwegian Model also contains, at Article 24, a ''general exceptions'' clause inspired by the exceptions provisions found in the GATS.[43] The effect of this clause is to make clear that no provision of the treaty shall be construed to prevent a party from adopting measures necessary to protect the public good, including public health and the environment. The general exceptions clause also states that measures that are arbitrary or discriminatory, or that amount to a disguised restriction on investment, are prohibited. The Norwegian Model includes additional exceptions (again inspired by the GATS) in relation to financial services regulations, national security measures, cultural exceptions, and taxation.

Practice in this area, however, remains inconsistent. Many treaties allow expropriation, provided that the taking is made for a public purpose and provided that the investor is compensated. Article 5 of the 2006 BIT

[41] *See supra* note 28, at 23.
[42] *Id.,* 22-23.
[43] *Id.,* 43.

between Germany and Trinidad and Tobago, for example, provide that investments

> shall not be directly or indirectly expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization . . . except for a public purpose and against compensation.[44]

Article 5 of the 2004 BIT between Jordan and the Republic of Korea contains a similar provision, save that there is no reference to indirect expropriation. Article 6 in each of the treaties signed by the Netherlands with Algeria, Bahrain and Burundi in 2007 prohibits the parties taking

> any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless . . . (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given; (c) the measures are taken against prompt adequate and effective compensation.

[44] Article 5 reads in full as follows:

Article 5—Expropriation

(1) Investments by nationals or companies of either Contracting Party shall not be directly or indirectly expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as ''expropriation'') in the territory of the other Contracting Party except for a public purpose and against compensation. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the date of the actual expropriation or the date on which the threatened expropriation has become publicly known, whichever is the earlier. The compensation shall be paid without delay and shall carry the usual bank rate of interest until the time of payment and shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law.

(2) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

Although, strictly, it falls outside the definition of new generation treaties herein adopted, it is worth noting the expropriation article of the Germany-China BIT of 2003,[45] which states as follows:

> Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation.

Treaties that clarify such commonplace provisions expressly by reference to social and environmental matters are still in the minority. None of the treaties mentioned in the preceding paragraphs contains a specific exceptions clause or any other type of express ''carve-out'' for measures taken to protect, for example, human rights, public health, or the environment.[46]

Investment Protection Should Not Be Pursued at the Expense of Other Public Policy Objectives

Some new generation BITs and FTAs contain provisions designed positively to clarify that the protection and promotion of investments must *not* be pursued at the expense of other public policy objectives, such as the protection of health or the environment.[47] As discussed above, one approach has been to include a general exceptions clause as found in the Norwegian Model BIT or the United States-Singapore FTA. Article 11 of the Canadian Model BIT, in contrast, states as follows:

[45] The Germany-China BIT is important as it is one of the first treaties China has signed providing for access to international arbitration. The Netherlands-China BIT also provides that investors may bring claims to international arbitration. In both cases the investor must first exhaust a specified domestic administrative review procedure. *See further* John Savage, ''Investment Treaty Arbitration and Asia: Survey and Comment,'' 1(1) *Asian Int'l Arb. J.* 8, 12 (2005).

[46] The preamble to the Netherlands' treaties includes the following passage: ''Considering that these objectives can be achieved without compromising health, safety and environmental measures of general application.'' The substantive provisions of the Germany-Trinidad & Tobago treaty are preceded by various recitals including recognition of ''the increasing need for measures to protect the environment.'' The Germany-China and Jordan-Republic of Korea treaties do not contain any language regarding environmental, health, or other social measures.

[47] *See supra* note 7, at 76-77.

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety of environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

Another approach has been to include statements in the preamble to a BIT of the parties' intention that the objectives of investment protection and promotion can be achieved without compromising the protection of health, safety, the environment, or other areas of public interest. More recently, there have been proposals for the inclusion of more positive obligations on the parties to safeguard the public interest.

A model BIT drafted by the International Institute for Sustainable Development (the IISD Model) contains a set of provisions designed to ensure that both investor rights *and* the public good are protected in a manner that is legitimate, transparent, and accountable. The IISD Model is predicated on the basis that various obligations and duties should be imposed on investors, for example, in relation to corporate social responsibility and anti-corruption.[48] Similarly, in addition to language in the preamble affirming the parties' commitment to their respective obligations under the Charter of the United Nations[49] and the Universal Declaration of Human Rights,[50] the Norwegian Model contains an article to the effect that the provisions of the treaty shall be without prejudice to the rights and obligations of the parties under other international agreements.[51] Further, in Article 32, parties adopting the Norwegian Model agree to encourage investors to conduct their investment activities in compliance with the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises[52] and to participate in the U.N. Global Compact.[53]

UNCTAD has recognized such developments as being ''in keeping with the intention of contracting parties to address the concerns of labour

[48] International Institute for Sustainable Development, *IISD Model International Agreement on Investment for Sustainable Development—Negotiators' Handbook* (2d ed. 2006) *available at* http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf,arts. 15 and 13, at 24-27 (last visited Mar. 28, 2008).

[49] U.N. Charter, http://www.un.org/aboutun/charter/pdf/uncharter.pdf, 16.

[50] Universal Declaration of Human Rights, http://www.un.org/Overview/rights.html#ap.

[51] Norwegian Model, art. 29.

[52] OECD Guidelines for Multinational Enterprises (June 2000), http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[53] U.N. Global Compact, http://www.unglobalcompact.org/index.htm.

unions and environmental NGOs regarding investment agreements.''[54] This statement begs the question whether similar provisions are to be found (or should be found) in other new generation treaties. Very few of the BITs surveyed during the course of research for this article contain positive environmental and social obligations, whether for investors or for States, of the type recommended by the IISD. Germany, Switzerland, and the Netherlands, for example, continue to conclude treaties that contain *no* reference to the host government's right to regulate in favor of environmental protection, public health, labor matters, and other aspects of the public good.[55]

Innovations in Relation to Dispute Settlement Procedures

The final feature of the new generation BITs to which this article is directed is a number of innovations in relation to the investor-State dispute settlement process. UNCTAD has noted, in particular, the following:[56]

1. provisions promoting greater control by states over arbitration procedures, such as Article 24 of the U.S. Model, which sets out the criteria under which an investor can submit a claim to arbitration;

2. provisions promoting judicial economy including (a) mechanisms to deal with claims lacking a sound legal basis, (b) provisions allowing for the consolidation of claims involving a common question of fact or law and arising out of the same events or circumstances, and (c) provisions preventing a dispute from proceeding in more than one forum at the same time; and

3. provisions intended to promote the consistent development of jurisprudence, such as the possibility contemplated by the Peru-United States FTA that the parties establish an appellate body or similar mechanism to review arbitration awards rendered in investor-State arbitrations pursuant to the treaty.

This article dwells on none of these features in detail, save to note that they are currently to be found only in FTAs and BITs concluded by the NAFTA States. (That said, the Norwegian Model contains a much-strengthened ''exhaustion of local remedies'' provision, requiring an investor to

[54] *See supra* note 7, at 78.

[55] *See, e.g.,* Germany-Oman BIT (2007); Switzerland-Oman BIT (2004); Bahrain-Netherlands BIT (2007).

[56] *See supra* note 7, at 79-85.

pursue domestic remedies for three years before an entitlement to bring a claim to international arbitration arises).

It would also appear that the investor-State dispute settlement provisions of recent FTAs are, on balance, more detailed than the provisions found in most BITs (including many new generation BITs).[57] The inspiration for these changes, according to one commentator, has been a realization that the international *commercial* arbitration model adopted by many treaties ''did not meet contemporary standards for the resolution of public disputes involving open and democratic states'' and a corresponding desire to improve the procedure better to meet the needs of users, both investors and States.[58]

In this regard, attention should be drawn, too, to what UNCTAD describes as a separate category of innovations appearing in new generation treaties,[59] namely, the provisions responding to civil society criticisms that the investor-State dispute resolution process is insufficiently transparent, given the nature of the public interest issues that might arise in a particular dispute. The U.S. and Norwegian Models presently contain provisions providing for increased transparency, including public access to documents, public hearings, and clarifying that tribunals can accept submissions from non-governmental organizations (NGOs) and other advocates of the public interest (the so-called civil society actors) and other non-disputing parties. International consensus in favor of increased transparency in investment arbitration has most recently found expression in the 2006 amendments to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules[60] and in the deliberations of a working group of the United Nations Commission on International Trade Law (UNCITRAL) presently considering amendments to the 1976 UNCITRAL Arbitration Rules.[61] Such consensus notwithstanding, only a handful of the new

[57] Legum, *supra* note 1, at 344; noting that the dispute settlement provisions of early US BITs ''spanned all of two pages . . . [t]hose in the NAFTA increased to seven pages . . . [and in the latest FTAs] the dispute resolution provision fills thirteen pages.''

[58] *Id.*, 348.

[59] *See supra* note 7, at 85.

[60] In particular the new Rule 37(2) allows a tribunal to accept submissions by non-disputing parties; *see* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (last visited June 12, 2008).

[61] The working group, and latterly the UNCITRAL, have expressed in-principle support for increasing the transparency of investment treaty arbitration conducted pursuant to the UNCITRAL Rules. However, a number of delegations have reserved their position as to the form any amendments to the rules should take and, indeed, whether or not transparency is best achieved by amending the rules or by issuing recommendations regarding appropriate treaty provisions regarding transparency. *See, e.g.,* Report of the United Nations Commission on International Trade Law, Forty-first session (16 June-3 July 2008), (U.N. Doc. A/63/17), *available at* http://

generation treaties surveyed for this artucke contain express provisions on transparency with respect to dispute resolution.

SOME THOUGHTS ON THE IMPLICATIONS OF DIVERGENCE FOR INVESTORS AND FOR GOVERNMENTS

Among the first issues to come to mind when considering the implications of divergence is the prospect of ''treaty shopping''; will investors structure their investments differently in order to take advantage of particular treaties? It does seem that there is a correlation (albeit based on a very cursory survey) between ''old generation'' BITs and the lack of an anti-treaty shopping clause. The new generation treaties add a new twist; some countries, as discussed above, have specifically addressed the possibility that investors will seek to rely on the MFN principle to take advantage of more favorable dispute resolution provisions contained in another treaty. Other States have attempted to prevent treaty shopping by denying protection to investors who incorporate a special purpose vehicle or letter-box company in a foreign jurisdiction in order to be able to take the benefit of safeguards under a particular treaty. A significant number of treaties remain silent on this issue. Yet against this background it has been noted that arbitral decisions on treaty shopping are ''quite uniform.''[62]

Is it appropriate to continue to rely on arbitrators to sort out the obligations to which States ostensibly sign up when they enter into an investment treaty? At a macro-political level, an analogy might be drawn between the divergences observed amongst the new generation of BITS and the World Trade Organization (WTO) ''Spaghetti Bowl'' debates whereby the proliferation of bilateral trade agreements has been seen as undermining efforts to establish a coherent multilateral system.

It is relevant to recall the various attempts that have been made to deal with investment on a multilateral level. The negotiations in the OECD for a multilateral agreement on investment (the so-called MAI) failed in 1998 after France withdrew its support and in the face of opposition from NGOs and a number of developing countries that perceived the treaty as emphasizing investors' rights at the expense of national regulatory discretion. Efforts within the WTO to deal with investment also stalled when, in 2003, a group of developing countries blocked attempts to place investment issues on the agenda for the Doha Round. As the network of bilateral and

daccessdds.un.org/doc/UNDOC/GEN/V08/555/08/PDF/V0855508.pdf?OpenElement (last visited Aug. 18, 2008).

[62] John Savage, ''Investment Treaty Arbitration and Asia: Review of Developments in 2005 and 2006,'' 3(1) *Asian Int'l Arb. J.* 1, 21 (2007).

regional treaties grows, the absence of a uniform approach to treaty drafting will almost certainly generate novel questions for investment tribunals.

As has been seen, a number of the new generation treaties (especially the treaties being signed by the United States) seek to water down the protections extended to investors. At the same time, a civil society backlash against investment treaties has intensified[63] (particularly in the area of transparency). Professor John Ruggie, in his role as the U.N. Secretary-General's special representative on business and human rights, has recently expressed some disquiet about the potential inconsistency between the rights accorded to investors under BITs and the State's duty to protect human rights:[64]

> [I]nvestor protections have expanded with little regard to States' duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.

Models such as those promulgated by the IISD, and more recently, the Norwegian model treaty appear designed to address this potential imbalance. The implications of these developments for investors are probably no more certain than the scope of the fair and equitable treatment standard. The commentary to the Norwegian model, however, gives some indication of the possible implications for governments:

> The main condition on concluding investment agreements is that the agreements shall be able to fulfil their economic and political functions

[63] *See, e.g.*, Mahnaz Malik, *Time for a Change: Germany's Bilateral Investment Treaty Programme and Development Policy*, Dialogue on Globalization, Occassional Paper No. 27 (Nov. 2006):

> [T]he German BIT programme appears solely focused on investment protection without reference to linkages between investment and sustainable development, at times without any consideration to the development aims that the German Federal Ministry for Economic Cooperation and Development itself espouses. In fact, the German BIT programme has a negative impact upon a developing state's policy space to take measures to achieve its development goals.

[64] *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (Apr. 7, 2008), *available at* http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf, 34 (last visited Aug. 27, 2008).

> without intervening unnecessarily in Norwegian exercise of authority. The investment agreements Norway aims to conclude shall be international instruments that shall satisfy the need for protection of Norwegian foreign investments while at the same time contributing to development in developing countries. . . . [For governments] to be able to make useful social regulations, investment agreements must contain balancing clauses that emphasize the legitimacy of the states' general legislative authority.

More recently, an UNCTAD survey[65] has found that despite the fact that BITs are stated to achieve *both* investment promotion and protection, traditionally the emphasis has been on protection with promotion primarily perceived as a desirable (if not perhaps inevitable) side effect. The UNCTAD survey demonstrated that only a minority of treaties contained explicit investment promotion provisions. It was suggested that parties to these instruments should consider strengthened investment promotion commitments in order better to contribute to the achievement of development goals.

CONCLUSION

It is clear that many of the new generation features discussed in this article have been prompted by developments in investment arbitration jurisprudence, notably in the context of the NAFTA. Equally clearly, some of the provisions have been influenced by pressure from civil society groups, particularly in relation to environmental issues. It is not necessarily always the case, however, that host-State experience with investor-State dispute resolution (or activist pressure) will lead to detailed or sensible policy making, or even new treaty language.

The approach taken by the NAFTA States might well be thought measured in comparison with the reactions of certain other States in the face of perceived reverses or that arise from a distrust of, or unwillingness to adhere to, internationally determined dispute resolution. Bolivia, for example, has recently withdrawn from the ICSID Convention; and Venezuela has denounced its BIT with the Netherlands. Argentina last signed a BIT in 2000, but that, perhaps, is hardly surprising, and certainly a less capricious response, given Argentina's own direct experience of the BIT disputes resolution process.

[65] UNCTAD, *Investment Promotion Provisions in International Investment Agreements*, UNCTAD Series on International Investment Policies for Development, UNCTAD/ITE/IIT/2007/7 (July 2, 2008).

While the United States, Canada, and Norway have clearly devoted considerable time and effort to the overhaul of their model treaties, other States seem less inclined to depart radically from traditional templates. Perhaps it comes down to this: the major capital-exporting countries of Europe—not least France, Germany, the Netherlands, Switzerland, and the United Kingdom—have little reason to fear a plethora of claims against them. Such States have scant incentive to dilute the protections contained in their treaties by the introduction of provisions directed specifically to environmental or social concerns or of other language narrowing the scope of key obligations in favor of host-State regulatory discretion.

Eclipse of Expropriation?

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INTRODUCTION

Despite Martin Domke's prediction,[1] more than 50 years ago, that henceforth governments would eschew direct expropriation, States have continued to expropriate foreign investments. In the foreseeable future, the rate of overt expropriations may very well increase due to factors such as the revival of models of State socialism in Latin America and the recrudescence of resource nationalism in oil-producing States, which in turn may trigger a wave of commodity nationalism and the weakening of a commitment to free trade and globalization in the world community.

In the area of international investment law, expropriation has traditionally occupied a central role as a disputed claim among parties under bilateral investment treaties (BITs) and investment chapters of Free Trade Agreements (FTAs).[2] The more than 2,500 extant BITs expressly confirm

[1] Martin Domke, ''On the Extraterritorial Effect of Foreign Expropriation Decrees,'' 4(1) *W. Pol. Q.* 12-16 (Mar. 1951).

[2] *See, e.g.*, North American Free Trade Agreement (NAFTA) Article 1110: Expropriation and Compensation, which provides, in relevant part,

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (''expropriation''), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

expropriation as a power available to the host State, subject to certain procedural safeguards and specific compensation requirements. Given all of these features—the current global trade environment, the specific provisions on expropriation in BITs, and the frequency of expropriation claims in investment disputes—one would expect tribunals either to (1) find that an investment has been expropriated and award appropriate compensation *or* (2) find that an investment has not been expropriated and award no compensation.

Yet a survey of recent arbitral jurisprudence yields a different, and somewhat surprising, trend: tribunals find a breach of *other* BIT provisions, increasingly that of fair and equitable treatment, and *still* award damages in the form of compensation for expropriation. Expropriation has, in many respects, been eclipsed by the standard of fair and equitable treatment. In purely compensatory terms, the result may be the same, but the consequences for the international investment regime could be far greater. The definition of ''acts tantamount to expropriation'' is not typically set forth in BITs; however, the standard of compensation is often expressly included as that of fair market value (FMV). For the standard of fair and equitable treatment, BITs typically do not establish a definition of the standard, nor do they prescribe as the measure of damages adequate compensation. In the absence of specific definitions in the *lex specialis*, tribunals have considered additional sources in order to elucidate the meaning of the terms.

WANING OF EXPROPRIATION

The various reasons that have been proposed to explain the eclipse of expropriation and the embrace of the fair and equitable treatment standard are not entirely convincing. One possible reason for the eclipse is that tribunals have simply become reluctant to find that an investment has been expropriated, perhaps because of the implicit rebuke to the host government, perhaps because of the apparent automaticity of the prescribed

> 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (''date of expropriation''), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

North American Free Trade Agreement, Dec. 8-14, 1992, 32 I.L.M. 289 (1993). Or see the United States-Argentina BIT (Nov. 14, 1991). Further discussion of both will be provided below.

remedy. Yet, if this is the reason, it is difficult to understand this reluctance, given that a confirmation of unfair and inequitable treatment is hardly an honor, and the adoption of expropriation's metric for compensation does not provide a comparatively more malleable remedy. Moreover, in application to specific facts, both present interpretive difficulties.

Certainly, expropriation, as a concept, is spacious enough to cover a broad range of sins. The definition of expropriation under BITs includes both outright expropriation and ''acts tantamount to expropriation,'' and BITs have long treated both as full equivalents. Indeed, in many BITs, the word ''expropriation'' in parentheses follows the words ''expropriation and acts tantamount to expropriation,'' indicating, at least in those treaties that the parties intended the term ''expropriation'' to cover both. Outright expropriation has been defined in various ways, but the very generality of the concept of ''acts tantamount to expropriation'' defies precise definition other than by reference to consequences.

Dolzer and Stevens, in their authoritative text, define ''acts tantamount to expropriation'':

> [A] host State, as is well known, can take a number of measures which have a similar effect to expropriation or nationalization, although they do not *de jure* constitute an act of expropriation; such measures are generally termed ''indirect,'' ''creeping,'' or ''de facto'' expropriation. The expropriation clause in most BITs therefore commonly includes expropriation and nationalization as well as a reference to indirect measures, *and accords them all the same legal treatment.*[3]

Previously, the core principle of ''acts tantamount to expropriation'' was applied frequently in the jurisprudence of arbitral institutions and international claims commissions. The Iran-United States Claims Tribunal, which repeatedly decided on the basis of ''acts tantamount to expropriation,'' described it in consequential terms: ''[t]he intent of the government is less important than the *effects of the measures* on the owner, and the form of the measures of control or interference is less important than the *reality of their impact.*''[4] In *Compañia del Desarrollo de Santa Elena*, an International

[3] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 99 (1995) (emphasis added); *accord Restatement (Third) of the Foreign Relations Law of the United States*, § 712 nn.6-7 (1987).

[4] Tippets v. Tams-Affa Consulting Eng'rs, 6 *Iran-U.S. Cl. Trib. Rep.* 219, 225-26 (1984) (emphasis added); *accord* Starrett Hous. Corp. v. Iran, 4 *Iran-U.S. Cl. Trib. Rep.* 122, 23 I.L.M. at 1124 (1983) (Concurring Opinion of Judge Howard M. Holtzmann); *see also* Int'l Sys. & Control Operations v. Indus. Dev. and Renovation Org., 12 *Iran-U.S. Cl. Trib. Rep.* 239, ¶ 97 (1986); Payne v. Iran, 12 *Iran-U.S. Cl. Trib. Rep.* 3, ¶ 22 (1986); Phelps Dodge Corp. v. Iran, 10 *Iran-U.S. Cl. Trib. Rep.* 121, ¶ 22 (1986); Sedco Inc. v. Iran, 9 *Iran-U.S. Cl. Trib. Rep.* 248 (1985).

Centre for Settlement of Investment Disputes (ICSID) tribunal took note that there is ''ample authority for the proposition that property has been expropriated when the effect of the measures taken by the State has been to deprive the owner of title, possession *or* access to the benefit and economic use of his property.''[5]

The content of the fair and equitable treatment standard has also been analyzed in various North American Free Trade Agreement (NAFTA) and international law decisions. Overall, the jurisprudence points to a lack of clarity regarding the standard. In 2001, the NAFTA Free Trade Commission explicitly noted its application to Article 1105(1): ''Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another.'' Thereafter, NAFTA tribunals such as *S.D. Myers,*[6] *Pope & Talbot,*[7] and *Waste Management*[8] affirmed the existence of fair and equitable treatment as an international minimum standard.

The existence of a minimum standard has likewise been confirmed in BIT cases. These awards represent a surprising departure from the high thresholds of fair and equitable treatment set in *Neer*[9] and *Chattin*[10] and demonstrate, as Alvarez Jimenez has observed, certain investment law tribunals' resort to ''*their particular* view as to the content of the minimum standard of treatment for aliens in order to justify how they apply the respective standards of treatment used in BITs.''[11]

[5] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ¶ 77, 39 I.L.M. at 1330 (2000) (citing *Tippets*). In the context of utility-rate regulation, the U.S. Supreme Court has made clear that U.S. municipal law is consistent with international law in this regard, observing that ''[i]t is not theory but the impact of the rate order which counts. . . . Whether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return.'' Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989); *see also* Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896) (rate impermissibly low where it proves ''so unjust as to destroy the value of property for all the purposes for which it was required,'' such that it ''deprive[s] the owner of property without due process of law'').

[6] S.D. Myers Inc. v. Canada, UNCITRAL (NAFTA), First Partial Award (Nov. 13, 2000), 40 I.L.M. 1408 (2001).

[7] Pope & Talbot Inc. v. Canada, UNCITRAL (NAFTA), Award on the Merits of Phase 2 (Apr. 10, 2001).

[8] Waste Management Inc. v. the United Mexican States, ICSID Case No. ARB (AF)/00/3, Award (Apr. 30, 2004).

[9] *See infra* note 17.

[10] B.E. Chattin (United States) v. United Mexican States, 4 R.I.A.A. 282 (1927).

[11] Alberto Alvarez-Jiménez, ''Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the

Because alleged expropriations are appraised in consequential rather than formal terms, a broad array of measures, which are considered cumulatively, can, together, qualify as ''measures tantamount to'' or ''measure[s] with similar effect'' to expropriation, even though some of the measures may have been individually, if not preceded or followed by others, relatively innocuous.[12] Dolzer and Stevens observe that

> it is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation and each case is therefore likely to be decided on the basis of its attending circumstances. In determining whether a taking constitutes an ''indirect expropriation'' it is particularly important to examine the effects that such taking may have had on the investor's rights. Where the effect is similar to what might have occurred under an outright expropriation, the investor would in all likelihood be covered under most BIT provisions.[13]

Nor does the finding of an expropriation require the actual seizure of an investment, as was clearly put in the dictum in *Santa Elena*. In economic terms, a physical investment is of value only as a basis for a stream of revenue for the duration of its economic life. Thus, cases like *Revere Copper and Brass*[14] and *Metalclad*[15] have held that an expropriation had taken place when the action of the State reduced or eliminated those reasonably expected profits, even though the investment, in a physical sense, might remain in the possession of the investor. At the moment the tribunal determines that an investment has been expropriated—either outright or by ''acts tantamount to expropriation''—compensation is due.

The standard of compensation in most BITs is that of FMV. For example, Article IV(1) of the United States-Argentina BIT provides as follows:

> Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (''expropriation'') except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and

Diallo Case before the International Court of Justice,''' 9(1) *J. World Inv. & Trade* 59 (Feb. 2008).

[12] U.S. BIT, art. IV(1) (Nov. 14, 1991); Union BIT, art. 5(1) (Aug. 26, 1992).

[13] Dolzer & Stevens, *supra* note 3, at 100.

[14] Revere Copper and Brass, Inc. (US) v. Overseas Private Investment Corp. (US), 17 I.L.M. 1321 (1978).

[15] *See infra* note 42.

> the general principles of treatment provided for in Article II (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier.[16]

In short, the concept of expropriation can encompass a wide range of illicit actions by a host State with respect to an international investment; at the liability and damages phase, the concept is sufficiently broad to accommodate the paradigmatic events at the heart of most investment disputes. Thus, one cannot find the reason for a tribunal's reluctance to find that an investment has been expropriated in some narrowness or rigidity in the legal concept of expropriation.

Yet, another possible reason for this reluctance may be the competing attraction of the very open-textured character of the fair and equitable treatment standard. The fair and equitable treatment doctrine may have been implicit in early jurisprudence with respect to treatment of aliens but appears to have had its genesis in the 1927 *Neer v. United Mexican States* case on diplomatic protection. In *Neer*, the United-States-Mexican Claims Commission held that ''The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency.''[17] The international minimum standard set forth in *Neer*, sometimes expanded by tribunals in international investment law, represents one of the standards applied in assessing violations of fair and equitable treatment. There is ambiguity surrounding the contents of the applicable standard of fair and equitable treatment in international investment law, which existing arbitral jurisprudence does little to resolve.

Similarly, the measure of compensation for a breach of the fair and equitable treatment standard is unsettled. A typical BIT clause does not include a statement of adequate compensation in the applicable article. Taking the U.S.-Argentina BIT as an example once more, Article II(2)(a) provides, ''Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required in international law.''[18] Thus, there is neither an express definition of the standard nor an articulation of adequate compensation at the moment of breach, and the role of the

[16] United States-Argentina BIT, *supra* note 2 at art. IV(1).

[17] Neer v. Mexico, United States-Mexican Claims Commission 1927, at 1, *reprinted in* 1927 *Am. J. Int'l L.* 555, 556, 3 I.L.R. 213.

[18] United States-Argentina BIT, *supra* note 2, at art. II(2)(a).

customary international law of diplomatic protection has also been questioned.

In the short term, the outcome has been an expansion of the fair and equitable treatment standard in international investment law, which has led to the eclipse of standards such as expropriation. In the long term, the consequences may be more severe: expansion may render the term so general that it can be applied to any behavior, thereby disturbing the balance of interests sought in international investment law.

WAXING OF FAIR AND EQUITABLE TREATMENT

When investment disputes erupt and investors make claims under these treaties to international investment tribunals, they prudently characterize the events in question in terms of as many of the rights available to them as they can. The claim of expropriation is still likely to be central, but it is virtually certain that one of the alternative claims will be a violation of fair and equitable treatment obligations. Most recently, international investment tribunals, presented with a choice of grounds for finding liability, are likely to decline expropriation, preferring the ground of a denial of fair and equitable treatment. Neither ''acts tantamount to expropriation'' nor ''fair and equitable treatment'' is explicitly defined in BITs; however, recent jurisprudence signals an eschewal of finding ''acts tantamount to expropriation'' in favor of embracing an enlarged fair and equitable treatment standard. Whether it has resulted from a tribunal's difficulty in delineating the scope of ''acts tantamount to expropriation'' or from a tribunal's conscious decision to find liability under a different rule, the consequences of this trend resound at the merits and damages phases of an arbitral proceeding.

At the merits phase, tribunals will tend to find that a claimant's investment has *not* been indirectly expropriated, but they will find that the claimant's right of fair and equitable treatment *has* been breached. This finding implies that there is an ascertainable difference between ''acts tantamount to expropriation'' and acts that violate the standard of ''fair and equitable'' treatment. Yet, at the damages phase, tribunals will tend to find that the measure of compensation is the same—FMV—regardless of whether the respondent is held liable for indirectly expropriating a foreign investment or for breaching the standard of fair and equitable treatment. FMV is the due standard of compensation for the expropriation of foreign investments, as expressly provided in many BITs and in customary international law, and not for breaches of fair and equitable treatment.

Notwithstanding, several tribunals have all found breaches of fair and equitable treatment, seemingly in *lieu* of indirect expropriation, and have

compensated the claimant with FMV. These include the tribunals in *CMS*,[19] *Sempra*,[20] *Enron*,[21] and *Azurix*.[22] It seems likely that the tribunal in *Saluka*[23] will arrive at similar results when the award on damages is complete; the tribunal's partial award held that the claimant's investment had not been expropriated but that there had been a breach of the fair and equitable treatment standard. Two awards, *PSEG*[24] and *LG&E v. Argentina*,[25] award a different measure of compensation.

Given these overall observations on the evolving relationship between indirect expropriation and fair and equitable treatment in international investment law, one would expect a tribunal to provide coherent reasons for its conclusions, grounded in the *lex specialis* and international law. But these expectations have not been satisfied.

In *CMS*, after a thorough review of the facts, the tribunal found that no expropriation had taken place:

> The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation. In the *Metalclad* case the tribunal held that this kind of expropriation relates to incidental interference with the use of property which has ''the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.'' Similarly, the Iran—United States Claims Tribunal has held that deprivation must affect ''fundamental rights of ownership,''[*Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 CTR 219 (1984-II), at 225; see also *Phelps Dodge Corp. v. Islamic Republic of Iran*, 10 CTR 121 (1986-I).] a criteria reaffirmed in the *CME v. Czech Republic* case. The test of interference with present uses and prevention of the realization of a reasonable return on investments has also been discussed by the Respondent in this context. [U.S. Supreme Court, *Penn Central*

[19] *See infra* note 26.
[20] *See infra* note 31.
[21] *See infra* note 32.
[22] *See infra* note 33.
[23] Saluka Investments BV (The Netherlands) v. the Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006) *available at* http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf.
[24] *See infra* note 34.
[25] *See infra* note 36.

> *Transportation Co. v. New York City*, 438 U.S. 104 (1978); Argentina Rejoinder, at 182.][26]

Substantial deprivation was addressed in detail by the tribunal in the *Pope & Talbot* case. But the *CMS* tribunal immediately shifted from an economic benefits test to a control test. The tribunal continued:

> The government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. *In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment.*[27]

Even though the tribunal endorsed the ''economic benefits'' test, it concluded by applying a ''control and management'' test, which is quite different: a claimant may not be enjoying its reasonably expected benefits due to action by the host State but, as in *Revere*,[28] the claimant may still be in control of the property—for whatever that control is worth.

Yet that was not the end of expropriation in the *CMS* case; expropriation resurfaced in the assessment of damages, vis-à-vis the breach of fair and equitable treatment. Finding that there had been a violation of the obligation to provide fair and equitable treatment to the investor and that the investor was not receiving its reasonably expected benefits, the tribunal turned to the specific provision in the BIT for assessing compensation for expropriation and applied it to the violation of the fair and equitable treatment obligation:

> 409. A first question the Tribunal needs to address is that of the standard of compensation applicable in the circumstances of this dispute. As was the situation in the *Feldman v. Mexico* case, the Tribunal is faced with a situation where, absent expropriation under Article IV, the Treaty offers no guidance as to the appropriate measure of damages or compensation relating to fair and equitable treatment and other breaches of the standards laid down in Article II. This is a problem common to most bilateral investment treaties and other

[26] CMS Gas Transmission Company v. the Argentine Republic, Award of the Tribunal, ¶¶ 262-263 (May 12, 2005), 44 I.L.M. 1205 (2005).

[27] *Id.*

[28] Revere Copper and Brass, Inc. (US) v. Overseas Private Investment Corp. (US), 17 I.L.M. 1321 (1978).

> agreements such as NAFTA. The Tribunal must accordingly exercise its discretion to identify the standard best attending to the nature of the breaches found.
>
> 410. Unlike the circumstances in the Feldman case, however, the Tribunal is persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses. Moreover, precisely because this is not a case of expropriation, the Claimant has offered to transfer its shares in TGN to the Argentine Republic, and the Tribunal will address this question in due course.[29]

The tribunal's reasoning is puzzling: even though there was *no* expropriation, compensation for the State's blocking of the reasonably expected benefits of the property (a breach of fair and equitable treatment, according to the tribunal) was awarded under the provision providing for compensation for expropriation. There is no question that a tribunal may ''exercise its discretion,'' but, in so doing, a tribunal's obligation to provide coherent reasons is rendered even more important.[30]

In *Sempra*, the tribunal likewise faltered in its analysis of indirect expropriation and fair and equitable treatment and corresponding assessment of damages. More specifically, the tribunal's faulty reasons include: (1) a selective reliance on prior jurisprudence as if it were *stare decisis*; (2) silence as to how an explicit provision in the *lex specialis* that applies to compensation for expropriation can be superimposed as compensation for fair and equitable treatment; and (3) lack of a cogent analysis and elaboration of fair and equitable treatment and the appropriate compensation resulting from its breach in international law, in view of the absence of an express definition of fair and equitable in the *lex specialis*.

> With respect to damages, the tribunal held as follows:
>
> 403. Although there is some discussion about the appropriate standard applicable in such a situation, several awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the appropriate standard of reparation in respect of breaches other

[29] *Id.* at ¶¶ 409-410.

[30] *See generally* Guillermo Aguilar Alvarez & W. Michael Reisman, *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (2008).

> than expropriation, particularly if such breaches cause significant disruption to the investment made. In such cases it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same.
>
> 404. Fair market value is thus a commonly accepted standard of valuation and compensation. In the present case, the Claimant made its investment in Argentina in 1996 and increased it over the years. The Tribunal is of the view that fair market value would be the most appropriate standard to apply in this case to establish the value of the losses, if any, suffered by the Claimant as a result of the Treaty breaches which occurred, by comparing the fair market value of the companies concerned with and without the measures adopted by Argentina in January 2002.[31]

The tribunal in *Enron* offered similar language to that found in paragraph 403 of *Sempra*:

> 363. On occasions, the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation.[32]

Mere difficulty in distinguishing between expropriation and fair and equitable treatment is not sufficient reason to award equal compensation for breaches of either standard, nor is it sufficient to justify the eclipse of expropriation.

As in *CMS, Sempra,* and *Enron*, the *Azurix* tribunal held that the claimant's investment had not been expropriated, but that there was a breach of the fair and equitable treatment standard. In its analysis, the tribunal considered the applicable provisions of the BIT and NAFTA. The tribunal first noted that neither treaty instrument provides a measure of compensation for breaches of fair and equitable treatment and relied on

[31] Energy International v. Argentine Republic, Award, ¶¶ 403-404 (Sept. 28, 2007), *available at* http://ita.law.uvic.ca/documents/SempraAward.pdf.

[32] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, Award, ¶ 363 (May 22, 2007), *available at* http://ita.law.uvic.ca/documents/Enron-Award.pdf.

prior awards in support of its decision to award FMV: ''In the present case, the Tribunal is of the view that a compensation based on the fair market value of the Concession would be appropriate, particularly since the province has taken it over.''[33] It is interesting to note that the tribunal described the harm to the claimant's investment with language that sounds in expropriation: ''the province has taken it over.'' This quotation clearly demonstrates the trend of tribunals to shy away from a finding of expropriation.

PSEG is one recent award that has found a different measure of compensation for a breach of fair and equitable treatment after finding that a claimant's investment had not been expropriated. In *PSEG*, the tribunal first noted that FMV was the appropriate measure of compensation for expropriation:

> 305. The Tribunal will accordingly consider first whether the claim to a fair market value of the Project is justified in light of the nature of the investment made. It must be noted in this respect that the BIT, like most treaties of its kind, provides for the fair market value as the measure for compensation only in connection with expropriation. Since the Tribunal has found above that there is no expropriation in this case, either direct or indirect, the fair market value does not appear to be justified as a measure for compensation in these circumstances.[34]

Next, the *PSEG* tribunal, instead of setting forth a plausible remedy for fair and equitable treatment in international law, distinguished the narrow circumstances of *PSEG* from those of other investment disputes.

> 307. From a legal point of view, the Tribunal is mindful that a number of cases accepted the measure of compensation based on the fair market value as appropriate for treaty breaches not amounting to expropriation and relating to the breach of fair and equitable treatment and other standards of protection under the treaty in question, as evidenced by both NAFTA and ICSID cases.
>
> 308. Yet, in all these cases the breach that was compensated had resulted in damage to investments that were at the production stage, not merely in planning or under negotiation. While the Tribunal has found that there is in this case a breach of fair and equitable treatment,

[33] Azurix Corp. v. the Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 424 (July 14, 2006).

[34] PSEG Global Inc. and Konya Ilgin Eletrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, ¶ 305 (Jan. 19, 2007).

> this breach relates not to damages to productive assets but to the failure to conduct negotiations in a proper way and other forms of interference by the Respondent Government. The appropriate remedies thus do not relate to a compensation for the market value of those assets but to a different objective.[35]

Based on this analysis, the tribunal in *PSEG* awarded claimant damages for investments made and out-of-pocket investments.

It is particularly striking that none of these awards, however, answers the critical question of the appropriate remedy in international law for breaches of the fair and equitable treatment standard: *CMS*, *Sempra*, *Enron*, and *Azurix* award the standard of compensation reserved for expropriation and *PSEG* limits its conclusions to a particularized set of facts.

The tribunal's award in *LG&E v. Argentina* represents the best attempt to address this question of compensation on a broader level. First, the tribunal indicated the limited scope of FMV as compensation for expropriation and, like the *CMS* tribunal, acknowledged the difficulty in determining the appropriate measure of compensation for violations of the fair and equitable treatment standard:

> It may be added that FMV is referred to in Article IV of the Treaty as the measure of compensation in cases of expropriation. The Tribunal considers that its application does not extend similarly to other treaty standards. As noted by the tribunal in *SD Myers* when analysing the analogous situation under NAFTA, the treaty does not State that it applies to all breaches of its provisions but ''*expressly attaches to expropriations.*''[36]

The tribunal subsequently noted the individual nature of the compensation awarded in prior awards that found unfair and inequitable treatment:

> [W]hen addressing the question of the absence of applicable treaty compensation standards for breaches other then expropriation, recent tribunals have opted to apply FMV. Yet, their decisions were grounded on the correspondence between the situation under analysis and expropriation.[37]

[35] *Id.* at ¶¶ 307-308.

[36] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No ARB/02/1, Award on Damages, ¶ 37 (July 25, 2007).

[37] *Id.* at ¶ 39.

The *LG&E* tribunal ultimately agreed on a method of calculation based on the corporation's dividends:

> The Tribunal's method to quantify compensation calculates the dividends that Claimants would have received *but for* Argentina's breaches and subtracts from such dividends those that were actually received by Claimants. Losses during the State of Necessity period are subsequently subtracted.[38]

Going forward, one would hope that tribunals will seek to follow and develop the *LG&E* tribunal's analysis, which takes as its premise that FMV is not an appropriate remedy for breaches of fair and equitable treatment.

EXTENSION OF ARBITRAL AUTHORITY

Fair and equitable has not merely overlapped with the expropriation issue, it has at times, overtaken it. The tribunal in the 2004 *Occidental*[39] award considered whether the fair and equitable treatment mandated by the Treaty is a more demanding standard than that prescribed by customary international law'' and held that it was not. Since then, however, there has been an inexplicable momentum in precisely the opposite direction: tribunals have single-handedly created an expanded definition of fair and equitable.

In *Genin*, the tribunal provided the following, with respect to the interpretation of fair and equitable treatment under the United States-Estonia BIT:

> Under international law, this requirement is generally understood to ''provide a basic and general standard which is detached from the host State's domestic law.'' While the exact content of the standard is not clear, the Tribunal understands it to require an ''international minimum standard that is separate from domestic law, but that is, indeed, a minimum standard.''[40]

Similarly, the tribunal in *CME* confirmed that

[38] *Id.* at ¶ 106.

[39] Occidental Exploration and Production Company v. Ecuador, Award (July 1, 2004), *available at* http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf.

[40] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001).

> The standard for actions being assessed as fair and equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals. Standards acceptable under international law apply.[41]

In *Metalclad*, the tribunal said that ''[t]he totality of these circumstances demonstrate a *lack of orderly process and timely disposition* in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly.''[42] In *Tecmed*, in a paragraph, which though only *dictum,* has been recited by many other tribunals, the tribunal said,

> The foreign investor expects the host State to act *in a consistent manner, free from ambiguity and totally transparently* in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as *the goals of the relevant policies and administrative practices or directives,* to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also the goals underlying such regulations.[43]

And in *Mondev*, the tribunal stated,

> On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such [fair and equitable] treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.[44]

These awards reflect two concurrent trends: the expansion of fair and equitable to include elements such as transparency and consistency and the elevation of fair and equitable to the status of ''customary international law'' via the means of treaty interpretation.

[41] CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Partial Award and Separate Opinion, ¶ 611 (Sept. 13, 2001).

[42] Metalclad Corporation v. United Mexican States, Award, ¶ 107 (Aug. 30, 2000).

[43] Técnicas Medioambientales Tecmed S.A. v. the United Mexican States, ICSID Case No. ARB(AF)/00/2 (May 29, 2003).

[44] Mondev International Ltd. v. United States of America, Award, ¶ 117 (Oct. 11, 2002).

Some of the consequences of this interpretation of fair and equitable are already evident:

> the content of the FET standard, if considered as going beyond the general international law standard, is not only indeterminate but also arbitrary. By detaching this standard from what general international law requires one places it in the context where there are no coherent standards of identification, their place being taken by the subjective discretion of the decision-maker.

Most recently, the decision maker's ''discretion'' has allowed for tribunals, uncertain as to whether a claimant's investment has been indirectly expropriated, to find a breach of fair and equitable treatment.

In addition to appraising the adequacy of the total administrative structure of a respondent State, international investment tribunals, looking through the lens of fair and equitable treatment, are even making appraisals of the propriety of *specific* national administrative actions with respect to a foreign investor both in terms of the law of the respondent as well as by an international standard of comportment. Consider one other paragraph from the *Occidental v. Ecuador* award:

> The Tribunal agrees with the Internal Revenue Service of Ecuador that Article 69A [of the Tax Code] grants the right to a tax refund to exporters of goods involved in activities such as mining, fishing, lumber, bananas and African palm oil. The Tribunal does not, however, agree that the oil industry is excluded from the application of Article 69A. . . . As has been explained above, the Tribunal has concluded that VAT reimbursement was not included in [Occidental's] contract. It follows that under Ecuadorian tax legislation the Claimant is entitled to such a refund.[45]

Thus, there seems to be a tendency for international tribunals, operating under the fair and equitable treatment rubric, to develop a dual role, one part of it transforming them into courts of appeal over the administrative action of a respondent State (1) appraising the adequacy of the entire administrative framework in terms of international law standards *as well as* (2) appraising the applicability of national law by the national administration in terms of its legal accuracy under that law.

[45] Occidental Exploration and Production Company v. Ecuador, Award, ¶ 189 (July 1, 2004), *available at* http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf.

All this introduces a more penetrating and interventionist international arbitral supervision of national procedures than was provided by the regime of expropriation. If expropriation is consequential, fair and equitable treatment is intentional. A finding of expropriation, it will be recalled, never looked beyond the action of the host State accused of expropriating. Moreover, if compensation was paid, no assessments of the general quality of the legal and administrative system were made. Fair and equitable treatment, by contrast, does not even require an expropriatory act.

REGULATORY PENUMBRA

Along with the apparent reluctance of a striking number of international investment tribunals to base awards on expropriation has been a tendency among capital importing States (including, of late, major capital exporters such as the United States) to reduce the material scope of the ground of expropriation by promoting the notion that regulatory action by the host State, which significantly deprives a foreign investment of value, is not to be deemed expropriation and hence will not give rise to a right to compensation.

The core assumption here is quite innovative. In public international law, no legal significance attaches to the agency or branch of a government which actually violates an international obligation. Thus, an expropriation is an expropriation, whether it is accomplished by the executive, legislative, or judicial branch of the host State; whichever branch is the agent, it is the responsibility of the State that is engaged. So it is more than a minor departure to postulate that an uncompensated expropriation that was accomplished by means of regulatory action does not violate BIT obligations. In effect, this new formulation, if accepted, would allow a State to expropriate a foreign investment without paying compensation.

That is not to say that a State may never regulate foreign investment in circumstances in which the regulation reduces the economic value of the investment. But it is to say that there are situations in which the exercise of regulatory power over a foreign investor will constitute expropriation under a BIT and require compensation: When the investor has entered the local market on the basis of a concession or stabilization agreement, pretending that a violation by the State of such agreements is only a ''regulatory expropriation'' and, as such, is not compensable, is plainly improper. It permits the host State to do, without liability, precisely what it promised the foreign investor it would *not* do. By contrast, when the investor has entered the host State's market without commitments or specific assurances from the host State, regulation by the host State of the economic sector in which the foreign investor is operating, and which has the effect of reducing the

reasonably expected profits of the foreign investor, may well *not* be considered expropriatory if it is neither discriminatory nor confiscatory.

Decision in this latter case involves complex prudential determinations, for it must take account of the host State's need to manage its political economy as well as the rights of the foreign investor to the protection of an international minimum standard. But it is a reasonable and sound development, for the administration of the modern political economy is accomplished by regulation. The transformation of the United States into an industrial dynamo could not have been accomplished if the Supreme Court had not exempted much regulation from the protections of the Fifth Amendment. Any contemporary State seeking to develop is, to that extent, a regulatory State, and international investment law can hardly ignore it. But when regulatory power is applied to foreign investments subject to a pre-agreed regime, the State must compensate. The State in question may still expropriate the foreign investor by means of regulations as, indeed, by any other means, but it must compensate.

RESULTING HAZE

The eclipse of expropriation and the coordinate expansion of fair and equitable treatment is much more than a simple change of vocabulary with no substantive change. Expropriation findings—especially in cases of creeping and constructive expropriation—certainly involve making judgments, but it appears that a finding of fair and equitable treatment involves and invites a much more subjective assessment on the part of a tribunal. Expropriation has a certain clarity, both in its precipitating event and its liquidation of compensation. There must have been action on the part of the host State, and the consequence of that action must have been a diminution of the reasonably expected profits of the investment. Violations of the fair and equitable treatment obligation often lack that clarity.

The distinction drawn earlier between regulatory expropriations, in circumstances in which there is a concession or stabilization agreement, and regulatory expropriations, when the foreign investor has simply entered the market, is fair to both host State and investor, for it allows reasonable regulatory action when the State has not committed itself to refrain from such action but insists that such action be treated as compensable expropriation when the State has so committed itself. Fair and equitable treatment, in contrast, does not so easily distinguish between foreign investments by agreement and foreign investments without such agreement.

Further, assessments of whether there has been a violation of fair and equitable treatment almost always impose a more onerous burden on the host State faced with allegations of unfair and inequitable treatment. Virtually every major investment involves some (if not ongoing) negotiations

with the host State's executive and especially its regulatory and tax authorities. Given the local power and the ambit for its operation enjoyed by the host State in contrast to the limited options of the foreign investor, whose sunk costs anchor it *in situ*, negotiations with the government, even when the negotiations were initiated by the foreign investor, will almost always have the appearance of something unfair and inequitable. And, ironically, the more democratic the host State, the more international investment disputes are likely to be subjects of public controversy, with national politicians, in the government and the opposition, vying to make the most intemperate statements. In the political arena in which they are uttered, they are likely to be taken as typical political rodomontade. Years later, adduced in an international investment arbitration, they are likely to look like incontrovertible evidence of unfair and inequitable treatment.

The eclipse of expropriation as a preferred ground for finding liability also makes the determination of the award of damages more difficult. It is no surprise that many tribunals including *CMS, Sempra, Enron,* and *Azurix*, having found a violation of fair and equitable treatment, turned to the compensation metric for expropriation in their liquidations of damages.

The eclipse of expropriation also raises problems in secondary markets that rely on the findings of international investment law. For example, political risk insurance usually offers protection against expropriation, so awards that, in the aggregate, recharacterize expropriations as violations of fair and equitable treatment, undermine the institution of political risk insurance. And insurance, which permits the quantification and management of risk, serves as an important strut of foreign investment.

CONCLUSION

In sum, it would appear that the eclipse of expropriation by fair and equitable treatment may have some costs for an efficient international investment law whose goals must include both encouraging private investment to facilitate economic development while not unduly infringing the autonomy and regulatory authority of the host State. International investment law, like all law, is a balance of competing interests. If that balance is disturbed, it could threaten the viability of this important part of international law.

We wonder if the explanation for the attraction felt by some tribunals to the fair and equitable standard can be found in the cognate attraction by certain tribunals in international commercial arbitration to the so-called *lex mercatoria* instead of the rigorous application of a system of national law that in turn is selected by choice of law methodology. In both cases, an articulated and verifiable legal system is supplanted by a much vaguer standard, allowing great scope for arbitral discretion. If this is the reason for

the eclipse, then we are encountering a major tectonic shift in international investment law.

The finding of indirect expropriation and the subsequent determination of compensation may not be an easy task for tribunals, but we question whether the solution to the difficulty is the expansion of the fair and equitable treatment standard apparent in some recent case law. The immediate effects of the case law, some of which are already visible, include the following: (1) a lack of coherent reasons for expanding the standard, (2) a departure from finding expropriation—either direct or indirect, and (3) the misappropriation of the measure of damages expressly reserved for expropriation in most BITs to breaches of fair and equitable treatment. Together, these effects threaten to destabilize the investment law regime in this area.

Interim Measures: An Arbitrator's Provisional Views

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INTRODUCTION

The issue of interim measures in investor-State arbitration is of interest to arbitrators and practitioners. It is a topic in motion. In this article, I will address the following facets of the issue:

1. Are interim measures available in investor-State arbitration to the same extent as in international commercial arbitration?
2. In what circumstances are interim measures recommended (ordered) in investor-State arbitrations?
3. Are interim measures sought against a State in an investor-State arbitration any different than measures sought against a non-State party?

In seeking to shed some light on the issue, I will refer to both the literature on the topic and my own experience as an arbitrator in investor-State arbitrations.

AVAILABILITY OF INTERIM MEASURES IN INVESTOR-STATE ARBITRATIONS: THE POWER OF CONSENT

The availability of interim measures in international arbitration, even where a State is respondent, is now well-settled. A tribunal's jurisdiction to order provisional measures is, like the parties' arbitration agreement itself, a function of the parties' consent. When opting for arbitration, be it in the context of an investor-State dispute or a purely commercial one, the parties

* With thanks to my colleagues, Alison FitzGerald and Renée Thériault, members of Ogilvy Renault's International Arbitration Team, for their assistance in preparing this article.

have complete freedom to shape the scope of a tribunal's jurisdiction to order provisional relief. And while parties will be well advised to draft their arbitration agreement carefully in this regard, they are always free to carve out concurrent jurisdiction of the courts in connection with such relief.

The International Centre for Settlement of Investment Disputes (ICSID) Convention and Arbitration Rules, which represent the quintessential framework for investor-State arbitration, expressly address the operation of the parties' consent. Article 26 of the convention, provides that ''[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'' Regarding provisional measures specifically, Article 47 of the convention states: ''Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.''

These two provisions have been the subject of much debate, as they effectively deem an ICSID tribunal's jurisdiction to order provisional relief to be exclusive. The burden is on the parties to expressly indicate otherwise. ICSID Arbitration Rule 39(6) makes that very clear: ''Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.''

The exclusivity of an ICSID tribunal's power to order provisional relief is a unique feature of the ICSID Arbitration Rules. Indeed, under other recognized arbitration frameworks, it is presumed (be it explicitly or implicitly) that courts retain the power to order such relief unless otherwise specified.[1] Chapter 11 of the North American Free Trade Agreement (NAFTA), also designed for investor-State arbitration, provides an interesting contrast. In its early iterations in 1992, NAFTA drafters had in fact stipulated that a tribunal could not order provisional measures.[2] The availability of provisional measures under NAFTA Chapter 11 would eventually be specified under Article 1134. And while initial versions of this provision referred to the availability of provisional measures for the protection of the tribunal's ''jurisdictional exclusivity,'' this language was eventually dropped.[3] Today, Article 1134 reads, in relevant part, as follows: ''A Tribunal may order an interim measure of protection to preserve the

[1] *See, e.g.,* E. Gaillard & J. Savage eds., *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶ 1320 (1999).

[2] *See* Meg Kinnear et al., *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* 1134-41 (2006).

[3] *Id.*

rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction.''

Another unique feature of ICSID and in particular Rule 39 is that it refers to the tribunal's power to ''recommend'' provisional measures. This language is used in the very first paragraph of Rule 39, which states, ''At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal.''

The reality is that once the parties have provided their consent, at least in the context of an ICSID arbitration, the tribunal will have the required jurisdiction to order provisional relief in accordance with the terms of Rule 39. An ICSID tribunal jurisdiction is in fact wide-reaching, far more than a tribunal operating under NAFTA Chapter Eleven. For instance, an ICSID tribunal may recommend provisional measures on its own initiative or recommend measures other than those specified in a request. Furthermore, a tribunal may at any time modify or revoke its recommendations.

One might be inclined to think that such broad powers, especially when exercised *sua sponte*, are potentially incompatible with the involvement of a sovereign State. There may also be a heightened sense of *méfiance* on the part of States due to the fact that an ICSID tribunal has the power to recommend provisional measures before it has definitely ruled on its jurisdiction over the dispute: a finding of prima facie jurisdiction will suffice.[4] And only recently, in 2006, Rule 39 was revised to allow requests for provisional measures on an expedited basis as soon as a dispute is registered with ICSID, that is, even before the tribunal is constituted.[5]

While the scope of an ICSID tribunal's power to order provisional measures has widened over time, it is significant that the issue of State sovereignty was at the forefront of the drafters' minds when Rule 39 was initially crafted. Their concern in respect of State sovereignty provides the explanation for the careful wording of Rule 39, premised as it is on a tribunal's power to ''recommend'' provisional measures, as opposed to the power to ''order,'' or language to that effect. As noted by Redfern and

[4] *See, e.g.,* Holiday Inns v. Morocco, 1978/79 ICSID Ann. Rep. 5, *cited in* A.R. Parra, ''The Practices and Experience of ICSID,'' in *Conservatory and Provisional Measures in International Arbitration* 37, 42 (ICC Publication No. 519, 1993).

[5] Paragraph 5 of Rule 39 of the ICSID Arbitration Rules provides as follows: ''If a party makes a request pursuant to (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.''

Hunter, ''[t]he use of the word 'recommend' in this context stems from the concern of the drafters of the ICSID Convention to be seen as respectful of national sovereignty by not granting powers to private tribunals to order a state to do or not do something on a purely provisional basis.''[6] Schreuer informs us that ''a conscious decision was made not to grant the tribunal the power to order binding provisional measures.''[7]

In the fullness of time, however, this concern of the drafters of the convention was set aside by less ''respectful'' ICSID tribunals. For instance, in the case of *Emilio Agustin Maffezini v. Kingdom of Spain*, the tribunal stated in no uncertain terms: ''The Tribunal's authority to rule on provisional measures is not less binding than that of a final award. Accordingly, for the purposes of this order, the tribunal deems the word 'recommend' to be of equivalent value as the word 'order'.''[8]

The issue of whether provisional measures are binding on States was long debated in the International Court of Justice (ICJ) as well. In the landmark *LaGrand* case initiated by Germany against the United States, it was argued by the latter that an ICJ order on provisional measures, made pursuant to Article 41 of the ICJ Statute, was not binding. This argument was rejected by the ICJ in the following terms:

> The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures

[6] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* ¶¶ 7-12 (4th ed. 2004).

[7] *The ICSID Convention: A Commentary* 758 (2001), *cited in* Redfern & Martin, *supra* note 6.

[8] Decision on Request for Provisional Measures (Oct. 28, 1999), 16 *ICSID Rev.—Foreign Inv. L.J.* 212, at ¶ 9 (2001), *cited in* Redfern & Martin, *supra* note 6. *See also* Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 1, ¶ 4 (July 1, 2003): ''It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them.''

indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[9]

INTERIM MEASURES IN INVESTOR-STATE ARBITRATIONS: A FEW EXAMPLES

It is clear that interim relief is available in investor-State arbitrations. I will now provide examples that illustrate different circumstances where interim measures were actually ordered or denied.

Rule 39 does not specify the kinds of measures that a tribunal may order, nor does it establish criteria for granting such measures. Paragraph 1 of Rule 39 simply states that ''a party may request that provisional measures for the preservation of its rights be recommended by the tribunal'' and that any such request ''specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require [the] measures.''

By contrast, Rule 26 of the UNCITRAL Arbitration Rules provides with greater particularity that the tribunal may order any interim measures ''it deems necessary in respect of the subject-matter of the dispute, including for the conservation of goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.'' Similarly, NAFTA Article 1134 provides that a tribunal constituted to hear an investment dispute under Chapter 11 of NAFTA may order interim measures to preserve the rights of a disputing party, ''including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction.''[10]

Several concepts emerge from a review of these rules. *First,* an unspoken requirement of a request for interim measures is that the tribunal seized of the request have prima facie jurisdiction over the dispute. This principle is now well established on the basis of ICJ, Iran-United States Claims Tribunal, and ICSID decisions and awards. Although the necessity of demonstrating prima facie jurisdiction continues to be challenged in *ad hoc* arbitrations, there is, in my view, no principled basis upon which to distinguish between *ad hoc* and institutional arbitrations in regard to this

[9] LaGrand Case (Federal Republic of Germany v. United States), 2001 I.C.J. 104, at ¶ 102 (June 27), *cited in* D.F. Donovan, ''The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, The Work of UNCITRAL and Proposals for Moving Forward,'' in A.J. van den Berg ed., *International Commercial Arbitration: Important Contemporary Questions* 119 (2002).

[10] Article 1134 also contains an important exclusion precluding a tribunal from ordering attachment or enjoining the application of the measure alleged to constitute a breach of NAFTA.

threshold requirement. The threshold is a relatively low one, and an application for interim measures will not be denied simply because a jurisdictional challenge has been raised.

As explained by the ICJ in the *Fisheries Jurisdiction* case (1972), a tribunal will have prima facie jurisdiction when ''the provision in an instrument emanating from both parties to the dispute appears, *prima facie,* to afford a possible basis on which the jurisdiction of the Court might be founded.''[11] Judge Schwebel has pointed out that the precise meaning of ''might'' in this context, that is, whether ''might'' means ''possibly might'' or ''might well'' or ''might probably,'' is subject to controversy.[12] Nevertheless, whatever ''might'' might mean, this threshold falls far short of requiring a party to demonstrate a likelihood of success on the merits.

The *second* concept apparent from this review is the class or category of interim relief available from arbitral tribunals. Interim measures are generally designed to fulfill one of three purposes: (1)to facilitate the conduct of arbitral proceedings, (2)to facilitate the enforcement of a future award, or (3)to preserve the status quo.[13] In certain civilian jurisdictions, the *référé* procedure may also be available to assist creditors in rapidly securing enforcement of their rights, either fully or in part, where those rights are not seriously in dispute.[14] The first two classes of relief are intended to ensure the efficiency and efficacy of the arbitral procedure and may comprise measures related to the preservation of evidence, the attendance of witnesses, or security for costs, among others. These kinds of measures are critical to a party's ability to secure meaningful relief, consistent with the parties' original arbitration agreement. The more controversial measures are often those with a protective or conservatory purpose, where a party seeks to preserve the status quo *ante*.

As mentioned earlier, Rule 39(1) of the ICSID Arbitration Rules specifies that a party may request ''provisional measures *for the preservation of*

[11] Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Interim Protection, Order of Aug. 17, 1972, 1972 I.C.J. 30, at ¶ 18; Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of Aug. 17, 1972, 1972 I.C.J. 12, at ¶ 17. *See also* Armed Activities on the territory of the Condo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Provisional Measures, Order of July 10, 2002, 2002 I.C.J. 241, ¶ 58; Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Request for the Indication of Provisional Measures, Order of July 13, 2006, I.C.J. Reports of Judgments, Advisory Opinions and Orders No. 915, ¶ 57 (Oct. 2007).

[12] Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* 175 (1994), citing Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua case,* 1984 I.C.J. 169, at 207.

[13] *See* Kinnear et al., *supra* note 2, at 1134-2—1134-3.

[14] Gaillard & Savage eds., *supra* note 1, at ¶¶ 1339-40.

its rights [emphasis added].'' This language has been interpreted by arbitral tribunals as requiring that the rights in issue exist at the time the application is made. The tribunal in *Maffezini v. Spain* stated concisely that ''[t]he use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created (sic) in the future.''[15]

In that case, the applicant respondent was seeking an interim measure requiring the claimant to post a guaranty or bond in the amount of the costs that the respondent expected to incur in defending the case. The tribunal rejected the application on the ground the alleged rights were based on ''hypothetical situations,'' namely whether the respondent would win the case and whether the tribunal would deem the claimant's case to be of such a nature as to require the claimant to pay the respondent's costs and expenses.[16] The tribunal concluded that granting the requested relief in those circumstances would have risked pre-judging the claimant's case.[17]

Interim measures are intended to guarantee the protection of rights whose existence might be jeopardized in the absence of such measures.[18] This is not to say, however, that the rights for which interim protection is sought need be proven.[19] To be clear, at the interim measures stage of a dispute the tribunal need only deal with the nature of the rights claimed, not with their actual existence or the merits of the allegations of their

[15] Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, ¶ 13 (Oct 28, 1999).

[16] *Id.* at ¶¶ 15-21.

[17] *Id.* at ¶ 21.

[18] *See* Occidental Petroleum Corporation, Occidental Petroleum and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 60 (Aug. 17, 2007). The author of this article is presently the chairman of the tribunal in this case. The rights in issue concern the claimants' alleged right to specific performance of their oil and gas concession. The claimants sought interim measure of protection in connection with this alleged right. The request for interim measures was denied.

[19] *See* LaGrand Case (Federal Republic of Germany v. United States), 2001 I.C.J. 104, at ¶ 102 (June 27) (''It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.''). *See also* Victor Pey Casado v. Chile, ICSID Case No. ARB/98/2, Decision, ¶ 49 (Sept. 25, 2001). The tribunal in *Pey Casado* observed on the basis of the *LaGrand* reasoning that prior to rendering final judgment, the alleged rights for which protection is provisionally sought may not be considered proven, real or actual. The English translation of the original French and Spanish language versions of this decision is available in 6 *ICSID Rep.* 375 (2004).

violation. This was the approach adopted by the tribunal in *Victor Pey Casado v. Chile*, where the tribunal stated,

> For its part, the Tribunal can neither prejudge nor even, to put it correctly, ''assume in an anticipatory fashion: . . .'' It must therefore reason, at this preliminary stage of the arbitration process, on the basis not of ''assumptions'' but of *hypotheses*, in particular that by which it may come to recognise its own jurisdiction on the substance of the case, and in such a case, the hypothesis whereby the rights that the decision may recognise for one or the other of the parties in question could be placed in danger or compromised by the *absence* of provisional measures.[20]

The rights for which interim protection is sought must also reasonably relate to the ''rights in dispute.''[21] In this regard the tribunal in *Plama Consortium Limited v. Republic of Bulgaria* stated that

> [t]he rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out.[22]

In *Plama*, the claimant had applied for an interim relief order recommending, among other relief, that the respondent immediately discontinue and/or cause to be discontinued all pending proceedings relating to the arbitration, and refrain from bringing or participating in any future proceedings before the Bulgarian courts relating in any way to the arbitration.[23] The tribunal determined that because the claims and relief sought by the claimant in the dispute were limited to damages, the scope of the rights relating to the dispute that deserved protection by way of provisional measures was necessarily also limited to the damage claims.[24] The tribunal summarized its conclusions in regard to the claimant's request

[20] Victor Pey Casado v. Chile, ICSID Case No. ARB/98/2, Decision, ¶ 46 (Sept. 25, 2001). The English translation of the original French and Spanish language versions of this decision is available in 6 *ICSID Rep.* 375 (2004).

[21] *See* Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Order, ¶ 40 (Sept. 6, 2005). *See also* Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, ¶¶ 123-125 (Oct. 28, 1999).

[22] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Order, at ¶ 40 (Sept. 6, 2005).

[23] *Id.* at ¶ 2.

[24] *Id.* at ¶ 41.

for an order recommending that the respondent discontinue all pending proceedings as follows:

> The Tribunal is reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies and is not satisfied that if it did so in this case, Respondent would have the power to impose its will on an independent judiciary. While under general principles of public international law, a state is responsible for actions of its courts, Claimant's Request for Urgent Provisional Measures is not based on a claim of denial of justice by those courts for which relief is sought.[25]

These cases clearly show that the circumstances in which provisional relief will be ordered to preserve the status quo pending resolution of the outcome of the dispute are quite narrowly circumscribed.

This brings me to the *third* and last concept emerging from my review of the rules, that is, interim measures are only to be granted where they are necessary to preserve a party's rights; or where there is an urgent need for interim relief in order to avoid irreparable harm from befalling the requesting party. In the words of a former president of the ICJ, Jumeney de Aréchaga, interim measures are necessary where the actions of a party ''are capable of causing or threatening irreparable prejudice to the rights invoked''[26] and will be deemed urgent where ''action prejudicial to the rights of either party is likely to be taken before such final decision is given.''[27]

In order to prove irreparable harm, a party must show that the harm threatened cannot be compensated by an order for damages. However, in the course of making this determination, the tribunal must be careful to

[25] *Id.* at ¶ 43.

[26] Aegean Sea Continental Shelf Case (Greece v. Turkey), Interim Measures of Protection, Order of Sept. 11, 1976, Separate Opinion of President Jimanez de Aréchaga, 1976 I.C.J. 3, at 11 (The Court denied an indication of interim measures sought by Greece prohibiting both Greece and Turkey, absent mutual consent and pending final judgment of the Court, from all exploration activity or scientific research with respect to the continental shelf areas in dispute).

[27] Case Concerning Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of July 29, 2001, 1991 I.C.J. 12, at 17 (The Court denied an indication of interim measures sought by Finland requiring Denmark to refrain from continuing or otherwise proceeding with construction works on a bridge spanning the strait of Great Belt which would otherwise impede the passage of ships to and from Finnish ports and shipyards). *See also* Tokio Tokelos v. Ukraine, ICSID Case No. ARB/02/18, Order No. 3, ¶ 8 (Jan. 18, 2005), where the tribunal held that there must be a ''threat of irreparable harm'' before provisional measures can be ordered.

avoid pre-judging the merits of the dispute.[28] As Professor Lew has cautioned,

> [I]n dealing with a request for an interim measure, an arbitral tribunal must refrain from prejudging the merits of the case. By way of illustration, an arbitral tribunal will generally refuse to grant such a measure, where the request essentially covers what is asked to be resolved in the substantial arbitration.[29]

In many cases, there is a very fine line between granting relief to ensure that a party is not irreparably prejudiced by events during the course of an arbitral proceeding and pre-judging the outcome of the dispute. This element of the provisional measures test is accordingly the most delicate and challenging for an arbitrator to consider when faced with an interim measures application, regardless of whether the party likely to be affected is a state or a private actor.

CONCLUSION: A DISTINCTION WITHOUT A DIFFERENCE?

The last issue I wish to address concerns the differences, if any, of ordering provisional measures against a State entity as opposed to a private entity. The commonly held view is that there is no justification for tailoring the arbitration process, including matters of provisional relief, on the basis of a State's particular status:

> [I]n the field of arbitration of state contracts, the trend has increasingly been for the state-party to be treated no differently than its private co-contractor. Indeed, as states become more frequently involved in commercial activities, special regimes for states and state-owned parties often appear incompatible with the requirements of international trade, such as the need to ensure the respect of agreements freely entered into by the parties.[30]

[28] *See* Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, ¶ 21 (Oct. 28, 1999).

[29] Julian D.M. Lew, ''Commentary on Interim and Conservatory Measures in ICC Arbitration Cases'' (2000) ICC Bull. 11, 23, *cited in* Redfern & Hunter, *supra* note 6, at ¶¶ 7-30.

[30] E. Gaillard & J. Edelstein, ''Recent Developments In State Immunity From Execution In France: Creighton v. Qatar,'' 15 *Mealy's Int'l Arb. Rep.* 49 (2000).

This, of course, is a natural consequence of the principle of party equality, a fundamental condition of due process. The only difference lies with a State's expectations regarding the arbitral process:

> The expectations of States differ very considerably from those of private parties who resort to commercial arbitration. Here it may be as well to remember that, unlike the situation of the private party who chooses flexibility of the arbitral process as an escape from the strict requirements of litigation, arbitration in any form is for a State a loss of liberty, an acceptance of constraints from which it is otherwise free.[31]

Nevertheless, as Oscar Schachter has observed, where the request for interim measures involves the operation of a natural resources concession, ''there may be reasons of a material and social character that make it 'impossible' or 'impracticable' for the offending State to restore the situation to its prior state.''[32] This was essentially the concern underpinning negotiation of Article 47 of the ICSID Convention. According to Christoph Schreuer, China, in particular, expressed concern over the ability of a State to comply with a provisional measure for reasons of national policy.[33] Additionally, the ability of a State party to ''impose its will'' on an independent branch of government, regardless of public international law principles of state responsibility, is, as the tribunal in *Plama* intimated, in certain circumstances questionable.[34]

It may therefore be that although the binding nature of an interim measure recommended by an ICSID tribunal is no longer seriously in question, the sovereign character of a State party to an arbitration may, in practical terms, influence the manner in which a tribunal disposes of an application for interim measures. I end with this provisional view.

[31] H. Fox, ''States and the Undertaking to Arbitrate,'' 37 *Int'l Comp. L.Q.* 1, at 4 (1988).

[32] Oscar Schachter, *International Law in Theory and in Practice*, 178 Collected Courses (Academy of International Law) 188, at 190 (1982).

[33] Christoph Schreuer, *The ICSID Convention: A Commentary* 758 (2001).

[34] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Order, ¶ 40 (Sept. 6, 2005).

Treatment of Non-Disputing State Party Views in Investor-State Arbitrations

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The focus of this article is on the role of a particular type of non-disputing party in investor-State arbitrations—the non-disputing State party, which is a party to the treaty under which the arbitration is submitted, but is not the respondent State in the arbitration. This article will examine the role that non-disputing State parties have played in investment arbitrations and will analyze how tribunals have treated such participation. While non-disputing party participation in investor-State disputes is premised on the notion that the party making such submissions may assist the tribunal in providing particular expertise and a view different from that expressed by the disputing parties,[1] participation by a non-disputing State party takes on

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[1] *See, e.g.*, NAFTA Free Trade Commission, Statement on Non-Disputing Party Participation (Oct. 7, 2003), *available at* http://www.state.gov/documents/organization/38791.pdf (In considering whether to allow non-disputing party participation, tribunals should evaluate the extent to which such party's submission ''would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.''); Methanex Corp. v. United States of America, NAFTA/UNCITRAL, Decision on Petition from Third Persons to Intervene as ''Amici Curiae'' (Jan. 15, 2001), *available at* http://www.state.gov/documents/organization/6039.pdf, ¶ 48 (stating that in determining whether to accept *amicus* submissions, tribunal would consider whether such submissions would or ''could assist the Tribunal'' with regard to the substantive dispute); United Parcel Service of America, Inc. v. Canada, NAFTA/UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent_oct.pdf, ¶ 70 (holding that, ''One governing consideration [for admission of *amicus* submissions] will be whether the Petitioners are likely to be able to provide assistance beyond that provided by the disputing parties.''); ICSID Rule 37(2) (2006) (in determining whether to allow third-party submissions, a tribunal should consider extent to which ''the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is

special significance given the State's role as a party to the treaty that is being interpreted by the tribunal. Indeed, Article 31(3) of the Vienna Convention on the Law of Treaties provides that ''[t]here shall be taken into account, together with the context [of a treaty]: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.''[2]

Certain treaties contain express mechanisms for non-disputing State party participation. Notable among them is the North American Free Trade Agreement (NAFTA).[3] NAFTA contains two different vehicles by which non-disputing State parties can make their views on interpretations of the treaty known to investor-State tribunals constituted under NAFTA Chapter 11. First, NAFTA Article 1128 provides a right to each non-disputing State party to make submissions to investor-State tribunals on issues of treaty interpretation.[4] Second, Article 2001 creates the Free Trade Commission (FTC), comprised of cabinet-level ministers of the three NAFTA parties, which has the authority to issue interpretations of any provision of NAFTA.[5] Pursuant

different from that of the disputing parties''); Suez Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal S.A. v. Argentina, United Nations Commission on International Trade Law (UNCITRAL), Order in Response to a Petition for Transparency and Participation as Amicus Curiae (May 19, 2005), *available at* http://ita.law.uvic.ca/documents/suezMay19EN.pdf, ¶ 70 (''The traditional role of an amicus curiae in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide.'').

[2] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 31(3) (May 23, 1969), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[3] North American Free Trade Agreement (NAFTA), Can.-Mex.-U.S., Dec. 17, 1992, *reprinted in* 32 I.L.M. 289 (1993) and 32 I.L.M. 605 (1993), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78.

[4] NAFTA Article 1128 provides, ''On written notice to the disputing Parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.'' The rules governing arbitration before the Iran-United States Claims Tribunal similarly allow for non-party participation in proceedings, and expressly refer to non-disputing State party participation. Iran-United States Claims Tribunal Rules of Procedure, art. 15(5) (1983), *available at* http://www.iusct.org/tribunal-rules.pdf (otherwise unmodified from Article 15 of the UNCITRAL Arbitration Rules) (''The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments—or, under special circumstances, any other person—who is not an arbitrating party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements.'').

[5] NAFTA Article 2001 provides, in relevant part, ''The Commission shall: (a) supervise the implementation of this Agreement; (b) oversee its further elaboration; (c) resolve disputes that may arise regarding its interpretation or application.''

to Article 1131(2), FTC interpretations are binding on Chapter 11 tribunals.[6]

The United States' post-NAFTA bilateral investment treaties (BITs) and free trade agreements (FTAs) providing for investor-State arbitration contain provisions similar to NAFTA Article 1128,[7] and some provide for an FTC with the authority to issue binding interpretations.[8] Similarly, Canada and Mexico have numerous post-NAFTA BITs or foreign investment promotion and protection agreements (FIPAs) and FTAs that provide for investor-State arbitration with provisions akin to NAFTA Articles 1128[9] and 1131.[10]

[6] NAFTA Article 1131(2) provides, ''An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.''

[7] *See, e.g.,* U.S. Model BIT, art. 28(2) (2004), *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf; Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR), art. 10.20(2) (Aug. 2, 2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/CAFTADR_Final_Texts/asset_upload_file328_418.pdf; United States-Chile FTA, art. 10.19(2) (June 6, 2003), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf; United States-Singapore FTA, art. 15.19(2) (May 6, 2003), *available at* http://www.ustr.gov/assets/Trade_Agreements / Bilateral / Singapore_FTA / Final_Texts / asset_upload_file708_4036.pdf; United States-Morocco FTA, art. 10.19(2) (June 15, 2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral / Morocco_FTA / Final_Text / asset_upload_file651_3838.pdf; United States-Uruguay BIT, art. 28(2) (Nov. 4, 2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf; United States-Rwanda BIT (not yet entered into force), art. 28(2) (feb. 19, 2008), *available at* http://www.ustr.gov/Trade_Agreements/BIT/Rwa/Section_Index.html.

[8] *See, e.g.,* U.S. Model BIT, *supra* note 7, art. 30(3); United States-Uruguay BIT, *supra* note 7, art. 30(3); United States-Rwanda BIT, *supra* note 7, art. 30(3); CAFTA-DR, *supra* note 7, art. 10.22(3); United States-Chile FTA, *supra* note 7, art. 10.21(3); United States-Singapore FTA, *supra* note 7, art. 15.21(2).

[9] *See, e.g.,* Canada Model FIPA, art. 35 (2004); Canada-Peru FIPA, art. 35 (Nov. 6, 2006), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf; Canada-Peru FTA, art. 832 (May 29, 2008), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-PeruFTA_chapter8-en.pdf; Canada-Chile FTA, art. G-29 (Dec. 5, 1996), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/chap-g26.aspx?lang=en.

[10] *See, e.g.,* Canada Model FIPA *supra* note 9, art. 40(2); Canada-Peru FIPA *supra* note 9, art. 40(3); Canada-Peru FTA, *supra* note 9, art. 837(3); Canada-Chile FTA, *supra* note 9, art. G-32(2); Mexico-Czechoslovakia BIT, art. 16(2) (Apr. 4, 2002), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/czech_mexico.PDF; Mexico-Portugal BIT, art. 15(2) (Nov. 11, 1999), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/mexico_portugal.pdf; Mexico-Iceland BIT, art. 16(2) (June 24, 2005), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/Mexico_Iceland.pdf; Mexico-Greece BIT, art. 16(2)

NAFTA parties have utilized the mechanisms provided in the treaty for making their views on issues of interpretation known to tribunals in cases in which they are not a disputing party.[11] In some cases, NAFTA Chapter 11 tribunals have invited the non-disputing State parties to make submissions on particular issues, indicating their interest in obtaining the views of the other treaty parties.[12]

Investor-State tribunals on occasion have also sought non-disputing State party views in cases where the treaty at issue did not provide any express mechanism for obtaining those views. In the arbitration *Aguas del Tunari S.A. v. Republic of Bolivia*,[13] for instance, the BIT at issue contained no such mechanism, yet the tribunal wished to have the Netherlands' view on certain Dutch government documents that had been submitted to the tribunal by the respondent State. The tribunal, citing Arbitration Rule 34 of the International Centre for Settlement of Investment Disputes (ICSID), wrote to the Legal Advisor of the Foreign Ministry of the Netherlands seeking the Netherlands' views in what it characterized as the ''first inquiry of a non-disputing state party to a BIT.''[14]

State parties similarly have considered engaging non-disputing State parties in proceedings in cases in which the governing treaty lacked a

(Nov. 30, 2000), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/mexico_greece.pdf; Mexico-S. Korea BIT, art. 14(2) (Nov. 14, 2000), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/korea_mexico.pdf.

[11] The NAFTA parties have made more than 50 submissions pursuant to Article 1128, with several submissions having been filed in a single case during various phases of the proceeding. *See generally* http://www.state.gov/s/l/c3439.htm. The NAFTA FTC issued interpretations in July 2001 and October 2003. *See* NAFTA Free Trade Commission, Interpretation of Certain Chapter 11 Provisions (July 31, 2001), *available at* http://www.state.gov/documents/organization/38790.pdf; NAFTA Free Trade Commission, Statement on Non-Disputing Party Participation, *supra* note 1.

[12] *See, e.g.*, Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1, Decision on Preliminary Question, ¶ 36 (July 17, 2003), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Fireman/decision/decision_ingles.pdf (noting that the United States made a submission in response to the tribunal's question regarding U.S. law); Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/5, Concurring Opinion of Arthur W. Rovine, ¶ 20 (Nov. 21, 2007), *available at* http://ita.law.uvic.ca/documents/ADM-Concurring.pdf (noting that, ''Unfortunately, neither Canada nor the United States filed submissions in the instant case, pursuant to Article 1128, notwithstanding invitations from the Tribunal to both governments to do so.'').

[13] Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), *available at* http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf.

[14] *Id.*, ¶ 258. ICSID Rule 34(2) provides that ''[t]he Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts.''

mechanism expressly providing for their participation. In dozens of ICSID cases pending against it, Argentina has raised a defense of ''necessity.''[15] Unlike NAFTA and the United States' post-NAFTA BITs, the Argentina-U.S. BIT does not contain any provision similar to NAFTA Articles 1128 or 1131. It was reported, however, that Argentina was considering requesting the United States to formally agree on the interpretation of the essential security provision in the BIT, particularly whether that provision was self-judging.[16]

There also has been at least one instance where a non-disputing State party to a treaty has criticized an investor-State tribunal for not affirmatively seeking its views on an issue of treaty interpretation. In the *SGS Société Généralé Surveillance S.A. v. Pakistan* arbitration, the ICSID tribunal rejected the claimant's contention that the so-called umbrella clause in the Swiss-Pakistan BIT, which provided that the parties should ''constantly guarantee the observance of commitments it has entered into with respect to the investments,'' provided a substantive obligation that converted breaches of contract into BIT violations.[17] Two months after the Decision on Jurisdiction was rendered, the State Secretariat for Economic Affairs of the Swiss government wrote to ICSID questioning why the tribunal did not inquire with the Swiss government about its views, particularly when ''the Tribunal attributed considerable importance to the intent of the Contracting parties . . . and indeed put this question to [Pakistan, the disputing party].''[18] The note rejected Pakistan's and the tribunal's interpretation of the treaty provision, and recorded Switzerland's concern that the decision would achieve some precedential value, especially given the fact that such clauses form ''part of virtually every BIT concluded by Switzerland and of many investment treaties found all over the globe.''[19] The Swiss note ''urge[d] all

[15] *See, e.g.*, CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 332 et seq. (May 12, 2005), *available at* http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf.; Enron Corp. & Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Award, ¶ 314 et seq. (May 22, 2007), *available at* http://ita.law.uvic.ca/documents/Enron-Award.pdf.; LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 201 et seq. (Oct. 3, 2006), *available at* http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf.

[16] *See, e.g.*, Shane Romig, ''Interview: Argentina Seeks Diplomatic Exit from ICSID Suits,'' *Dow Jones Newswires,* Oct. 12, 2007, *available at* http://www.bilaterals.org/article.php3?id_article=9950.

[17] SGS Société Généralé Surveillance S.A. v. Pakistan, ICSID Case No. ARB/O1/13, Decision on Jurisdiction, ¶¶ 163-173 (Aug. 6, 2003), *available at* http://ita.law.uvic.ca/documents/SGSvPakistan-decision_000.pdf.

[18] Letter from Marino Bladi, Ambassador State Secretariat for Economic Affairs of Switzerland to Mr. Antonio Parra, Deputy Secretary-General of ICSID dated Oct. 1, 2003, *reprinted in* 19 *Mealey's: Int'l Arb. Rep.* E3 (Feb. 2004).

[19] *Id.*

parties concerned to take [Switzerland's] views into consideration when examining cases that imply a provision similar to Article 11 of the BIT Switzerland-Pakistan.''[20]

In cases where non-disputing State parties have made submissions to investor-State tribunals on issues of treaty interpretation, and there has been agreement among all of the parties to the treaty, tribunals generally have accepted the parties' shared interpretation. In several cases, however, tribunals have failed to address explicitly the consequences of the parties' agreement, and some have expressly reached their determination on other grounds. Moreover, there have been notable exceptions in this regard, where investor-State tribunals have rejected the unanimous interpretation of the parties in favor of its own interpretation.[21]

TREATMENT OF PARTY AGREEMENT AS EXPRESSED THROUGH BINDING INTERPRETATION

As described above, NAFTA establishes an FTC that has authority to render binding interpretations of the treaty's provisions. In July 2001, the NAFTA FTC issued an interpretation of the Minimum Standard of Treatment Article (Article 1105) clarifying, among other things, that the article prescribed the customary international law minimum standard of treatment, and the obligation to accord fair and equitable treatment does not require treatment in addition to, or beyond, that standard. The implications of the parties' interpretation were dealt with by several tribunals. Generally, the parties' interpretation was recognized as binding, although one tribunal suggested otherwise.

In its award on damages, the tribunal in *Pope & Talbot Inc. v. Canada*[22] conceded that its interpretation of NAFTA Article 1105(1), rendered before

[20] *Id.*

[21] Not surprisingly, where there is some, but less than unanimous, agreement among the State parties to a multilateral treaty, tribunals have not accorded much, if any, legal significance to the partial agreement. Similarly, the views of sub-national entities, which are not parties to the treaty, have been accorded little weight by tribunals. *See, e.g.*, Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award, ¶ 72 (June 19, 2007), *available at* http://ita.law.uvic.ca/documents/bayview.pdf (only briefly acknowledging in its discussion of the U.S. submission a letter submitted to the tribunal by the Texas attorney-general, the first assistant attorney-general, and the solicitor general); *see also* United Mexican States v. Metalclad Corp., [2001] B.C.L.R.3d 359 (containing no reference to Quebec's arguments, although Quebec had been granted leave to intervene in the set aside proceeding).

[22] Pope & Talbot Inc. v. Canada, NAFTA/UNCITRAL, Award on Damages (May 31, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/damage_award.pdf.

the FTC's interpretation, was inconsistent with that interpretation. In an earlier award, that tribunal had concluded, "[N]otwithstanding the language of Article 1105, which admittedly suggests otherwise, the requirement to accord NAFTA investors fair and equitable treatment was independent of, not subsumed by the requirement to accord them treatment required by international law."[23] In evaluating the effect of the FTC interpretation on its award, the *Pope & Talbot* tribunal ascribed to itself the role of determining whether the interpretation was, in fact, an interpretation:

> If a question is raised whether, in issuing an interpretation, the Commission has acted in accordance with Article 2001, an arbitral tribunal has a duty to consider and decide that question and not simply to accept that whatever the Commission has stated to be an interpretation is one for the purposes of Article 1131(2).[24]

The tribunal suggested that if it were to conclude that an FTC interpretation was actually an amendment, rather than an interpretation, it would not be bound to apply the interpretation.[25] Although the *Pope & Talbot* tribunal stated that it would characterize the FTC interpretation as an amendment,[26] it also concluded that this determination was not required. In the tribunal's view, its finding that Canada had breached Article 1105(1) would not have been different even applying the FTC's interpretation.[27]

Subsequently, all three NAFTA parties criticized the *Pope & Talbot* tribunal's suggestion that Chapter 11 tribunals had authority to determine for themselves whether FTC interpretations were ''interpretations'' and to disregard such interpretations as contrary to NAFTA Article 1131's express language, as well as the Vienna Convention.[28]

No other NAFTA Chapter 11 tribunal adopted the *Pope & Talbot* tribunal's approach in assessing the effect of the FTC interpretation. In the

[23] *Id.,* ¶ 9.
[24] *Id.,* ¶ 23.
[25] *Id.,* ¶¶ 18-19, 24.
[26] *Id.,* ¶¶ 46-47.
[27] *Id.,* ¶ 65.
[28] ADF Group, Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot,* 7-12 (June 27, 2002), *available at* http://www.state.gov/documents/organization/11662.pdf; ADF Group, Inc. v. United States of America, Second Submission of Canada Pursuant to NAFTA Article 1128 (July 19, 2002), *available at* http://www.state.gov/documents/organization/12224.pdf; ADF Group, Inc. v. United States of America, Second Article 1128 Submission of the United Mexican States (July 22, 2002), *available at* http://www.state.gov/documents/organization/12504.pdf.

case *United Parcel Service of America, Inc. v. Canada*, the tribunal sidestepped the issue of whether the FTC interpretation was authoritative because it concluded that it interpreted the provision in the same manner as did the FTC.[29] The tribunal thus stated, ''We do not address the question of the power of the Tribunal to examine Interpretations of the Free Trade Commission. Rather, we agree in any event with its conclusion.''[30]

In concluding that the NAFTA parties' shared interpretation as expressed by the FTC was controlling, the tribunal in *ADF Group, Inc. v. United States of America* noted, ''[W]e have the parties themselves—all the parties—speaking to the Tribunal. No more authentic and authoritative source of instruction on what the parties intended to convey in a particular provision of NAFTA, is possible.''[31] That tribunal went on to defend the FTC mechanism as meeting the ''systemic need not only for a mechanism for correcting what the parties themselves become convinced are interpretative errors but also for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain.''[32] The tribunal in *Mondev International Ltd. v. United States of America* similarly applied the FTC's interpretation.[33]

The NAFTA Chapter 11 tribunal in *Methanex Corp. v. United States of America* addressed the nature of the FTC interpretation in even more detail, holding that ''the FTC interpretation [is] entirely legal and binding on a tribunal seised with a Chapter 11 case. The purport of Article 1131(2) is clear beyond peradventure (and any investor contemplating an investment in reliance on NAFTA must be deemed to be aware of it).''[34] In addition to relying on NAFTA Article 1131(2), which, as noted above, makes such interpretations binding on NAFTA Chapter 11 tribunals, the United States also argued that the interpretation constituted a subsequent agreement among the parties under Article 31(3)(a) of the Vienna Convention.[35] The tribunal rejected the claimant's opposing view that any subsequent agreement needed to be concluded with the same formal requirements as a

[29] United Parcel Service of America, Inc. v. Canada, Award on Jurisdiction, ¶¶ 94-99 (Nov. 22, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Jurisdiction%20Award 22Nov02.pdf.

[30] *Id.*, ¶ 97.

[31] ADF Group, Inc. v. United States of America, Award, ¶ 177 (Jan. 9, 2003), *available at* http://ita.law.uvic.ca/documents/ADF-award_000.pdf.

[32] *Id.*

[33] *See* Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Final Award, ¶¶ 120-125 (Oct. 11, 2002), *available at* http://ita.law.uvic.ca/documents/Mondev-Final.pdf.

[34] Methanex Corp. v. United States of America, Final Award, pt. IV, ch. C, ¶ 20 (Aug. 3, 2005), *available at* http://www.state.gov/s/l/c5818.htm.

[35] *Id.*, pt. II, ch. B, ¶ 19.

treaty.[36] Rather, the *Methanex* tribunal concluded that it had ''no difficulty in deciding that the FTC's Interpretation of 31st July 2001 is properly characterized as a 'subsequent agreement' on interpretation falling within the scope of Article 31(3)(a) of the Vienna Convention.''[37]

The tribunal also dismissed the claimant's argument that ''far reaching'' changes to a treaty (as the claimant characterized the FTC interpretation), could only be made via amendment.[38] As an initial matter, the tribunal disagreed with the claimant's characterization, finding that ''as far as Methanex's textual claim under [NAFTA] Article 1105(1) was concerned, the interpretation changed nothing.''[39] The tribunal then declared itself bound to respect subsequent interpretations, so long as such interpretations would not result in a violation of a *jus cogens* rule.[40]

Finally, based on its finding that the FTC interpretation was binding on it and constituted a subsequent agreement of the parties, the tribunal found it unnecessary to determine whether the consensus among the NAFTA parties as expressed previously through their Article 1128 submissions on this same issue also qualified as a subsequent agreement under the Vienna Convention.[41]

In sum, with very limited exceptions, NAFTA Chapter 11 tribunals accepted that they are bound to apply interpretations adopted by the FTC in accordance with Article 1131(2). Only the *Pope & Talbot* tribunal suggested that a NAFTA Chapter 11 tribunal could refuse to apply an FTC interpretation if the tribunal itself determined that it was, in fact, an amendment. That approach was rejected, explicitly or implicitly, by other tribunals. The *Methanex* tribunal additionally concluded that the FTC's interpretation constituted a subsequent agreement of the parties under Vienna Convention Article 31(3)(a). In each case where the FTC interpretation was at issue, the tribunal declined to decide whether the parties' submissions made pursuant to NAFTA Article 1128 on the issue addressed by the FTC also constituted a subsequent agreement among the parties under Article 31(3)(a) of the Vienna Convention.

[36] *Id.,* ¶ 20.
[37] *Id.,* ¶ 21.
[38] *Id.,* pt. IV, ch. C, ¶ 20.
[39] *Id.,* ¶ 18.
[40] *Id.,* ¶ 24.
[41] *Id.,* pt. II, ch. B, ¶ 21.

TREATMENT OF PARTIES' AGREEMENT AS EXPRESSED THROUGH SUBMISSIONS MADE TO ARBITRAL TRIBUNALS

With a few notable exceptions, where the NAFTA parties' agreement was evidenced through Article 1128 submissions, tribunals have ruled consistently with the parties' shared interpretation. Many tribunals have done so, however, without analyzing the import of party agreement in terms of Article 31(3) of the Vienna Convention.

In concluding that the minimum standard of treatment article refers to customary international law as it exists today, the *ADF* tribunal, for instance, referenced the United States' accord with this interpretation and found it ''equally important to note'' that Canada and Mexico shared this view, as made clear in their respective Article 1128 submissions.[42] Similarly, both the *Mondev* tribunal and the tribunal in *Waste Management, Inc. v. United Mexican States (II)* recorded the shared interpretation of all three NAFTA parties on this point, and likewise accepted this interpretation.[43]

In the *UPS* arbitration, the tribunal determined in accordance with the shared view of all three NAFTA parties,[44] that in order to submit a claim under NAFTA Article 1116(1)(a) ''a breach of Chapter 11's Section A must be alleged.''[45] The tribunal did not expressly discuss the import of the parties' consensus under the Vienna Convention. With respect to the issue

[42] ADF Group, Inc. v. United States of America, Award, ¶ 179 (Jan. 9, 2003), *available at* http://ita.law.uvic.ca/documents/ADF-award_000.pdf.

[43] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Final Award, ¶¶ 123-125 (Oct. 11, 2002), *available at* http://ita.law.uvic.ca/documents/Mondev-Final.pdf; Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 92 et seq. (Apr. 30, 2004), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Waste_2_management/laudo/laudo_ingles.pdf.

[44] *See* United Parcel Service of America, Inc. v. Canada, Article 1128 Submission of the United Mexican States, 3-6 (May 14, 2002), *available at* http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_canada/Ups/1128/Segundo_1128_Mexico_UPS.pdf; United Parcel Service of America, Inc. v. Canada, Third Submission of the United Mexican States, 1-2 (Aug. 23, 2002), *available at* http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_canada/Ups/1128/Tercer_1128_Mexico_UPS.pdf; United Parcel Service of America, Inc. v. Canada, Second Submission of the United States of America, 1-4 (May 13, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/1128_submission.pdf; United Parcel Service of America, Inc. v. Canada, Third Submission of the United States of America, 1-2 (Aug. 23, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/USA1128SubmissionAug232002.pdf.

[45] United Parcel Service of America, Inc. v. Canada, Award on Jurisdiction, ¶¶ 59, 69 (Nov. 22, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Jurisdiction%20Award 22Nov02.pdf.

of whether, as Canada argued, there was ''insufficient state practice to establish customary international law on matters of competition,''[46] the tribunal similarly noted the common views of the United States and Mexico on this point, as expressed in their respective Article 1128 submissions,[47] and concurred that ''there is no rule of customary international law prohibiting or regulating anticompetitive behaviour.''[48]

In *Methanex*, all three NAFTA parties rejected the claimant's position that the scope of NAFTA Chapter 11 extends to any measure that has an effect on an investor. Rather, the parties agreed that Article 1101(1), which provides that the chapter applies to measures ''relating to'' an investor or its investment, requires the measure to have a legally significant connection to the investor or its investment.[49] The United States argued that the parties' submissions evidenced a subsequent agreement within the meaning Article 31(3)(a) of the Vienna Convention, which the tribunal must take into account and ought to consider as authoritative.[50]

The *Methanex* tribunal interpreted Article 1101(1) in accordance with the parties' views but expressly stated that it was ''bas[ing] that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA Chapter 11.''[51]

[46] *Id.,* ¶ 78.

[47] *See id.*; United Parcel Service of America, Inc. v. Canada, Second Submission of the United States of America, 5 (May 13, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/1128_submission.pdf; United Parcel Service of America, Inc. v. Canada, Article 1128 Submission of the United Mexican States, 8-12 (May 14, 2002), *available at* http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_can ada/Ups/1128/Segundo_1128_Mexico_UPS.pdf.

[48] United Parcel Service of America, Inc. v. Canada, Award on Jurisdiction, ¶ 92 (Nov. 22, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Jurisdiction%20Award 22Nov02.pdf.

[49] Methanex Corp. v. United States of America, Partial Award, ¶ 130 (Aug. 7, 2002), *available at* http://ita.law.uvic.ca/documents/Methanex-1stPartial.pdf (recording position of the United States); Methanex Corp. v. United States of America, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶¶ 10-24 (Apr. 30, 2001), *available at* http://www.state.gov/documents/organization/3946.pdf; Methanex Corp. v. United States of America, 1128 Submission of the United Mexican States, ¶¶ 5-8 (Apr. 30, 2001), *available at* http://www.state.gov/documents/organization/3959.pdf.

[50] *See* Methanex Corp. v. United States of America, Post-Hearing Submission of Respondent United States of America, 1-6 (July 20, 2001) *available at* http://www.state.gov/documents/organization/6050.pdf; Methanex Corp. v. United States of America, Response of Respondent United States of America to Methanex's Post-Hearing Submission, 1-6 (July 27, 2001), *available at* http://www.state.gov/documents/organization/6052.pdf.

[51] Methanex Corp. v. United States of America, Partial Award, ¶ 147 (Aug. 7, 2002), *available at* http://ita.law.uvic.ca/documents/Methanex-1stPartial.pdf.

Thus, according to the tribunal, ''it was not necessary for [it] to address other submissions advanced by the USA in support of its interpretation based on Article 31(3) of the Vienna Convention (supported by Canada and Mexico).''[52]

The tribunal in *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*[53] similarly recorded the shared views of the NAFTA parties on interpretation of the treaty. While its determination also was in accord with that shared view, it did not appear to place any particular significance on the parties' agreement. In that case, Mexico took the position that a claim was deemed submitted to arbitration when the claimant filed its notice of arbitration, and not, as the claimant argued, when it filed its notice of intent. The distinction was relevant to the tribunal's jurisdiction over certain claims in light of NAFTA Articles 1116(2) and 1117(2), which provide that an investor may not ''make a claim'' if more than three years have elapsed since the claimant or the enterprise knew or should have known of the alleged breach and resulting damage. Both the United States and Canada filed Article 1128 submissions on this point, concurring that a claim is submitted to arbitration upon the filing of a notice of arbitration.[54]

The *Feldman* tribunal noted the submissions of the United States and Canada in this regard,[55] and concluded, consistent with the parties' views, that the filing of a notice of arbitration, and not the notice of intent, constituted the submission of the claim to arbitration.[56] Although the tribunal referenced the U.S. and Canadian positions, it did not engage in any analysis concerning the legal import of the three parties' agreement in reaching its conclusion.[57] Rather, the tribunal based its determination primarily on a textual analysis of NAFTA's provisions.[58]

While these NAFTA Chapter 11 tribunals interpreted the treaty in accordance with the parties' common views—whether relying on those views

[52] *Id.*

[53] Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States, ICSID Case No. ARB(AF)/99/1 Award on Jurisdiction (Dec. 6, 2000), *available at* http://ita.law.uvic.ca/documents/feldman_mexico_jurisdiction-english.pdf.

[54] *See* Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States, Submission of the United States on Preliminary Issues, ¶ 14 et seq. (Oct. 6, 2000), *available at* http://www.state.gov/documents/organization/4179.pdf; Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States, Submission of the Government of Canada, ¶ 10 et seq. (Oct. 6, 2000), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Marvin/1128/001006_1128_Second_Canada_Feldman.pdf.

[55] Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States, ICSID Case No. ARB(AF)/99/1 Award on Jurisdiction, ¶ 39 (Dec. 6, 2000), *available at* http://ita.law.uvic.ca/documents/feldman_mexico_jurisdiction-english.pdf.

[56] *Id.,* ¶ 47.

[57] *See id.*

[58] *See id.,* ¶ 40 et seq.

or reaching the same conclusion by other means—two tribunals reached interpretations at odds with the expressed common views of the NAFTA parties. In doing so, neither tribunal addressed the relevance of the parties' submissions in terms of the Vienna Convention.

In the *Pope & Talbot* arbitration, all three NAFTA parties expressed the view that Article 1102 (the national treatment provision) was designed to protect against discrimination on the basis of nationality, and that to establish a breach of the provision a claimant had to demonstrate that it (or its investment) was treated less favorably by virtue of its nationality.[59] Although the tribunal acknowledged the parties' shared view, it disregarded that interpretation, concluding, with limited reasoning, that it ''would tend to excuse discrimination that is not facially directed at foreign owned investments.''[60] In reaching this determination, the tribunal failed to engage in any analysis of the persuasive weight of the parties' agreement under the Vienna Convention.

Also in that arbitration, before the FTC interpretation was adopted, the tribunal had occasion to consider the contemporaneous consensus of the United States, Mexico, and Canada with respect to the meaning of the phrase ''fair and equitable treatment'' in NAFTA Article 1105(1). All three NAFTA parties had expressed their view that Article 1105(1), the minimum standard of treatment provision, prescribed the minimum standard of treatment under customary international law, and that ''fair and equitable treatment'' was a reference to that standard.[61] The tribunal rejected this

[59] *See* Pope & Talbot Inc. v. Canada, Government of Canada Supplemental Counter-Memorial, ¶ 98 (Nov. 7, 2000), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/B-5.pdf; Pope & Talbot Inc. v. Canada, First Submission of the United Mexican States, 11-12 (Apr. 3, 2000), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/A-3.pdf; Pope & Talbot Inc. v. Canada, Second Submission of the United Mexican States, 2-3 (May 25, 2000), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/A-5.pdf; Pope & Talbot Inc. v. Canada, First Submission of the United States, 2 (Apr. 7, 2000), *available at* http://www.state.gov/documents/organization/4097.pdf; Pope & Talbot Inc. v. Canada, Second Submission of the United States, 1-2 (May 25, 2000), *available at* http://www.state.gov/documents/organization/4176.pdf.

[60] Pope & Talbot Inc. v. Canada, Award on the Merits of Phase 2, ¶ 79 (Apr. 10, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/phases.aspx?lang=en#2.

[61] *See* Pope & Talbot Inc. v. Canada, Government of Canada Counter-Memorial (Phase Two), ¶¶ 221, 233 (Oct. 10, 2000), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/B-2.pdf; Pope & Talbot Inc. v. Canada, Fourth Submission of the United States of America (Nov. 1, 2000), *available at* http://www.state.gov/documents/organization/4098.pdf; Pope & Talbot Inc. v. Canada, Fifth Submission of the United States of America (Dec. 1, 2000), *available at* http://www.state.gov/documents/organization/4175.pdf; Pope & Talbot Inc. v. Canada, Third Submission of the United Mexican States, 2-3 (Nov. 5, 2000),

approach, finding that the term ''fair and equitable treatment'' required treatment above and beyond that which was required under customary international law.[62]

The tribunal referenced the United States' Article 1128 submission, noting that ''The United States asserts that, whatever the meaning of the BITs, the drafters of NAFTA Chapter 11 'excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment.'''[63] The tribunal went on to observe that ''[n]either Mexico nor Canada has subscribed to the version of the intent of the drafters put forward by the United States,''[64] and that the United States had ''offered no other evidence to the Tribunal that the NAFTA Parties intended to reject the additive character of the BITs.''[65] Therefore, the tribunal concluded, ''the suggestions of the United States do not enjoy the deference that might otherwise be accorded to representations by parties to an international agreement as to the intent of the drafters.''[66]

While the *Pope & Talbot* tribunal appeared to recognize the potential import of the NAFTA parties' shared statements of intent, it apparently misunderstood the position of the parties: Mexico later affirmed in its Article 1128 submission to the *ADF* tribunal that both Mexico and Canada had endorsed the U.S. position in the *Pope & Talbot* arbitration, including its ''version of the intent of the drafters.''[67] As Mexico noted in a later *Pope & Talbot* submission, the FTC's interpretation was ''in part stimulated by the failure of this and other Chapter Eleven tribunals to give effect to the shared views of the NAFTA parties, notwithstanding the rules of interpretation in Article 31 of the [Vienna Convention], notably paragraphs 3(a) and (b).''[68]

available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/B-4.pdf; Pope & Talbot Inc. v. Canada, Post-Hearing Submission of the United Mexican States, 3-5 (Dec. 1, 2000), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/B-6.pdf.

[62] Pope & Talbot Inc. v. Canada, Award on the Merits of Phase 2, *supra* note 60, ¶¶ 113-118.

[63] *Id.,* ¶ 114.

[64] *Id.,* ¶ 114 n.109.

[65] *Id.,* ¶ 114.

[66] *Id.*

[67] *See* ADF Group, Inc. v. United States of America,, Second Article 1128 Submission of the United Mexican States, 8-10 (July 22, 2002), *available at* http://www.state.gov/documents/organization/12504.pdf.

[68] Pope & Talbot Inc. v. Canada, Post-Hearing Submission of the United Mexican States (Damages Phase), 2 (Dec. 3, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/C-7.pdf.

Finally, the *S.D. Myers Inc. v. Canada*[69] tribunal considered and rejected a position adopted by all three NAFTA parties as to the appropriate scope of damages under NAFTA Chapter 11. Canada argued that damages recoverable under Chapter 11 were limited to compensation for harm accruing to the investment in the host State, or to the harm suffered by the investor in its capacity as an investor. The United States and Mexico expressed their accord with Canada's position.[70] As the United States noted in one of its Article 1128 submissions,

> The United States therefore agrees with Canada and Mexico that the Tribunal's task . . . is limited to assessing damages flowing from the breach of the NAFTA's provisions with respect to investments [and not] . . . with respect to any decrease in cross-border trade in goods or services as such, for those matters are not addressed by Chapter 11.[71]

The tribunal rejected Canada's position, making no reference to the non-disputing parties' submissions.[72]

As shown, NAFTA Chapter 11 tribunals, with few exceptions, have interpreted the treaty in accordance with the parties' agreement, as expressed through non-party submissions made to the tribunal. While most tribunals have acknowledged the parties' shared interpretation, tribunals have not expressly relied on that agreement in reaching their determination, nor have they expressly found those submissions to constitute a subsequent agreement among the parties under the Vienna Convention.

[69] S.D. Myers, Inc. v. Canada, NAFTA/UNCITRAL, Second Partial Award (Oct. 21, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MyersPA.pdf.

[70] *See* S.D. Myers, Inc. v. Canada, Second Submission of the United Mexican States, 3-7 (Sept. 12, 2001), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Canada/myers/1128/Segundo_1128_Mexico_Damages_Phase.pdf; S.D. Myers, Inc. v. Canada, Supplemental Submission of the United Mexican States, ¶¶ 25-26 (Sept. 25, 2001), *available at* http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Canada/myers/1128/Tercer_1128_Mexico_Damages_Phase.pdf; S.D. Myers, Inc. v. Canada, Submission of the United States of America, 3 (Sept. 18, 2001), *available at* http://www.state.gov/documents/organization/6029.pdf.

[71] S.D. Myers, Inc. v. Canada, Submission of the United States of America, 3 (Sept. 18, 2001), *available at* http://www.state.gov/documents/organization/6029.pdf.

[72] S.D. Myers, Inc. v. Canada, NAFTA/UNCITRAL, Second Partial Award, ¶¶ 123-139 (Oct. 21, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MyersPA.pdf.

TREATMENT OF PARTIES' AGREEMENT AS EVIDENCED BY STATEMENTS MADE OUTSIDE OF THE ARBITRATION

Recognizing the significance of establishing party agreement on interpretation of treaty provisions, respondent States have also introduced statements made by non-disputing State parties in fora outside of the arbitration and urged investor-State tribunals to find either subsequent agreement or subsequent practice establishing agreement of the parties regarding the treaty's interpretation.[73] To date, States have had mixed success in this regard.

In *Aguas del Tunari*, the tribunal set a high evidentiary standard for demonstrating the parties' agreement when derived from statements made outside of the current arbitration. In that arbitration, Bolivia introduced prior statements made by Dutch officials in an attempt to demonstrate agreement among the parties that the treaty did not confer jurisdiction over the dispute. These statements were made by officials in response to questions posed by Dutch members of Parliament; during one such exchange, a Dutch official appeared to state the Dutch government's view that the claimant in the *Aguas del Tunari* dispute had no recourse under the BIT.[74] The tribunal declined to find a subsequent agreement between the two parties based on Bolivia's position and the prior statements of the Dutch officials. It noted that the ''coincidence of several statements does not make them a joint statement. And, it is clear that in the present case, there was no intent that these statements be regarded as an agreement.''[75]

[73] In similar fashion, in a State-to-State case before the Iran-United States Claims Tribunal, the United States introduced subsequent practice of the parties to support its position that the tribunal had jurisdiction over official (i.e., government) counterclaims. Specifically, the United States demonstrated that both parties had in the past filed counterclaims before the tribunal, and neither party had objected. The Unied States also referenced previous arguments made by Iran that the tribunal had jurisdiction over such counterclaims. In response, Iran argued that Vienna Convention Article 31(3) was only a subsidiary means of treaty interpretation and contested the United States' description of the parties' prior practice. After reviewing this evidence, the tribunal found that the parties had engaged ''in a concordant, common and consistent practice in filing counterclaims to official claims, and this practice reflects an agreement as to the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration. Iran's objections in the present Case to the Tribunal's jurisdiction over official counterclaims have been rendered nugatory by its conduct in other cases.'' The Islamic Republic of Iran v. The United States of America, AWD ITL 83-B1-FT, ¶ 116 (Sept. 9, 2004).

[74] Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction. ¶ 255 (Oct. 21, 2005), *available at* http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf.

[75] *Id.,* ¶ 251.

Before making its finding, the tribunal requested from the Dutch government further information concerning the documentary bases for the prior statements, and whether the government's statements reflected an interpretive position of general application. In response, the Dutch government noted that its officials may have relied on incorrect information in making the statements which Bolivia invoked.[76] The tribunal deemed the response from the Dutch government to be relevant under Vienna Convention Article 32 (supplementary means of interpretation), but not useful for analysis under Article 31.[77] The tribunal ultimately found that the statements of the Dutch officials were inconsistent and inconclusive in context and, thus, could not be regarded as subsequent practice ''which establishes the agreement of the parties regarding the interpretation of the BIT.''[78]

The tribunal in *Sempra Energy International v. Argentina*[79] similarly placed a high bar on establishing party agreement. Argentina, in that case, argued that the essential security provision in the BIT was self-judging, and attempted to demonstrate party agreement on that issue by introducing a letter written by a U.S. State Department official. That letter stated, ''[T]he position of the U.S. government [is] that the essential security language in our FCN treaties and Bilateral Investment Treaties is self- judging, *i.e.*, only the party itself is competent to determine what is in its own essential security interests.''[80] The *Sempra* tribunal found that the letter in question was irrelevant because it did not ''address any specific treaty, least that with Argentina.''[81] The tribunal went on to say that

> What is relevant is the intention which both parties had in signing the Treaty, and this does not confirm the self-judging interpretation. . . . Moreover, even if this interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but

[76] *See id.,* ¶ 258 et seq.; *see also id.,* app. IV, *available at* http://ita.law.uvic.ca.

[77] Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 260 (Oct. 21, 2005), *available at* http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf.

[78] *Id.,* ¶ 262.

[79] Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), *available at* http://ita.law.uvic.ca/documents/SempraAward.pdf.

[80] *Id.,* ¶ 382 (citing ''a letter sent by an official of the United States Department of State on September 15, 2006 to a former official asked to testify in the context of a different arbitration'').

[81] *Id.,* ¶ 385.

this would not affect rights acquired under the Treaty by investors or other beneficiaries.[82]

Tribunals have also looked skeptically at interpretations officially advocated by parties to a treaty in prior arbitrations that would seem to express agreement with a disputing party's position in a later arbitration. The *Feldman* tribunal, for instance, determined that statements made by parties in prior litigious circumstances were not particularly relevant. In that arbitration, Mexico introduced statements made by the United States in an Article 1128 submission filed in the *Pope & Talbot* case to support its argument that the national treatment provision in the treaty addressed only discrimination on the basis of nationality. Concluding that ''such statements were made in the context of cases with different fact situations and, possibly, legal and policy considerations,'' the tribunal ''cho[se] not to consider'' the submission.[83]

Similarly, in *Enron Corp. & Ponderosa Assets, L.P. v. Argentina*,[84] the tribunal failed to find a legally relevant agreement on the basis of statements made by one of the parties in the context of a different arbitration. In that case, Argentina introduced submissions of the United States from the *Mondev* NAFTA Chapter 11 arbitration in an attempt to persuade the tribunal that both parties shared the view that minority shareholders had standing only to claim for damages suffered by them in their capacity as shareholders and not for injury to the corporation in which they held an interest. The *Enron* tribunal rejected Argentina's reliance on the United States' position in *Mondev*, concluding that, ''What the State of nationality of the investor might argue in a given case to which it is a party cannot be held against the rights of the investor in a separate case to which the investor is a party.''[85] In this respect, the tribunal contrasted investor-State arbitration with diplomatic protection, ''where the investor was subject to whatever political or legal determination the State of nationality would make in respect of its claim.''[86]

The NAFTA Chapter 11 tribunal in *Bayview Irrigation District* et al. v. United Mexican States[87] did rely on prior statements made by a non-

[82] *Id.,* ¶¶ 385-386.

[83] Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States, Final Award, ¶ 164 (Dec. 16, 2002), *available at* http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf.

[84] Enron Corp. & Ponderosa Assets, L.P. v. Argentina, Decision on Jurisdiction (Jan. 14, 2004), *available at* http://ita.law.uvic.ca/documents/Enron-Jurisdiction_000.pdf.

[85] *Id.,* ¶ 48.

[86] *Id.*

[87] Bayview Irrigation District et al. v. United Mexican States, NAFTA/UNCITRAL Award (June 19, 2007), *available at* http://ita.law.uvic.ca/documents/bayview.pdf.

disputing party; those statements, however, had not been made in the context of an arbitration in which the non-disputing party was the respondent. In that case, Mexico argued that only investors who have made, or have sought to make, investments in the territory of another NAFTA party fell within the scope of Chapter 11's coverage. The United States expressed its agreement with Mexico's interpretation in an Article 1128 submission.[88] Mexico relied both on this submission and on statements to the same effect made by the United States in its statement of administrative action (SAA), an instrument submitted to the U.S. Congress in connection with the conclusion of NAFTA. Although Canada did not make a submission in the case, Mexico relied on its statement of implementation (SOI) of NAFTA, a document like the U.S. SAA, which expressed the same view.[89]

The claimants argued that the alleged agreement among the parties should be disregarded because the interpretation advanced by the parties amounted to a change of the treaty's terms, and ''[t]he only appropriate avenue for adding new terms to NAFTA provisions is through the amendment process, not by Tribunal decision-making, nor by means of Section [sic] 1128 submissions.''[90] The *Bayview* tribunal disagreed, and concluded that its interpretation was

> supported by the fact that it is the interpretation publicly adopted by the NAFTA Parties themselves prior to this litigation. The Tribunal notes the terms of the United States Statement of Administrative Action submitted to Congress in connection with the conclusion of the NAFTA, [citation omitted] the report on NAFTA prepared prior to the approval of the NAFTA by the Mexican Senate, [citation omitted] and the Canadian Statement on Implementation of the NAFTA [citation omitted].[91]

[88] Bayview Irrigation District et al. v. United Mexican States, Submission of the United States of America (Nov. 27, 2006), *available at* http://www.state.gov/documents/organization/77667.pdf.

[89] Bayview Irrigation District et al. v. United Mexican States, United Mexican States Post-Hearing Submission on Jurisdiction. ¶ 15 (Dec. 15, 2006), *available at* http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_Mexico/Marzulla/documentos_basicos/esc_post_audiencia_ing.pdf.

[90] Bayview Irrigation District et al. v. United Mexican States, Supplemental Memorial of Bayview Irrigation District et al. in Support of Jurisdiction, 8 (Dec. 15, 2006), *available at* http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_Mexico/Marzulla/documentos_basicos/suplemento.pdf.

[91] Bayview Irrigation District et al. v. United Mexican States, NAFTA/UNCITRAL Award, ¶ 106 (June 19, 2007), *available at* http://ita.law.uvic.ca/documents/bayview.pdf.

While noting that its interpretation was consistent with that advanced by Mexico in the arbitration and by the United States in its Article 1128 submission, the tribunal confirmed that ''it is an interpretation which the Tribunal would have reached in any event, even if the United States had made no intervention in these proceedings.''[92] Thus, the *Bayview* tribunal's conclusion was supported by the parties' interpretation expressed at the time of treaty formation but appears to have been uninfluenced by later arbitral submissions.

At least one tribunal, however, has considered statements made in the context of a prior arbitration. The tribunal in *Canadian Cattlemen for Fair Trade v. United States of America*[93] addressed the very same issue as did the *Bayview* tribunal, and similar arguments were made regarding an agreement among the parties. Specifically, the United States illustrated its own consistent interpretation on the issue, citing to its SAA and its Article 1128 submission made in the *Bayview* arbitration.[94] Mexico filed an Article 1128 submission in the case, on which the United States relied, in addition to the views expressed by Mexico in the *Bayview* arbitration.[95] Finally, the United States argued that Canada had expressed its agreement with this interpretation in its SOI as well as through its written submissions made in the *S.D. Myers* arbitration.[96]

[92] *Id.*

[93] Canadian Cattlemen for Fair Trade v. United States of America, NAFTA/UNCITRAL, Award on Jurisdiction (Jan. 28, 2008), *available at* http://www.state.gov/documents/organization/99954.pdf.

[94] Canadian Cattlemen for Fair Trade v. United States of America, Reply on the Preliminary Issue of Respondent United States of America, 12, 15-16 (May 1, 2007), *available at* http://www.state.gov/documents/organization/84471.pdf.

[95] *See id.*; Canadian Cattlemen for Fair Trade v. United States of America, NAFTA/UNCITRAL, Award on Jurisdiction, ¶ 176 (Jan. 28, 2008), *available at* http://www.state.gov/documents/organization/99954.pdf.

[96] *See id.,* ¶ 175; Canadian Cattlemen for Fair Trade v. United States of America, Memorial on the Preliminary Issue of Respondent United States of America, 8 (Dec. 1, 2006), *available at* http://www.state.gov/documents/organization/77483.pdf; Canadian Cattlemen for Fair Trade v. United States of America, Reply on the Preliminary Issue of Respondent United States of America, 12 and n.27 (May 1, 2007), *available at* http://www.state.gov/documents/organization/84471.pdf.; Canadian Cattlemen for Fair Trade v. United States of America, Hearing on the Preliminary Issue—Vol. 2, 306, 310 (Oct. 10, 2007), *available at* http://www.state.gov/documents/organization/93611.pdf [hereinafter Canadian Cattlemen Transcript, Day 2]. *See also* Canadian Cattlemen for Fair Trade v. United States of America, Hearing on the Preliminary Issue—Vol. 1, 123 (Oct. 9, 2007), *available at* http://www.state.gov/documents/organization/93610.pdf [hereinafter Canadian Cattlemen Transcript, Day 1] (claimant arguing that ''statements made in the context of litigation'' should be not be considered when ascertaining whether there is party agreement); Canadian Cattlemen Transcript, Day 2, at 303 (United States disagreeing with the claimant's denigration of party statements made during

After reviewing the evidence, the tribunal concluded that ''[a]ll of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a 'subsequent agreement' by the NAFTA Parties.''[97] The tribunal expressed hesitancy to infer a binding agreement ''in light of the limited experience thus far with many of the subtleties and implications of Chapter 11 of the NAFTA.''[98] In particular, the tribunal noted the absence of any Article 1128 submission made by Canada in the case but stated that this absence ''cannot be seen as evidence of Canadian support for the Claimants' position on this issue, [or] as evidence of Canadian opposition.''[99]

The *Canadian Cattlemen* tribunal, however, did find the parties' consonant conduct to amount to ''subsequent practice.'' The tribunal held that finding State practice under the Vienna Convention depends on whether the practice is sufficiently '''concordant, common and consistent'''[1000] to '''clearly establish[] the understanding of all the parties.'''[101] In effect, the tribunal found that Canada's statements made in its SOI and in the *S.D. Myers* arbitration were ''concordant, common, and consistent'' with the conduct of the United States and Mexico, and were therefore within the scope of Article 31(3)(b) of the Vienna Convention.[102] The tribunal noted that the subsequent practice of the NAFTA parties in this case confirmed its interpretation of the text's ordinary meaning.[103]

The wide variety of contexts in which statements made by States outside of a pending arbitration are made accounts for some of the difference in treatment accorded to those statements by tribunals. Investor-State tribunals thus far, however, have also taken divergent approaches in assessing the weight to be accorded to statements made by non-disputing State parties in the context of a prior arbitration.

litigation, noting there is ''no basis on which to make such a distinction or draw any distinction and discount some State practice and not other State practice.'').

[97] Canadian Cattlemen for Fair Trade v. United States of America, NAFTA/UNCITRAL, Award on Jurisdiction, ¶ 187 (Jan. 28, 2008), *available at* http://www.state.gov/documents/organization/99954.pdf.

[98] *Id.*

[99] *Id.*

[100] *Id.*, ¶ 182 (citing Ian Sinclair, *The Vienna Convention on the Law of Treaties* 137 (2d ed. 1984)).

[101] *Id.*, ¶ 183 (citing Ian Brownlie, *Principles of Public International Law* 635 (5th ed. 1998)).

[102] *Id.*, ¶ 189; *see also id.*, ¶ 175.

[103] *Id.*, ¶ 189.

CONCLUSION

Where a treaty provides a mechanism for the parties to issue binding interpretations, tribunals, with few exceptions, have accepted and applied those interpretations. Once only a feature of NAFTA, a mechanism for binding interpretation is now also available in the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR) and other investment treaties. Given the difficulties of rendering such interpretations—especially in a multilateral context—their use has been, and likely will continue to be, rare.

Apart from such explicitly binding expressions, tribunals recognize that treaty parties can reach subsequent agreement through other less formal means than simultaneous exchange of written documents. Some treaties provide a mechanism for non-disputing State parties to express their interpretive positions in ongoing arbitrations. Even where no mechanism exists, however, such participation has been requested by tribunals and may be urged by non-disputing State parties. Tribunals have generally reached conclusions in accord with the statements of agreement expressed by non-disputing State parties through submissions to the current arbitration. Yet, tribunals have expressed some reluctance in finding those submissions to constitute subsequent agreement under Article 31(3)(a) of the Vienna Convention.

As BITs proliferate, leading more States to become involved in treaty-based arbitration, the frequency with which respondent States introduce position statements of treaty parties made in prior proceedings is likely to increase. A few tribunals have been hesitant to accord weight to statements made by non-disputing State parties outside of the current arbitration, especially when those statements were made in the context of an arbitration where the non-disputing State party was a respondent. A tribunal in one case, however, has taken into account such statements and relied on them to establish subsequent practice of the parties. Future tribunals will undoubtedly continue to clarify the weight to be accorded under Vienna Convention Article 31(3)(a) and (b) to these and all statements of non-disputing State parties.

Part II

Recent Significant Domestic Judicial Decisions Involving or Potentially Involving International Arbitration

Current Developments in the United States

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I have been asked to review recent developments in arbitration law in the United States over the last year, although the review is not comprehensive or systematic. Instead, it touches briefly on five topics that I think warrant attention and, in some instances, will consider trends extending back beyond a year. The topics are as follows:

1. the recent U.S. Supreme Court decision in *Hall Street v. Mattel*,[1] which held that parties could not expand by contract the scope of judicial review of an arbitral award under the Federal Arbitration Act, 9 U.S.C. Section 1 et seq.;
2. U.S. case law on jurisdiction to determine jurisdiction;
3. U.S. case law on public policy as a defense to enforcement;
4. U.S. case law on the enforceability of an award vacated in the place of arbitration under Article V(1)(e) of the New York Convention;[2] and
5. returning to *Hall Street*, U.S. case law on manifest disregard of the law as a ground for vacating an award.

HALL STREET V. MATTEL

Perhaps the most significant decision on U.S. arbitration law to come down in the past year, and certainly the one that garnered the most attention, was the Supreme Court's decision in *Hall Street Associates LLC v. Mattel*.[3] A debate had been going on in the U.S. courts for some time over what many called, after one of the early prominent decisions, the *Kyocera* issue[4] —specifically,

[1] Hall St. Assocs. LLC v. Mattel, 128 S. Ct. 1396 (2008).

[2] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[3] Hall St. Assocs. LLC v. Mattel, 128 S. Ct. 1396 (2008).

[4] LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (where parties have agreed that an arbitral award is subject to district court review for errors of law and for findings of fact not supported by substantial evidence, it was error for

whether parties could expand by contract the scope of judicial review of arbitral awards. Typically, parties have attempted to expand the scope of judicial review by providing that the decisions of the arbitral tribunal will be reviewable by the district court for factual and legal errors, in addition to the statutory grounds available under the Federal Arbitration Act (FAA). In *Hall Street*, for example, the parties agreed that

> [t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.[5]

This kind of clause adds a level of judicial appellate review to the arbitral process: the case is heard in the first instance by an arbitral tribunal, which renders its decision on the merits, but then the district court reviews the merits of that decision in accord with the specified standards of review.

Of course, one can question the wisdom of such agreements. In particular, unless the parties could effectively waive, and in fact do waive, appellate review in the court of appeals, the mechanism holds out the prospect of three tiers of decision making: the arbitration (frequently before a panel of three arbitrators), review in the district court, and then appellate review in the court of appeals. Such a mechanism, needless to say, would not advance the aim of efficiency that many see as central to arbitration.

In any event, the question for the Supreme Court, however infused by policy considerations,[6] was whether or not the FAA permitted the parties to agree to a more searching standard of district court review than that set out in the FAA itself. In other words, were the FAA's statutory grounds exclusive or merely default grounds? Hence, *Hall Street* presented competing models of the character of the authority courts exercise when they review awards.

district court not to consider these bases), *overruled by* Kyocera Corp. v. Prudential-Bache T Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (*en banc*).

[5] Hall St. Assocs. LLC v. Mattel, 128 S. Ct. 1396, 1400-01 (2008); *cf.* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997).

[6] The Court received briefs *amicus curiae* from various non-parties. *See, e.g.,* Brief for the United States Council for International Business as Amicus Curiae in Support of Respondents, Hall Street Assocs. LLC v. Mattel, 128 S. Ct. 1396 (2008), 2006 U.S. Briefs 989, 2007 U.S. S. Ct. Briefs LEXIS 751 (Sept. 14, 2007); Brief for the American Arbitration Association as Amicus Curiae in Support of Affirmance, Hall Street Assocs. LLC v. Mattel, 128 S. Ct. 1396 (2008), 2006 U.S. Briefs 989, 2007 U.S. S. Ct. Briefs LEXIS 751 (Sept. 14, 2007).

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The Court's opinion also included substantial *dicta* about ''manifest disregard'' as a ground for *vacatur,* which may prove as significant as the primary holding. I will return to that topic later.

JURISDICTION TO DETERMINE JURISDICTION

U.S. law continues to provide strong support for the enforcement of arbitration agreements. In the 2005 term, for example, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court confirmed the separability doctrine as a matter of U.S. federal law, holding again that unless the validity of the arbitration clause itself is challenged, a dispute over the validity of the contract is for the arbitrators.[11]

U.S. courts' treatment of the distinct question of jurisdiction to determine jurisdiction (or, in the terminology of the U.S. cases, the arbitrability of arbitrability), remains less precise. Some of the imprecision can be traced to the Supreme Court's discussion in *First Options v. Kaplan.*[12] In that case, the Court addressed whether an agreement to arbitrate executed by a closely held corporation bound its shareholder and, specifically, whether the arbitration tribunal or the court had the authority to determine that question. The Court held that only if the party to be bound had ''clearly and unmistakably'' agreed to submit the jurisdictional question to the tribunal would the Court enforce the agreement. As the parties had not ''clearly and unmistakably'' so agreed, the Court affirmed the decision below that vacated the tribunal's award.

The *First Options* Court spoke, though, as if the question of jurisdiction to determine jurisdiction were simply an either/or proposition—that is, as if the question were whether, in each specific case, the arbitration tribunal or the court should have ''primary responsibility'' to decide the ''arbitrability of the dispute.''[13] Except perhaps as to scope, however, it would surely be an unusual case in which a dispute about whether the parties had agreed to arbitrate jurisdiction did not encompass the dispute about whether they had

[11] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). For recent cases applying *Buckeye*, see, e.g., Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc., 516 F.3d 695 (8th Cir. 2008) (reaching jurisdictional dispute where plaintiff disputed the existence of a valid arbitration agreement); Lee v. Chase Manhattan, 2008 WL 698482 (N.D. Cal. Mar. 14, 2008); Santana Row Hotel Partners v. Zurich Am. Ins. Co., 2007 WL 914464 (N.D. Cal. Mar. 20, 2007).

[12] First Options v. Kaplan, 514 U.S. 938 (1995). *See generally* William W. Park, ''The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz—Kompetenz- Has Crossed the Atlantic?'' 12 *Int'l Arb.* 137 (1996).

[13] First Options v. Kaplan, 514 U.S. 938, 942-47 (1995).

agreed to arbitrate at all.[14] If that is so, the determination whether the parties had agreed to arbitrate jurisdiction—for example, the validity of the arbitration agreement or the question whether it bound a non-signatory—would effectively determine the jurisdictional question itself.

Given its apparent either-or assumption, the Court did not acknowledge that the question of jurisdiction to determine jurisdiction is almost always one of timing—that is, when the courts should consider arbitral jurisdiction. On that point, of course, different legal systems take different views. In the United States, at least prior to *First Options*, a party challenging arbitral jurisdiction could obtain a judicial decision on the issue by a variety of means, including by suing to enjoin an arbitration or by filing an action and drawing a motion to stay in favor of arbitration.[15] Under French law, by contrast, the courts would generally refuse to address arbitral jurisdiction until the completion of the proceeding unless the arbitration agreement is ''patently void.''[16] And under the United Nations Commission on International Trade Law (UNCITRAL) Model Law, a tribunal may decide the question whether it has jurisdiction over a dispute, but its ruling that it does may be reviewed on an interlocutory basis by a court having jurisdiction.[17]

In a couple of early cases, U.S. courts had considered the question in light of the standard provision in arbitration rules, such as Article 6(2) of the International Chamber of Commerce (ICC) Rules, that the arbitral tribunal has the authority to determine its own jurisdiction. In *Contec Corp. v. Remote Solution, Co., Ltd.*[18] and *Apollo Computer, Inc. v. Berg*,[19] in response to motions to compel arbitration, the courts referred the parties to arbitration in reliance on an arbitration rule without first determining the jurisdictional

[14] *First Options* was certainly not such a case. That case presented the straightforward situation in which one party argued that it was not party to the arbitration agreement, and therefore that the arbitrator had no jurisdiction to decide the merits *or* the arbitrability of its dispute. The Supreme Court agreed. *Id.* at 946.

[15] *See, e.g.,* Collins & Aikman Prods. Co. v. Bldg. Sys., 58 F.3d 16 (2d Cir. 1995) (ordering arbitration of certain claims and litigation of others); David L. Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d 245 (2d Cir. 1991) (referring dispute to arbitration); Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home & Allied Workers, 788 F.2d 894 (2d Cir. 1986) (affirming denial of motion to compel).

[16] *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 407 (Emmanuel Gaillard & John Savage eds., 1999).

[17] UNCITRAL Model Law on International Commercial Arbitration, art. 16(3) (2006).

[18] Contec Corp. v. Remote Solution, Co., Ltd., 398 F.3d 205, 208 (2d Cir. 2005) (applying American Arbitration Association Rule 7).

[19] Apollo Computer, Inc. v. Berg, 886 F.2d 469, 472-73 (1st Cir. 1989) (applying ICC Rules of Arbitration art. 8.3).

question.[20] But neither case expressly addressed the question of the effect of the tribunal's ruling in a subsequent proceeding for confirmation, *vacatur*, or enforcement. Hence, both cases could be seen as merely adopting the French view that in the face of a prima facie clause, the arbitral tribunal should get the first shot.

In the wake of *First Options*, the issue has been litigated more frequently. Specifically, does the standard provision supply the clear and unmistakable evidence of an agreement to arbitrate jurisdiction that *First Options* required?[21] While the decisions do not always display perfect clarity, at least two courts—the Third Circuit in *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*[22] and the Southern District of New York in *Telenor Mobile Communications AS v. Storm LLC*[23] —have concluded that a tribunal's determination that it had jurisdiction did not prevent a court asked to confirm or vacate the award from entertaining the argument that the tribunal lacked jurisdiction.

In *China Minmetals*, the defendant in an action to confirm an arbitral award entered by the China International Economic and Trade Arbitration Commission (CIETAC) argued that the agreement containing the arbitration provision was a forgery and that it never entered into an agreement to arbitrate. Even though the tribunal had already rejected this argument, the Court held that a party that claimed that ''the alleged agreement containing the arbitration clause on which the arbitral panel rested its jurisdiction was void *ab initio*'' was entitled to argue that point to the district court, and remanded the case to the district court to make an ''independent determination'' of that question.[24]

In *Telenor*, the party objecting to enforcement of the award argued that there was no valid arbitration agreement because the party executing the contract had not been authorized to do so. The court recognized that the tribunal had determined that the arbitration agreement was valid but held that it had an obligation independently to determine the issue. Upon *de novo* consideration, the court agreed with the tribunal.

[20] *See also* Alliance Bernstein Inv. Res. & Mgmt., Inc. v. Schaffran, 445 F.3d 121, 124 (2d Cir. 2006) (applying NASD Code of Arbitration Procedure).

[21] For a comprehensive treatment of this issue that became available after these remarks were delivered, see Hulbert, Richard W., Institutional Rules and Arbitral Jurisdiction: When Party Intent is Not Clear and Unmistakable, 17 *Am. Rev. Int'l Arb.* 545 (2006) [available June 2008].

[22] China Minmetals Materials Imp, & Exp, Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 288-89 (3d Cir. 2003).

[23] Telenor Mobile Commc'ns AS v. Storm LLC, 524 F. Supp. 2d 332, 351 (S.D.N.Y. 2007).

[24] China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 289-90 (3d Cir. 2003).

While it may be the case, as *First Options* said in *dicta,* that where the parties have agreed to arbitrate the question of jurisdiction, ''the court's standard for reviewing the arbitrator's decision about [jurisdiction] should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate,''[25] it should, as a practical matter, be the rare case in which the parties have actually agreed to arbitrate that question. U.S. doctrine on the point is not yet fully in accord with the widely recognized international rule. For instance, although *Telenor* cited *China Minmetals*'s statement that ''every country that allows arbitrators to determine their own jurisdiction also allows some form of judicial review of the arbitrator's jurisdictional decision,''[26] it distinguished earlier cases on a textual difference between the American Aribtration Association (AAA) and ICC rules on the one hand and the UNCITRAL rules on the other.[27]

Before leaving the topic, I want to mention a recent, unusual, but, I believe, important case from the Southern District of New York. In *GlobalGold Mining, LLC v. Robinson*,[28] a claimant whose case against one of four parties the ICC court had refused to refer to arbitration under Article 6(2) on the ground that there was no prima facie agreement to arbitrate, sued to compel the ICC to refer the question of jurisdiction—specifically, whether a non-signatory to the arbitration agreement could nonetheless be compelled to arbitrate—to an arbitral tribunal. The district court refused to do so, holding that by agreeing to the ICC rules, the parties had given the ICC, not the tribunal, the authority to make this determination. The court reasoned that if the ICC could be compelled to refer all questions of jurisdiction to the tribunal, it would defeat the purpose of Article 6(2), which is to allow the ICC court not to empanel a tribunal where there is not a prima facie agreement to arbitrate. Instead, the district court held, the claimant should have applied, as Article 6(2) expressly contemplates, to a court for a declaration that there was a binding agreement to arbitrate between the parties, in which event the claimant would have had to bring the adverse party into the action. The court thereby endorsed the regime contemplated by Article 6(2).

[25] First Options v. Kaplan, 514 U.S. 938, 943 (1995).

[26] Telenor Mobile Commc'ns AS v. Storm LLC, 524 F. Supp. 2d 332, 351 (S.D.N.Y. 2007).

[27] Telenor Mobile Commc'ns AS v. Storm LLC, 524 F. Supp. 2d 332, 350-51 (S.D.N.Y. 2007) (comparing Contec Corp. v. Remote Solution, Co., Ltd., 398 F.3d 205, 208 (2d Cir. 2005), and Shaw Group, Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 123 (2d Cir. 2003).

[28] GlobalGold Mining, LLC v. Robinson, 533 F. Supp. 2d 442 (S.D.N.Y. 2008).

PUBLIC POLICY AND NON-ARBITRABILITY AS GROUNDS FOR REFUSAL TO ENFORCE

As we know, Article V(2) of the New York Convention permits a court to refuse to enforce an award when either ''[t]he subject matter of the difference is not capable of settlement by arbitration'' under the law of the forum or ''[t]he recognition or enforcement of the award would be contrary to the public policy'' of the forum state. U.S. courts generally remain disciplined in their resort to these grounds.

There is at least one exception, the decision in *Sarhank Group v. Oracle Corp.*[29] There the Court of Appeals for the Second Circuit spoke in public policy terms when it was really addressing arbitral jurisdiction. An arbitral tribunal sitting in Cairo had applied the ''group-of-companies'' doctrine to bind a non-signatory parent to the arbitration agreement signed by its subsidiary. The district court held that it was bound by that ruling. The court of appeals reversed, remanding to the district court to assess whether under the applicable law—which the court viewed as U.S. federal law—the parent was bound. The use of public policy terminology in the case was not simply unnecessary, but unfortunate, because the Second Circuit's invocation of that potentially expansive doctrine might be used as justification in a later case.

Two cases from the last few years are, in my view, more representative of the U.S. courts' approach. The case of *Baxter v. Abbott Laboratories,*[30] from the Seventh Circuit, presented the situation that commentators had been anticipating since the Supreme Court decided *Mitsubishi*[31]—that is, an unsuccessful anti-trust claimant asked a U.S. court to take a ''second look'' at the arbitral award denying its claim. Writing for the majority, Judge Easterbrook read *Mitsubishi* to mean what it said: if the arbitral tribunal had ''[taken] cognizance of the antitrust claims and actually decided them,'' a reviewing court would not revisit the merits.[32] I confess that I have always been a bit puzzled by the suggestion that *Mitsubishi* allowed for some review on the merits, as the language on which *Baxter* relied seems to me straightforward.

In any event, it was also clear that Judge Easterbrook, an anti-trust expert, took a dim view of the merits of the petitioner's anti-trust claim. Judge Cudahy, meanwhile, vigorously dissented on the ground that *Mitsubishi* did not require the courts to defer to an arbitrator's decision that

[29] Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005).
[30] Baxter v. Abbott Labs., 315 F.3d 829 (7th Cir. 2003).
[31] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).
[32] Baxter v. Abbott Labs., 315 F.3d 829, 832 (7th Cir. 2003).

''command[ed] illegal conduct'' in violation of U.S. antitrust law.[33] Specifically, he would have held, resting on Article V(2)(b), that a court should refuse to enforce an award that ''command[ed] the parties to break the law or to violate clearly established norms of public policy'' in the form of the antitrust laws.[34]

In the second case, *MGM Products Group v. Aeroflot Russian Airlines*[35] from the Second Circuit, an arbitral tribunal sitting in Stockholm rejected the respondent's argument that the contract that the claimant alleged had been breached violated the Iranian sanctions regime in the United States and hence was unenforceable. The district court[36] first observed that it agreed with the arbitral tribunal that the contract did not violate the U.S. regulation but then held that, even if it had, the violation would not implicate the ''the most basic notions of morality and justice'' in the United States and hence would not rise to the level justifying a refusal to enforce on public policy grounds set forth in *Parsons & Whitmore*.[37]

On appeal, in a short opinion, the Second Circuit took a different tack, effectively treating the case as one of arbitrability rather than public policy.[38] The court noted that the alleged violation of the U.S. regulations had been put to the arbitrators and that they had decided the issue. The court therefore deferred to that holding.

ENFORCEMENT OF AWARDS SET ASIDE IN THE PLACE OF ARBITRATION

Under Article V(1)(e) of the New York Convention, a court may refuse to enforce an award that ''has been set aside . . . by a competent authority of the country in which . . . that award was made.'' The French position, exemplified by *Hilmarton*[39] and, more recently, *PT Putrabali*,[40] is that an

[33] *Id.* at 839.

[34] *Id.* at 834.

[35] MGM Prods. Group v. Aeroflot Russian Airlines, 91 Fed. App'x 716 (2d Cir. 2004).

[36] MGM Prods. Group v. Aeroflot Russian Airlines, 573 F. Supp. 2d 772, 775 (S.D.N.Y. 2003).

[37] Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrialie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

[38] MGM Prods. Group v. Aeroflot Russian Airlines, 91 Fed. App'x 716, 717-18 (2d Cir. 2004).

[39] Société Hilmarton v. Société O.T.V., Cass. 1re civ., Mar. 23, 1994, 1994 *Rev. Arb.* 327, *translated in* 20 *Y.B. Yearbook Comm. Arb.* 663 (1995).

[40] Société PT Putrabali Adyamulia v. Société Rena Holding, Cass. 1re civ., June 29, 2007, *Bull. Civ. I,* No. 251 (2007) (English digest available at http://www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80892).

international award is not tied to any particular legal order and hence that, consistent with Article VII of the New York Convention, French law could give effect to an award set aside in the place of arbitration. An early U.S. case, *In re Chromalloy Aeroservices*,[41] adopted that view.

The post-*Chromalloy* trend in the United States has been firmly in the opposite direction, however,[42] and after the D.C. Circuit's decision in *TermoRio S.A. E.S.P. v. Electranta S.P.*,[43] that position is now definitive.

The background of *TermoRio* is this: After an arbitral tribunal sitting in Colombia issued an award in favor of TermoRio, Colombia's highest administrative court vacated the award on the ground that the arbitration agreement was invalid because Colombian law as of the date of the agreement did not permit arbitration under ICC rules. TermoRio brought an action in the D.C. District Court to enforce the tribunal's award. In decisions first by Judge Oberdorfer in the district court, and then by Judge Edwards for the court of appeals, those courts refused to give effect to the award.

In the debate between the territorialists and the anationalists, *TermoRio* came down squarely on the side of the territorialists. After holding that there was no basis as a matter of the law of recognition of judgments to refuse effect to the Colombian ruling, the court held that ''[a]n arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made.''[44] While earlier cases had purported merely to distinguish *Chromalloy*, it is hard to see how it might survive *TermoRio*.

MANIFEST DISREGARD

Before concluding, I want to return to the treatment in *Hall Street* of the doctrine of ''manifest disregard'' as a ground for *vacatur* of awards under U.S. domestic law. As I have just explained, the *Hall Street* Court held that parties could not expand the grounds for *vacatur* by contract. To reach that holding, the Court emphasized that the statutory grounds were exclusive. And to sustain that point, the Court had to address manifest disregard, a judicially created ground.

[41] *In re* Chromalloy Aeroservices, 939 F. Supp. 907 (D.D.C. 1996).

[42] *See, e.g.*, Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2d Cir. 1999).

[43] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007).

[44] *Id.* at 936.

Prior to *Hall Street*, the doctrine of manifest disregard had been well accepted—with the exception of the Seventh Circuit[45]—as an independent ground for *vacatur*. The doctrine arose from *dictum* in *Wilko v. Swan*,[46] a case that has since been overruled on its principal holding.[47] But the standard it imposes has been articulated in widely varying ways—from the ''conscious disregard'' standard articulated and applied in the First, Eighth, Tenth, and Eleventh Circuits, to the even more stringent test applied in the Second, Sixth, Ninth, and District of Columbia Circuits that the law ignored by arbitrators not only be consciously disregarded, but well defined, explicit and clearly applicable to the case at hand, to the Fifth Circuit's approach, permitting *vacatur* under this doctrine if the arbitrators acted contrary to applicable law and if enforcing the award would result in significant injustice, taking into account all circumstances of the case.[48] At first glance, the doctrine appears prudent and reasonable. A truly egregious result on the merits in an arbitration, especially one that results from a deliberate failure to apply law, should not stand. The difficulty, of course, is that however deferentially a standard is articulated, it remains a merits review, and it thereby provides a tool for any unhappy party wishing to attack an award. Litigators know that defending a result, no matter the standard, requires careful review of fact and law.

For a graphic illustration of the point, one need only review judicial decisions determining that there was no manifest disregard. Think, specifically, of the well-known decision in *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*,[49] which confirmed that a party to an arbitration sited in the United States could invoke manifest disregard as a ground for *vacatur* even if the award would be subject to the New York Convention.

And so the doctrine launches a thousand petitions to vacate, even though those petitions rarely lead to the *vacatur* of an award. Keep in mind, too, that an appeal would lie from a refusal of a district court to vacate an

[45] Prior to *Hall Street*, the Seventh Circuit had held that there was, in effect, no independent ''manifest disregard'' ground for *vacatur*. Wise v. Wachovia Secs. LLC, 450 F.3d 265 (7th Cir. 2006); *see also* Joseph Stevens & Co. v. Cikanek, 2008 WL 2705445 (N.D. Ill. July 9, 2008); Jimmy John's Franchise LLC v. Kelsey, 549 F. Supp. 2d 1034 (C.D. Ill. 2008).

[46] Wilko v. Swan, 346 U.S. 427 (1953).

[47] *Wilko v. Swan* held that claims of violations of Section 14 of the Securities Act of 1933 were not arbitrable, a holding overruled by *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484 (1989).

[48] *See, e.g.,* Cytyc Corp. v. DEKA Prods. Ltd., 439 F.3d 27, 35 (1st Cir. 2006); Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc., 409 F.3d 87, 90-91 (2d Cir. 2005); Sarofim v. Trust Co. of the West, 440 F.3d 213, 217 (5th Cir. 2006).

[49] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys ''R'' Us, Inc., 126 F.3d 15 (2d Cir. 1997).

award. Think again of *Alghanim*, in which Toys ''R'' Us attempted to relitigate the merits of the tribunal's lost profits award before both the district court[50] and the court of appeals, and even sought *certiorari* from the Supreme Court.[51] Again, thereby, a choice to arbitrate risks at least three, or even four, levels of merits decision making.

The courts of appeals have grown increasingly frustrated with the use of the manifest disregard doctrine as a vehicle for judicial review on the merits. Both the Tenth[52] and Eleventh[53] Circuits have recently made clear that they will consider imposing sanctions on parties that bring frivolous manifest disregard claims that are really disguised attacks on the merits of the award. The Eleventh Circuit decided not to impose sanctions in *Harbert* primarily because the petitioner ''did not have the benefit of this notice and warning,'' but warned it would sanction ''those who pursue similar litigation positions in the future.''[54] A year and a half later, in *S&L Enterprises*, the Tenth Circuit went further, actually inviting the prevailing party to file a motion for sanctions.

So back to *Hall Street*. The petitioner Hall Street relied on the *Wilko dictum* for its argument that the grounds in Sections 10 and 11 of the FAA were not exclusive. Specifically, Hall Street argued that *Wilko* had created a non-statutory ground of *vacatur*, and there was no reason not to allow parties to do the same. The *Hall Street* Court not only declined to extend the *Wilko dictum* to include grounds created by private contract, but it questioned whether *Wilko* had created a new ground for review at all. Without deciding the issue, it suggested that ''manifest disregard'' might simply equate misconduct under Section 10(a)(3) or arbitral conduct in excess of their authority under Section 10(a)(4).

Hall Street's treatment of manifest disregard has not yet promoted uniformity. While some courts have avoided the issue by not finding manifest disregard on the facts,[55] many courts, though not all, that have

[50] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys ''R'' Us, Inc., 96 Civ. 5853, 1996 U.S. Dist. LEXIS 18734 at *3-4 (S.D.N.Y. 1996).

[51] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys ''R'' Us, Inc., 22 U.S. 1111 (1998) (denying *certiorari*).

[52] S&L Enters., Inc. v. Ecolab Inc., 247 Fed. App'x 970 (10th Cir. 2007).

[53] B.L. Harbert Intern., LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

[54] *Id.* at 914.

[55] Rogers v. KBR Technical Servs. Inc., No. 08-20036, 2008 U.S. App. LEXIS 12320 (5th Cir. June 9, 2008); Halliburton Energy Servs., Inc. v. NL Indus., 553 F. Supp. 2d 733, 752 (S.D. Tex. 2008) (considering, and rejecting, manifest disregard ''out of an abundance of caution''); Fitzgerald v. H&R Block Fin. Advisors, 2008 WL 2397636 (E.D. Mich. June 11, 2008) (without considering effect of *Hall Street*); DMA Int'l, Inc. v. Qwest Commc'ns Int'l, 2008 WL 4216261 (D. Colo. Sept. 12, 2008).

considered the issue since *Hall Street* have read the decision to reject the doctrine as an independent ground for *vacatur*.[56] For example, the Second Circuit recently concluded that while *Hall Street*'s holding that the FAA is the exclusive grounds for *vacatur* is ''undeniably inconsistent with some [of its past] dicta treating the manifest disregard standard as a[n] . . . entirely separate . . . ground from vacatur,'' *Hall Street* had not ''abrogate[d] the 'manifest disregard' doctrine altogether.''[57] Therefore, the Court maintained its three-part test whereby awards would be vacated ''in the rare instances in which 'the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.'''' At the same time, the Court was careful to equate that test with the grounds for *vacatur* under Section 10(a)(4) of the FAA.[58] Meanwhile, the Sixth Circuit has recently noted that the Supreme Court had not rejected the doctrine ''in all circumstances,'' finding it ''imprudent to cease employing such a universally recognized principle'' and vacated the arbitral award at issue based on manifest disregard of the law without attempting to tie the doctrine to statutory grounds.[59] The Supreme Court may have to decide the issue.

[56] *See, e.g.,* ALS & Assocs., Inc. v. AGM Marine Constructors, Inc., 557 F. Supp. 2d 180,185 (D. Mass. 2008) (citing Ramos-Santiago v. UPS, 524 F.3d 120 (1st Cir. 2008), which distinguished *Hall Street* as applying only to FAA cases); Householder Group v. Caughran, 576 F. Supp. 2d 796 (E.D. Tex. 2008); Wood v. Penntex Res. LP, WL 2609319 (S.D. Tex., June 27, 2008); Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp. 2d 993 (D. Minn. 2008).

[57] Stolt-Nielson SA v. AnimalFeeds Int'l Corp., 2008 WL 4779582, at *7 (2d Cir. Nov. 4, 2008).

[58] *Id* at *8.

[59] Coffee Beanery, Ltd. v. WW, L.L.C., 2008 U.S. App. LEXIS 23645, at *10-*13 (6th Cir. Nov. 14, 2008).

England: A Look Back on a Year of Authority and Hilarity

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INTRODUCTION

The tenth anniversary of the coming into force of the Arbitration Act 1996 (AA96) was celebrated on January 31, 2007. England started the second decade of its modern arbitration era with a year marked by authority and hilarity, an unusual combination in this field.

Authority was provided by the House of Lords' firm endorsement of arbitration in *Fiona Trust & Holding Corporation v Yuri Privalov*[1] and its reference to the European Court of Justice (ECJ) in *West Tankers*[2] on whether an anti-suit injunction related to arbitration proceedings is compatible with the EU Judgments Regulation.[3] Plaudits are due to Lord Hoffmann for almost single-handedly carrying the torch for England as an arbitration center. We also had the English Court of Appeal on confidentiality in English arbitration in *Michael Wilson & Partners Limited v. John Forster Emmott.*[4]

Hilarity came courtesy of that most unlikely source, The Law Society, in a brochure entitled *England and Wales: The Jurisdiction of Choice*[5] in green, the color of envy.

[1] Fiona Trust & Holding Corp. and 20 others v. Yuri Privalov and 17 others, *sub nom* Premium Nafta Products Ltd. & ors. v. Fili Shipping Co & Ors., [2007] UKHL 40, *aff'g* [2007] EWCA Civ 20.

[2] West Tankers Inc v. RAS Riunione Adratica di Sicurta SpA and others, [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391.

[3] EC Council Regulation of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (The Judgments Regulation), EC Regulation 44/2001, 2001 O.J. (L 12) 1.

[4] Michael Wilson & Partners Limited v. John Forster Emmott, [2008] EWCA Civ 184.

[5] Http://lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf.

The desirability of England as a seat of arbitration is forever perceived as being under threat, and this is perhaps the overriding theme of this past year. Certainly the language used by the House of Lords in the following cases makes clear that this consideration is never far from their minds. Indeed, the internationalization of London arbitration practice is evident with the advent of litigation related to investment treaty cases for consideration by the English courts (*Ecuador v. Occidental,*[6] *EMV v. The Czech Republic,*[7] *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA*, ExxonMobil's thwarted attempt to obtain a worldwide freezing injunction against the government of Venezuela's assets).[8]

On top of all this, concern was expressed at the report prepared by Professor Schlosser and others advising the European Union about the possibility of bringing arbitration within the ambit of the Judgments Regulation.[9]

HOUSE OF LORDS

Fiona Trust[10] had everything going for it: a catchy name, a judgment in first instance that flew in the face of the principle of competence-competence (and was promptly reversed), charter parties, a Russian tycoon, and allegations that the contracts had been procured by bribery. The owners applied to the English court for a declaration that they had validly rescinded the charter parties. The charter parties contained an arbitration clause, so the charterers applied for a stay of the litigation in favor of arbitration (Section 9, AA96). The stay was refused at first instance, on the startling basis that, if a party argues that the contract was procured by bribery, it is more *convenient* once and for all for a court, rather than an arbitral tribunal, to determine whether the alleged bribe vitiated not only the contract but also its arbitration clause. The stay was granted on appeal.

On further appeal to the House of Lords, there were two principal issues:

[6] The Republic of Ecuador v. Occidental Exploration & Production Company, [2007] EWCA Civ 656.

[7] The Czech Republic v. European Media Ventures SA, [2007] EWHC 2851 (Comm).

[8] Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA, [2008] EWHC 532 (Comm).

[9] Http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

[10] Fiona Trust, *supra* note 1.

- whether the arbitration clause, as a matter of construction, covered a dispute concerning whether the contract was procured by bribery; and
- whether a party was bound to submit to arbitration when it alleged that, but for the bribery, it would never have entered into the contract containing the arbitration clause.

On the first question, the House of Lords drew a line under the ''battle of the prepositions''—the long-standing and awkward distinction dear to English law between ''arising under'' (covering contractual, but not tortious and other claims) and ''arising out of'' (wide enough to cover non-contractual claims). The House of Lords sensibly pointed out that business people would be very unlikely to have intended semantic distinctions of this type. Applying an approach that aligns English law with international standards of construction, Lord Hoffmann concluded that there was nothing in the arbitration agreement to suggest that the parties intended that allegations of bribery ought to be referred to a national court rather than arbitration.

''The unobtrusive efficiency of the supervisory law'' of the seat was how Lord Hoffmann, giving the leading speech, characterized one of the prominent factors leading parties to opt for arbitration over litigation. Other factors are the neutrality and expertise of the tribunal, the privacy of the process, the availability of legal services at the seat. It is worth keeping those words in mind, they will reappear shortly.

On the issue whether fraud tainted the entire agreement and rendered it void and unenforceable, the House of Lords took a strong stance in favor of the separability of the arbitration clause (Section 7, AA96) and held that the arbitration agreement was ineffective only if the owners could produce credible evidence showing that bribery had specifically induced the parties to agree to arbitration. (No indication was provided as to what burden of proof that ''credible evidence'' entails, a vexed question in international arbitration.)

West Tankers[11] is a simmering volcano. Whether the English courts are entitled to issue anti-suit injunctions against a party having started court proceedings in another EU jurisdiction (that court thus becoming the ''court first seized'' and having priority according to the Judgments Regulation) is an issue that has elicited considerable debate in Europe.

The ECJ, in *Gasser GmbH v. MISAT Srl (Case C-116/02),*[12] decided that a court of a member State on which exclusive jurisdiction has been conferred

[11] West Tankers, *supra* note 2.
[12] Gasser GmbH v. MISAT Srl (Case C-116/02), [2003] ECR I-14693.

pursuant to Article 23 cannot issue an injunction to restrain a party from prosecuting proceedings before a court of another member State if the latter court was first seized of the dispute; and in *Turner v. Grovit (Case C-159/02)*[13] likewise decided that a court of a member State may not, even on the ground that those proceedings have been commenced in bad faith, issue an injunction to restrain a party from commencing or prosecuting proceedings in another member State that has jurisdiction under the Judgments Regulation. Both decisions rely on the proposition that the regulation provides a complete set of uniform rules for the allocation of jurisdiction between member States and that the courts of each member State have to trust the courts of other member States to apply those rules correctly.[14]

In *West Tankers*, however, the question arose whether the anti-suit injunction could be ordered where the court proceedings had been started in breach of an arbitration agreement. The Judgments Regulation (for the time being) excludes arbitration from its system of allocation of jurisdiction. The question is whether that exclusion extends to cover litigation about the arbitral process itself. The House of Lords referred that question to the ECJ, not without Lord Hoffmann providing the ECJ with the benefit of his thoughts.

In language almost exactly pre-figuring his speech in *Fiona Trust*, Lord Hoffmann characterized arbitration as a process ''in which the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services and the unobtrusive effectiveness of the supervising jurisdiction.'' Anti-suit injunctions prevent parties from seeking to defeat this commercial expectation by starting court proceedings in breach of the agreement to arbitrate.

And where ought one to go to arbitration, if at a loss for venues? Here again Lord Hoffmann provides guidance:

> Of course arbitration cannot be self-sustaining. It needs the support of the courts; but, for the reasons eloquently stated by Advocate General Darmon in The Atlantic Emperor, it is important for the commercial interests of the European Community that it should give such support. Different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose

[13] Turner v. Grovit (Case C-159/02), [2004] ECR I-3565.

[14] For a case published on June 8, 2008, in which the English Court of Appeal reviews the history and factors underlying the grant of anti-suit injunctions and upholds the injunction, see *Munib Masri v Consolidated Contractors International Company SAL and Consolidated Contractors (Oil & Gas) Company SAL,* [2008] EWCA Civ 625.

the governing law and seat of the arbitration according to what they consider will best serve their interests.

The Courts of the United Kingdom have for many years exercised the jurisdiction to restrain foreign court proceedings as Colman J did in this case: see Pena Copper Mines Ltd v Rio Tinto Co Ltd (1911) 105 LT 846. It is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. As Professor Schlosser also observes, it saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction (which was what eventually happened to the buyers in The Atlantic Emperor: see [1992] 1 Lloyd's Rep 624) and so little as to lead to a default judgment. That is just the kind of thing that the parties meant to avoid by having an arbitration agreement.

Whether the parties should submit themselves to such a jurisdiction by choosing this country as the seat of their arbitration is, in my opinion, entirely a matter for them. The courts are there to serve the business community rather than the other way round. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, it may be regarded as one of the advantages which the chosen seat of arbitration has to offer. Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies. In proceedings falling within the Regulation it is right, as the Court of Justice said in Gasser and Turner v Grovit, that courts of Member States should trust each other to apply the Regulation. But in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of Kompetenz-Kompetenz) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate.

Finally, it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the

> arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.[15]

The decision of the ECJ is awaited with some trepidation. There is a real risk, in light of its previous cases and the proposal to do away with the arbitration exception in the Judgments Regulation, that the ECJ will seek to dampen English law's enthusiasm for anti-suit injunctions (see ''Postscript'' below).

ARBITRATION EXCEPTION

September 2007 saw the publication of the final report by Professors Schlosser, Hess, and Pfeiffer on the review of the Judgments Regulation.[16]

One of the areas proposed for review is the current exclusion of arbitration from the scope of the Judgments Regulation. The regulation is a regime between EU countries, which provides a complete set of uniform rules for the allocation of jurisdiction. Arbitration has always been considered to fall outside that regime. One of the reasons for this was that there were already in place important international conventions governing the enforcement of arbitration agreements and awards, particularly the 1958 New York Convention.[17]

The consultations carried out among member States show a clear majority of views against changing the current state of affairs with respect to the recognition and enforcement of awards. However, there are other areas of tension that are unsettled and may lead to conflicting decisions in different member States, as they fall outside the Brussels regime. Examples include the following:

- The recognition of foreign declaratory judgments on the validity of an arbitration clause;

[15] West Tankers, *supra* note 2, ¶¶ 17-21.

[16] Http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_I_en.pdf. Council Regulation 44/2001, http://europa.eu/scadplus/leg/en/lvb/l33054.htm.

[17] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3

- Anti-suit injunctions in arbitration matters (pending the decision in *West Tankers*[18]);
- Ancillary measures to arbitration, that is, applications to the court to appoint an arbitrator, fix the seat of arbitration, extend time limits, preserve evidence. On this point there has been a radical proposal by Professor Hans van Houtte[19] to create a separate head of exclusive jurisdiction for ancillary proceedings at the state court of the seat of arbitration; and
- Provisional measures.

Recommendations include the following:

- The Judgments Regulation should not address issues dealt with by the New York Convention.
- This does not exclude the import of supplemental and supporting provisions, particularly with regard to the interface between the New York Convention and the regulation. Specific wording is proposed.

Developments are being followed very closely. To echo the words of Lord Hoffmann in *West Tankers*, the European Union would be well advised to keep in mind that it is competing with the rest of the world for arbitral seats.

CONFIDENTIALITY

Collins L.J. states in *Michael Wilson & Partners Limited v. John Forster Emmott,*[20] that the conduct of arbitration is private and that privacy is implicit in the agreement to arbitrate. In addition, and despite silence on this point in the AA96, English case law over the past 20 years has established an obligation of confidentiality, implied by law and arising out of the nature of arbitration. The obligation is not limited to commercially confidential information in the traditional sense.

This policy may have to give way to the public interest (e.g., *West Tankers*,[21] where a party seeks an injunction to stop proceedings started in

[18] West Tankers, *supra* note 2.
[19] 21(2) *Arb. Int'l* 509 (2005).
[20] Michael Wilson & Partners Limited v. John Forster Emmott, *supra* note 4.
[21] West Tankers, *supra* note 2.

breach of an arbitration clause, and *Mobil Cerro Negro v. PdVSA,* discussed below).[22]

This is another area where English law clings to the notion that parties choose to arbitrate for the confidentiality afforded by arbitration—this is viewed by some commentators as outdated and incorrect. It is certainly at odds with other jurisdictions, such as Australia and Sweden, which have expressly ousted an implied obligation of confidentiality in the arbitration process.

The English Rules of Civil Procedure provide, at CPR 62.10, that applications to the Court arising out of arbitration proceedings are held in private, with the exception of a preliminary decision on a point of law or an appeal on a point of law.

The report prepared by an *ad hoc* steering committee on the occasion of the tenth anniversary of the AA96[23] outlines the difficulty in legislating in this area, and a majority of those polled expressed satisfaction with the present regime, so it is unlikely that this will change in the near future.

INVESTMENT TREATY LITIGATION IN THE ENGLISH COURTS

The past year has also seen investment treaty litigation coming before the English courts, partly as a result of London having been chosen as the seat of the arbitration proceedings.

In *Ecuador v. Occidental*,[24] the court was asked whether an arbitral tribunal constituted pursuant to the bilateral investment treaty (BIT) between the United States and Ecuador had jurisdiction to determine claims relating to the refund of value added tax (VAT) payments, or whether the terms of the treaty precluded that jurisdiction. The tribunal ruled that it had jurisdiction, found that the refusal by Ecuador to refund the VAT was in violation of the BIT and went on to order that Ecuador pay Occidental over U.S.$71 million plus interest.

Ecuador challenged the award before the English courts on the basis of lack of substantive jurisdiction pursuant to Section 67 AA96. The place of arbitration was London, chosen for reasons of convenience—which goes to show the far-reaching implications of such a decision.[25]

[22] Mobil Cerro Negro v. PdVSA, *supra* note 8.

[23] *See* 23(3) *Arb. Int'l* 437 (2007).

[24] Ecuador v. Occidental, *supra* note 6.

[25] England was also chosen as a seat of arbitration in the case of *Piero Foresti, Laura de Carli and Others v. Republic of South Africa*, ICSID Case No. ARB/(AF)/07/01, where a group of European mining investors allege that Black Empowerment obligations imposed on foreign investors in the mining sector run counter to guarantees in BITs between SA and Italy, Belgium, and Luxemburg.

The Court of Appeal dismissed the challenge and maintained the award. It made the somewhat surprising pronouncement that uncertainties in the interpretation of a BIT should be resolved in favor of the investor:

> We accept Mr Greenwood's submission that the object and purpose of a BIT (including this BIT) is to provide effective protection for investors of one state (here OEPC) in the territory of another state (here Ecuador) and that an important feature of that protection is the availability of recourse to international arbitration as a safeguard for the investor. In these circumstances it is permissible to resolve uncertainties in its interpretation in favour of the investor: see eg the views of the arbitrators in paragraph 116 of their award in SGS v Philippines (2004) 8 ICSID Reports 515.

Contrary to this is *El Paso Energy International Company v. The Argentine Republic,*[26] in favor of a balanced view: ''a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activity, and the necessity to protect foreign investment and its continuing flow.'' *In EMV v. Czech Republic*, as in *Occidental*, the court recognizes that treaties are governed by public international law and that, insofar as the Vienna Convention on the Law of Treaties[27] represents customary international law, its rules are part of English law. It also sounds a note of caution about the Court of Appeal's endorsement in *Occidental* of the *SGS v. Philippines* pro-investor stance on interpretation:

> The Court of Appeal in *Ecuador v. Occidental (No.1)* [2006] QB 432 at §§14-20 and 32-35 described the nature of the legal relationship created and the rights generated by BITs. Under these treaties investors are given substantive and procedural rights, which may be pursued in their own right rather than by the State on their behalf. BITs give rise to consensual agreements to arbitrate between an investor and a State, arising out of (but distinct from) the treaty itself. In these circumstances it seems to me plain that in interpreting a BIT the Court is entitled to take into account that one of the objects of the treaty was to

[26] El Paso Energy International Company v. The Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/15, ¶ 68 (Apr. 27, 2006), citing Methanex Corporation v. United States of America, 44 I.L.M. 1345 (2005) and Noble Ventures v. Romania, ICSID Case ARB No. ARB/01/11.

[27] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 31(3) (May 23, 1969), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

> confer rights on an investor, including a valuable right to arbitrate. If the suggestion made in *Ecuador v. Occidental (No.2)* at §28, that it is permissible to resolve uncertainties in the interpretation of a BIT in favour of an investor, who is not a party to the treaty, is said to amount to a rule of interpretation, the suggestion goes rather further than appears to be justified in International law.[28]

The Court goes on to apply a teleological interpretation of the treaty and to find that the tribunal had jurisdiction decide as it did.

In *Mobil Cerro Negro Ltd. v. PdVSA*,[29] the Commercial Court set aside a worldwide freezing injunction granted *ex parte* for a limited time, where the applicant failed to show a real risk of dissipation of assets or that the case was one of urgency. The Court considered the following factors:

1. Worldwide freezing orders are made ''only sparingly'' and usually only where there is ''compelling evidence of serious international fraud'';
2. These orders will not be made absent some real connection with England (such as assets located or parties domiciled within the jurisdiction);
3. There must be a genuine risk of dissipation of the defendant's assets;
4. An *ex parte* application will only be entertained in a case of urgency (failing urgency, with the permission of the arbitral tribunal);
5. The order will only be made where the arbitral tribunal is unable or not more appropriately placed to make the requested freezing order (here no application for a freezing order had been made in Venezuela); and
6. In every other respect it would be appropriate to grant the injunction.

In the instant case, the court lifted the freezing order on the bases that there were no PdVSA assets in England, the amount frozen was large (U.S.$12 billion), there was no evidence that PdVSA was in the process of dissipating its assets, and the seat of arbitration was outside England.

The English courts are aware of the broad and devastating reach of these orders and will only grant them sparingly and in exceptional circumstances.

[28] [2007] EWHC 2851, ¶ 23.
[29] Mobil Cerro Negro Ltd. v. PdVSA, *supra* note 8.

It is interesting to note that the application in *Mobil* was made in private pursuant to CPR 62.10 but that, given the public interests at stake, the judgment was handed down in public without reference to those aspects of the case which were considered confidential.

"JURISDICTION OF CHOICE"

Lord Hoffmann's efforts at promoting the unobtrusive efficacy of English law and the sensible business pragmatism of its courts are, regrettably, undermined by the Law Society's brochure[30] aiming at selling England and Wales as ''the jurisdiction of choice'' for dispute resolution.

In the *Queen Mary/PwC Survey on International Arbitration: Corporate Attitudes and Practice,*[31] London ranked as the preferred arbitration venue, followed by Switzerland and France. In Fulbright and Jaworski's *Second Annual Litigation Trends Survey,*[32] London came out first as favored arbitration venue in the world.

There are reasons for London's prominence as an international arbitration venue. They are not, it is submitted, those that are put forward in the brochure, which do not accord with reality and practice.

The claim that the English common law is ''more flexible'' than the civil law is redolent of an uneasy ''Fog over the Channel: Continent cut off'' perspective on things. Hailing the ''absence of a general duty of good faith'' as an asset of the common law is foreign to international arbitration. Branding civil law systems as ''more rigid and prescriptive'' just does not represent what international arbitration practitioners in the United Kingdom are about.

The real assets of London as a seat are precisely those put forward by Lord Hoffmann—a sophisticated and pragmatic judiciary, a developed history and tradition of arbitration law and practice, high standard of legal services, a cosmopolitan society that is open to the world.

There are also real difficulties to be addressed, interestingly not alluded to in the brochure: the question of costs, a difficult selling point in one of the most expensive cities in the world, jurisdictional challenges pursuant to Sections 67-68 AA96, creating pressure on the courts to disregard the application of the competence-competence doctrine, and the Section 69 right of appeal on a point of law, criticized for fostering delay and cost.

[30] *See supra* note 5.
[31] Http://www.pwc.co.uk/eng/publications/International_arbitration.html.
[32] *See* http://www.fulbright.com.

CONCLUSION

In closing, a word from the Gallic shores, where colleagues labor under the strictures of the civil law. Jean-Francois Revel, the French philosopher who passed away recently, was ruthless in denouncing the excesses of *le rayonnement français,* the dissemination of French ideas and culture, which he saw as a form of self-indulgence:

> French culture has radiated for so long, it is a wonder mankind has not died from sunstroke.

In radiating the English approach to international arbitration, one ought to be mindful of the risk of sunstroke. That, coming from a jurisdiction with such infamous weather, would be the ultimate irony.

The law in this article is current as of June 2008.

POSTCRIPT

On February 9, 2009, the ECJ delivered its judgment in the *West Tankers* case:[33] Unsurprisingly, the ECJ followed the Opinion of Advocate General Kokott and found that anti-suit injunctions in aid of arbitration are incompatible with the Judgments Regulation. This is so despite the exclusion of arbitration from the scope of the Judgments Regulation.

The ECJ reasoned as follows: the issue before the Italian courts concerned a claim in tort for damages. These proceedings clearly came within the scope of the regulation. The question whether they were commenced in breach of an arbitration agreement was a preliminary issue that followed the main proceedings and also fell within the scope of the regulation. It was therefore for the Italian court to decide the question of the application of the arbitration agreement.

[33] Riunione Adriatica Di Sicurta SpA (RAS) v. West Tankers Inc., Case C-185-07.

Recent Significant French Judicial Decisions Involving International Arbitration

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French case law regarding international arbitration is marked by its coherence. This specificity is due to the fact that arbitration cases are centralized by the Paris Court of Appeal in a specialized chamber with the same magistrates sitting all the time. Therefore, this Court's decisions are not only highly coherent, they are also highly authoritative in France. The significance of French decisions also stems from the fact that, according to the statistics published by the International Chamber of Commerce (ICC), Paris is the most chosen place of arbitration.

The present review of French decisions aims at summarizing the recent evolution of French arbitration law, namely, the recognition of estoppel in the French legal system, the continuing statement of the obligation to raise objections as early as possible and possibly to the arbitral tribunal itself, the statement of the existence of an arbitral legal order, and the new consequences of the impossibility of appealing international arbitral awards. The cases from both the Court of Appeal and from the French Supreme Court (*Cour de Cassation*) thus generally highlight just how supportive the French courts have been of arbitration, notably in cases rendered in recent years.

GOLSHANI CASE—THE RECOGNITION OF ESTOPPEL IN THE FRENCH LEGAL SYSTEM

The French *Cour de Cassation,* by a decision delivered on July 6, 2005 (the *Golshani* case), officially introduced the principle of estoppel into French arbitration law.[1] Prior to this formal introduction, the Paris Court of Appeal

[1] Golshani v. Gouvernement de la République islamique d'Iran, Cass. Civ 1, July 6, 2005, 2005(4) *Rev. Arb.* 993, comment by Ph. Pinsolle; see also comments by H. Muir Watt, 2006 *Rev. Crit. DIP* 602; M. Behar-Touchais, 2006 *J.D.I.* 608; T. Clay, 2005 *D.* pan. 3060; F.-X. Train, 2006 *Gaz. Pal.* 18 (Feb. 24-25, 2006); E. Agostini, 2006 *D.* 1424.

had implicitly recognized the principle of estoppel on several occasions, affirming that a party is ''precluded from contradicting itself to the detriment of others'' and had rejected several arguments if not directly on this legal basis, always using such formulation and never denying this rule.[2] However, only in the *Golshani* case was the reference expressly made to the principle of estoppel.

Briefly, the facts of the case were as follows:

Mr. Golshani, a U.S. citizen, went before the Iran-United States Claims Tribunal in 1982 seeking compensation for the expropriation of property that took place at the time of the 1979 Iranian Revolution. The arbitral tribunal rejected his claims in an award in 1993, granting U.S.$50,000 to the Iranian government for the costs of arbitration. The award was granted *exequatur* (i.e., recognition and enforcement) in France, a decision that Mr. Golshani appealed before the Paris Court of Appeal.

Mr. Golshani claimed that the tribunal ruled in the absence of an arbitration agreement, which is a ground for annulment under Article 1502(1) of the French Code of Civil Procedure. This point was considered inadmissible by the Court of Appeal, which ruled that ''[i]ndividuals referring to the Iran-United States Claims Tribunal, accept by so doing the arbitration agreement executed . . . between the United States and Iran to which they become parties.''[3] However, the Court did not expressly state on what legal basis it rejected the claim. There were three possible legal foundations: the waiver by the claimant of his right to invoke the absence of an arbitration agreement (due to his acceptance of the latter when referring the dispute to the tribunal), the necessary consequences of the duty to perform the arbitral agreement in good faith, and the principle of estoppel.

Mr. Golshani brought the issue before the *Cour de Cassation,* which upheld the decision, clarifying the legal basis on which it was rendered. The Court stated that

> Mr. Golshani, who filed the request for arbitration before the Iran-United States Claims Tribunal himself and who took part, for over nine years, in the arbitral proceedings, is precluded, under the rule of

[2] *See* ITM v. Gavaud, CA Paris, Jan. 17, 2002, 2002(1) *Rev. Arb.* 205; Macron et SARL Int'l Display Design v. Société des Cartonnages de Pamfou, CA Paris, Sept. 12, 2002, 2003(1) *Rev. Arb.* 173, comment by M.-E. Boursier; CA Paris, Feb. 19, 2004; Euton v. Ural Hudson, 2004(4) *Rev. Arb.* 873, comment by L. Jaeger; CA Paris, June 3, 2004, Exodis v. Ricoh France, 2004(3) *Rev. Arb.* 683, comment by P. Callé; Thales Air Défense v. GIE Euromissile, CA Paris, Nov. 18, 2004, 2005(3) *Rev. Arb.* 751, comment by L. Radicati di Brozolo, at 529.

[3] Golshani v. Gouvernement de la République islamique d'Iran, CA Paris, June 28,2001, 2002(1) *Rev. Arb.* 163, comment by J. Paulsson at 169; 27 *Y.B. Com. Arb.* 439 (2002).

> estoppel, from submitting, by a contradictory argument, that the tribunal had ruled in the absence of an arbitration agreement, or on the basis of a void arbitration agreement.[4]

Even though the Court referred explicitly to the principle of estoppel, neither the scope of application of the principle nor its substance in French law were discussed.

The Paris Court of Appeal has made use of this principle several times since the *Golshani* case. According to this Court, the principle of estoppel both prevents a party from expressing an opinion contrary both to what it previously explicitly stated and to elements to which it previously did not object.

First, the principle of estoppel prevents, for instance, a party from expressing contradictory ideas in separate proceedings. In a recent case, a party to arbitration proceedings applied to set aside the award on the ground that the arbitral tribunal had ruled in the absence of an arbitration agreement.[5] However, that same party had previously invoked the existence of an arbitration agreement on the basis of which the award was rendered, when the other party had commenced legal proceedings before a state court.

Considering this situation, the Paris Court of Appeal held that ''under the rule of estoppel, [the] company is precluded from invoking the absence of an arbitration agreement, after having argued before the state courts the existence of such an agreement.'' Similarly, where a party consented to an extension of the arbitral tribunal's deadline, it cannot subsequently object on the grounds that arbitration deadlines have passed.[6]

Second, the principle of estoppel prevents a party from raising objections late in the proceedings, as it is considered to have waived its right to object, and the other party relied on this waiver. For example, in two decisions dated February 7, 2008,[7] and April 10, 2008,[8] the Paris Court of Appeal declared inadmissible the challenge of an arbitrator on the ground of the principle of estoppel. In the first case, the claimant ''after having questioned the independence of [the arbitrator] in a letter addressed to the arbitrators on 18 October 2004, . . . had filed a request challenging him

[4] 2005 *Rev. Arb* 993 n.1.

[5] Société Baste SA v. Société Lady Cake Feine Kuchen GmbH, CA Paris, Sept. 20, 2007, 2007.I. *JCP Gen.* 216 comment by J. Beguin, 2008 *D pan.* 188, comment T. Clay; 2008(60) *Petites Affiches* 3, comment by S. Clavel.

[6] Société Française de Rentes et de Financements Crédirente v. Société Compagnie Générale de Garantie SA, CA Paris, Feb. 7, 2008, 06/01279 (Lexbase).

[7] *Id.*

[8] SAS C22 v. Société John K. King & Sons Limited, CA Paris, Apr. 10, 2008, 06/15636 (Lexbase).

only at the end of December 2005,'' when the final award had already been rendered. The Court held that the claimant had lost its right to object due to its failure to promptly take action following the October letter.

In the second case, the parties proceeded with the arbitral proceedings without raising any objections concerning the composition of the tribunal. When the initial award was set aside by an English judge on a point of law, the case was sent back to the same arbitrator, who rendered a second award. At this point, the French company tried to resist enforcement in France on the basis that the tribunal was the same, and, therefore, was not independent. This attempt was unsuccessful, however, with the tribunal determining that what appeared to be an agreement by the parties as to the composition of said tribunal was sufficient grounds for applying the principle of estoppel and enforcing the award.[9]

The principle of estoppel as recognized in France does not necessarily resemble that of common law countries. Many civil law national systems recognize similar concepts; Germany and Switzerland, for instance, adopt this principle as the maxim ''*non concedit venire contra factum proprium.*''[10] Moreover, this principle has long been used in arbitral case law.[11]

The principle of estoppel, as described by the decisions of the Paris Court of Appeal reported above, is most similar to the rule of estoppel as used in international law practice. The International Court of Justice, in its decision *El Salvador v. Honduras,* defined the following as the essential elements required by estoppel, ''a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.''[12] Estoppel, as understood in international law, is a broader concept than the original common law principle. It is more adapted to the French legal system and easier to reconcile with the decisions of French courts on the issue. Further decisions will be required to confirm this, but it undeniably seems to be the most logical definition of the French principle of estoppel.

[9] *Id.*

[10] *Fouchard Gaillard Goldman on International Commercial Arbitration* § 1462 (1999).

[11] Ph. Pinsolle, ''Les applications du principe d'interdiction de se contredire au détriment d'autrui en droit du commerce international,'' in *L'interdiction de se contredire au détriment d'autrui* 37 (M. Béhar-Touchais ed., 2001); ''Distinction entre le principe de l'estoppel et le principe de bonne foi dans le droit du commerce international,'' 125 *JDI* 905 (1998); E. Gaillard, ''L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international (le principe de l'estoppel dans quelques sentences arbitrales récentes)'' 1985(2) *Rev. Arb.* 241.

[12] Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application to Intervene, Judgment, 1990 I.C.J. 92, at 118.

OBLIGATION OF THE PARTIES TO RAISE PROCEDURAL OBJECTIONS AS EARLY AS POSSIBLE IN THE PROCEEDINGS AND TO THE ARBITRAL TRIBUNAL ITSELF

It is a general principle of international arbitration that a party cannot keep its objections relating to alleged procedural flaws to itself and raise them for the first time at the annulment stage.[13] France is no exception. The parties have an obligation to raise procedural objections before the arbitral tribunal each time that it is possible. This rule enables the arbitral tribunal, or the relevant authority supervising the arbitration, whenever possible, to fix the problem themselves.

Should a party raise objections too late, they will then be declared inadmissible. Moreover, if the right to subsequently challenge the award may be lost by a positive act, that is, confirming that there is no objection, it can also be lost by a mere abstention. If one party has reason to believe that it is suffering harm due to a violation of its procedural rights, it must, therefore, attempt to cure the problem during the course of the proceedings rather than wait for the end of the process. Otherwise, its right to challenge the award for that reason will simply be lost.[14]

This rule is quite strictly applied by French courts. The Paris Court of Appeal, for instance, stated as a general principle that objections should be raised when possible to the arbitral tribunal itself.[15] In this decision dated February 22, 2007, the Court found that where one arbitrator became an employee of the same group of companies as one of the parties, the opposing party's failure to object promptly was fatal. Instead, when the opposing party then lost and sought to set aside the award based on the fact that the arbitrator was not independent, the Court refused. The Court further applies this principle to all procedural objections and in particular to the challenge of a member of the arbitral tribunal, the violation of the applicable arbitration rules, the extension of the delay of the arbitral proceedings, the order to provide simultaneous legal opinions, the language of the proceedings, etc.

As a matter of fact, in a decision dated March 6, 2008, the Paris Court of Appeal refused to set aside an award, as the award itself did not reveal any

[13] *Fouchard Gaillard Goldman on International Commercial Arbitration* § 1606 (1999); J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration*, § 555 (2007).

[14] *Fouchard Gaillard Goldman on International Commercial Arbitration* § 1067 (1999); A. Redfern & M. Hunter with N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, § 4-76 (4th ed. 2004); J.D.M. Lew, L.A. Mistelis & S.M. Kröll, *Comparative International Commercial Arbitration* § 13-21 (2003).

[15] Société Worms Services Maritimes SA v. Société CMA-CGM SA, CA Paris, Feb. 22, 2007, 05/20604 (Lexbase).

sign of the lack of independence of the tribunal and as any other prior events showing such lack of independence had not been mentioned earlier in the proceedings.[16] Similarly, in the context of a China International Economic and Trade Arbitration Commission (CIETAC) arbitration, in which the rules for nomination of an arbitrator had not been followed, the same Court judged once more that, ''to be admissible, the alleged objection pursuant to article 1502 must be raised, each time this is possible, before the arbitral tribunal itself,'' and as there is no doubt that the concerned party ever objected during the course of the arbitral proceedings, the objection is now inadmissible.[17]

In the same CIETAC arbitration, the relevant rules provided for arbitration in Chinese in the absence of choice by the parties. However, an order of the arbitral tribunal allowed for some documents to be exchanged in English and some use of the English language for interpretation purposes at the hearing. At the annulment stage, a party objected to the use of the English language,as it violated the CIETAC rules. Because this party had not voiced any objection to the arbitral tribunal on that matter, it was once more precluded from mentioning such objections at this stage.[18]

In fact, the mere absence of objection to the extension of the delays in the proceedings is enough for the Court to consider that a party is precluded from the right to object at the annulment stage.[19] Where the concerned party could have objected directly to the arbitral tribunal and failed to do so, the Court rejected its later objection. However, in that case, the objecting party had also expressly accepted the extension and had therefore waived its right to object later.

There are further examples of the Court's jurisprudence insofar as the timing of procedural objections is concerned. In one such case, at the end of the final hearing, the arbitral tribunal accepted pleading notes from one of the parties, which the other party did not receive at that time.[20] This second party did not protest. When the second party then lost the arbitration, however, it tried to set aside the award on the basis that the parties had been treated unequally. The Court rejected this argument because the party had failed to protest at a relevant time before the arbitral tribunal when there was potential for the problem to be solved. As the party

[16] Société Concurrence SA v. Société Sony France SA, CA Paris, Mar. 6, 2008, 06/14765 (Lexbase).

[17] Société Thimonnier v. Société Inner Mongolia Yili Industrial Group Co. Ltd., CA Paris, Jan. 31, 2008, 06/15363 (Lexbase).

[18] *Id.*

[19] S.A. Capitol Film v. S.A. Eurozoom, CA Paris, Apr. 3, 2008, 06/17712 (Lexbase).

[20] Société MTN v. Poly Tech Radiant Inc., CA Paris, Oct. 11, 2007, 07/01353 (Lexbase).

had not objected earlier, it was considered by the Court as having waived its right to object.

The same applies to a party who did not object to an order of the arbitral tribunal requesting both parties simultaneously to provide a legal opinion on the arbitrability of the counterclaim in the case.[21] Specifically, one of the parties changed its prayer for relief only in its post-hearing brief: initially, it had prayed for relief from invalidity of a patent, but in the post-hearing brief, it claimed for damages. The second party did not react to this change. When the first party was awarded damages, however, the second party then complained before the French Court, protesting what it called the procedural inequality between the parties, since it did not have the opportunity to respond to the modified prayer for relief. The Court, however, rejected this argument finding that the second party's complaint should have been raised as soon as it was possible before the arbitral tribunal.

It follows that, in practice, a party who suspects the existence of a reason to doubt that its rights are respected in the proceedings has no option but to mention it immediately to the arbitral tribunal in order not to lose its right to challenge the award at the end of the process. The general obligation of the parties to object to the arbitral tribunal is now, moreover, often reinforced by the principle of estoppel, as already mentioned above, as the facts leading to either of these solutions are often similar.[22]

This principle is however to be distinguished from the rule explained above, since what is in play in the principle of estoppel is not only the behavior of a party, but also how the other party perceives this behavior and adapts its own accordingly. Moreover, whereas the principle of estoppel aims at protecting the party suffering from surprise behavior by the other party, the necessity of objecting as early as possible to the arbitral tribunal aims at protecting the arbitral process itself.

PUTRABALI CASE—THE EXISTENCE OF AN ARBITRAL LEGAL ORDER

On June 29, 2007, the French *Cour de Cassation* rendered a landmark decision in the *Putrabali* case.[23] The decision's importance is due to the fact

[21] Centre Technique des Industries Mécaniques v. Société SDT International, CA Paris, Mar. 13, 2008, 06/12878 (Lexbase).

[22] SAS C22 v. Société John K. King & Sons Limited, CA Paris, Apr. 10, 2008, 06/15636 (Lexbase).

[23] Société PT Putrabali Adyamulia v. Société Rena Holding, Cass. Civ. 1, June 29, 2007. For a commentary and an English translation of the decision, see Ph. Pinsolle, ''The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali,'' 24(2) *Arb. Int'l* 277, at 293 (2008). This decision has already been

that it provides a firm theoretical foundation for the solution adopted by French courts since the famous *Hilmarton* case.[24] regarding the enforcement in France of awards set aside in their country of origin.

The underlying dispute in the *Putrabali* case was a maritime one, related to the obligation of a buyer to pay for goods that sank during their transportation. The sellers (P.T. Putrabali Adyamulia) initiated arbitration under the rules of the International General Produce Association Ltd. (IGPA), as provided for in the contract. The board of appeal of IGPA rendered an award, dated April 10, 2001, in which it considered that Rena Holding did not have to pay the claimed price. The award was then appealed on points of law before the English High Court, which led the award to be partially set aside on May 19, 2003. Following the High Court's decision, a second award was rendered in the case on August 19, 2003, directing Rena Holding to pay to Putrabali an amount of €163,086.04.

In the meantime, the buyers, Rena Holding, presented the first award, dated April 10, 2001, for *exequatur* in France. *Exequatur* was granted and Putrabali appealed the decision before the Paris Court of Appeal. As per the constant position of French courts on the issue, this Court upheld the decision granting recognition and enforcement of the award in a judgment of March 31, 2005.[25] It stated that the grounds for refusing enforcement in France of an international arbitral award were exhaustively enumerated by Article 1502 of the French Code of Civil Procedure and that the fact that the award had been set aside in the country of origin was not one of those grounds.

The *Cour de Cassation* confirmed the lower Court's decision reasoning that

> an international arbitral award—which is not anchored in any national legal order—is an international judicial decision whose validity must be

published and commented in French in a great number of legal journals: 192 *Petites Aff.* 20 (2007), comment by M. de Boisséson; 2007 *Dalloz Actu. Jur.* 1969, comment by X. Delpech; P.-Y. Gautier obs, http://www.avocats.fr/space/edouard.bertrand (Oct. 4, 2007); *JCP.*IV.2606 and 2607 (2007); 2007 *Dalloz Panor.* 180 and 2007 *JDI* 1236, comments by Th. Clay; 2007(3) *Rev. Arb.* 507, 517, comment by E. Gaillard; 2007 3 *Gaz. Pal. Cah. Arb.* 14, comment by Ph. Pinsolle; and 2007 *ASA Bull.* 826, comment by P.Y. Gunter. Forthcoming: 2007 *Dalloz*, comment by L. Degos; 2007 *J. Int'l Arb.*, comment by A. Mourre; 2007 *Rev. Jur. D Aff.*, comment by J.-P. Ancel.

[24] Hilmarton, Cass. Civ. 1, Mar. 23, 1994, (1995) 20 *Y.B. Com. Arb.* 663 (1995); 1994(2) *Rev. Arb.* 327, comment by Ch. Jarrosson; 1994 *JDI* 701, comment by E. Gaillard; 1994 *RTD com.* 702, comment by J.-Cl. Dubarry and E. Loquin; 1995 *Rev. Crit. DIP* 356, comment by B. Oppetit; 1995 23 *Petites Aff.* 8 (2ème esp.), comment by G. Parléani.

[25] Putrabali, CA Paris, Mar. 31, 2005, 2006(3) *Rev. Arb.* 665, comment by E. Gaillard.

> ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought. Under Art. VII of the [1958 New York Convention], Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules. It could also base its request on the French rules on international arbitration, which do not provide that the annulment of an arbitral award by the courts of the country where it was rendered is a ground for refusing its recognition and enforcement.[26]

The foundations of the *Putrabali* decision are innovative in two ways: the *Cour de Cassation* affirms that an international arbitral award is not anchored in any national legal system and it qualifies the arbitral award as an *international judicial decision*.

In former decisions, the Court founded its reasoning on the absence of incorporation of the arbitral award into the legal order of the country of origin.[27] However, in the *Putrabali* case, the Court went further and affirmed that the arbitral award is not incorporated in *any state legal order*. Not only is the arbitral award autonomous from the legal order of the place of arbitration, it is autonomous from all national legal orders. This autonomy from all national legal orders does not imply, however, that the Court considers the award to belong to any order at all. It rather confirms the existence of an arbitral legal order which is independent from national legal orders.[28]

Such existence of an international arbitral order distinct from any national legal order will no doubt be questioned by many practitioners of the arbitration community. It must be remembered, however, that, back in 1963, when the same Court affirmed for the first time the notion that the arbitration agreement could be separated from the underlying contract,[29] the idea was no less revolutionary and no less subject to criticism. The fact that, today, the principle of separability of the arbitration agreement is internationally accepted and recognized as one of the foundations of the

[26] 2007(3) *Rev. Arb.* 507, 517, comment by E. Gaillard; 2007 3 *Gaz. Pal. Cah. Arb.* 14, comment by Ph. Pinsolle.

[27] Hilmarton, Cass. Civ. 1, Mar. 23, 1994; *see supra* note 2.

[28] On the notion of an arbitral legal order, see E. Gaillard, ''Aspects philosophiques du droit de l'arbitrage international,'' 2008 *RCADI*; E. Gaillard, ''Souveraineté et autonomie. Réflexions sur les représentations de l'arbitrage international,'' closing conference speech, *reprinted in* 2007 *Revista Brasileira de Arbitragem* (forthcoming) and 2007 *JDI* 1163.

[29] Gosset, Cass. Civ. 1, May 7, 1963, 1963 *JCP, Ed. G*, Part II, No. 13405, and B. Goldman's note; 1964 *JDI* 82, comment by J.-D. Bredin; 1963 *Rev. Crit. DIP* 615, comment by H. Motulsky; 1963 *Dalloz Jur.* 545, comment by J. Robert.

success of international arbitration worldwide, allows one to hope for the eventual equal success of this conception of arbitral legal order. This would, no doubt, have far-reaching consequences for international arbitration.

The second foundation, upon which the French *Cour de Cassation* based its acceptance of the Court of Appeal's granting enforcement of an award set aside in the country of origin, is the fact that an award is an ''international judicial decision.'' This means that the international arbitral award is considered to be a judicial decision *per se*. It does not need to be blessed by any national court to be recognized and enforced. The recognition of an international arbitral award as an international judicial decision therefore has as an immediate consequence the recognition of an international arbitral order.

The consequences of the *Putrabali* case are therefore that the French courts will scrutinize awards according to their own principles without paying any attention to the history of the award in its country of origin. Following this logic, only the courts of the countries where enforcement is sought should decide on what grounds such enforcement is granted. This solution gives priority to the efficiency of arbitration rather than applying throughout the world the decision rendered by the court of the country of origin, which could result in an arbitral award being enforceable nowhere. This solution is moreover consistent with the choice of the parties who chose arbitration in a desire to settle their disputes in a neutral and independent forum. Such an innovation, once more demonstrates the role of France in defining international standards for arbitration.

DECISION OF MARCH 13, 2007—NO CONTRACTUAL MODIFICATION RIGHTS TO RECOURSE OPEN AGAINST AN ARBITRAL AWARD IN FRENCH LAW

In a very recent decision,[30] the U.S. Supreme Court considered that the Federal Arbitration Act (FAA) statutory grounds for vacating or modifying an award are exclusive with regard to enforcement under the FAA's expedited judicial review mechanisms. Rejecting both the argument that expandable judicial review authority has been accepted as the law and that supplemental review should be allowed because arbitration is a ''creature of contract,'' the Court instead ultimately concluded that parties cannot attempt to draft agreements that would contravene the FAA's statutory grounds.

[30] Hall St. Assocs. LLC v. Mattel, 128 S. Ct. 1398 (2008), *available at* http://www.supremecourtus.gov/opinions/07pdf/06-989.pdf.

These statutory grounds are further determined not to be malleable, leading the Court to conclude that a contrary holding would fight the plain meaning of the text, which substantiates a policy in favor of limited review. The particular scope of this holding should be noted, however: it seems that this decision only applies to FAA arbitration since the Court decided nothing with regard to other possible means of seeking judicial enforcement of an award. Parties could therefore potentially supplement such grounds in other arbitration contexts.

Conversely, it is well established in French case law that parties to an international arbitration agreement cannot provide for supplementary means of recourse. They do not have the right to derogate from the means of recourse provided for in Article 1504 of the Code of Civil Procedure, which are considered mandatory regardless of the possible, contrary agreement of the parties.

The Paris Court of Appeal had the occasion to affirm this principle as early as 1989 in a case between a French and a Swiss company.[31] When a dispute arose between the parties, both companies agreed to the nomination of an *ad hoc* arbitrator who would rule ''without considering the provisions of the Code of Civil Procedure.'' It was also provided in the agreement that the award could be appealed, notwithstanding the fact that no appeal is possible in France against an arbitral award rendered in an international matter.

Confronted with the attempted appeal of the award, the Paris Court of Appeal ruled that ''the parties to an international arbitration do not have the power to create a means of recourse which is not provided for under the mandatory provisions of the law of the country where they have intended to locate [the arbitration].'' However, in addition to the statement of this principle, the Court added that as the arbitration agreement contravened mandatory provisions of the Code of Civil Procedure, it should be voided. Further, the Court explained that the consent of the parties to arbitration was doubtlessly given only because of the agreed appeal. The nullity of the arbitration agreement logically voided the award.

The impossibility of providing for supplementary means of recourse was therefore sufficient grounds for the vacation of both the arbitration agreement and the award. The solution has, however, changed due to the pressure of the Paris Court of Appeal, which, although it repeatedly rejected appeals against international arbitration awards, stated that this rejection implied different consequences.[32]

[31] Société Binaate Maghreb v. Société Screg Routes, CA Paris, Dec. 12, 1989, 1990(4) *Rev. Arb.* 863, comment by P. Level.

[32] SARL HEC Ecole des Hautes Etudes Commerciales v. SA Citcom, CA Paris, Oct. 19, 2000,; Chefaro International BV v. Barrère et autre, CA Paris, Oct. 2, 2003;

For example, when a Belgian company applied for the setting aside of an award rendered in Paris concerning a dispute between itself and an Irish company, on the ground that the arbitration agreement provided for the possibility of an appeal although the context of the dispute was international, the Paris Court of Appeal refused to proceed or to consider setting aside the award.[33] The Court reaffirmed the principle that means of recourse provided for by the Code of Civil Procedure are mandatory, but nonetheless confined its ruling to hold that only the agreement of the parties to appeal should be set aside, not the entire arbitration agreement.

This is the solution that the *Cour de Cassation* recently confirmed.[34] In an international brand license agreement, the parties had, once again, agreed on arbitration as a way to resolve their dispute, mentioning however the possibility of appealing the award. When the Dutch company, party to the agreement, applied to set aside the award on the ground that the parties would not have agreed to arbitration without the possibility of appeal, the *Cour de Cassation* applied precisely the case law developed by the Paris Court of Appeal.

The Court stated as follows: ''regarding international arbitration, the means of recourse available under Article 1504 of the new Code of Civil Procedure are mandatory and exclude appeal of the award, regardless of any contrary agreement of the parties . . . as the parties have agreed to proceed to arbitration, only the provisions of their agreement concerning the possibility to appeal should be considered inoperative'' such that the scope of judicial review of a contract cannot be enlarged or modified by the judge or by the annulment court.

In considering the evolution of French doctrine with regard to the scope of review, there is one very recent case that should be examined: the *SNF v. Cytec* case from June 2008, dealing with EU anti-trust law and touching on international public policy and the extent of review by an annulment court.[35] In fact, this is the first case in France in which the Supreme Court actually decided what the scope of review would be. The case was about an arbitration taking place in Belgium and regarding the validity of a supply contract, which the arbitrators concluded was invalid under EU law, leading them to annul the contract and award damages.

In the damages award, the party that had resisted the annulment received more than what it had initially claimed at the beginning of the

SA Marion v. SRL Molino Peila, CA Paris, Oct. 16, 2003, Euton v. Ural Hudson, CA Paris, Feb. 19, 2004, all in 2004(4) *Rev. Arb.* 859, comment by L. Jaeger.

[33] Euton v. Ural Hudson, CA Paris, Feb. 19, 2004, 2004(4) *Rev. Arb.* 873.

[34] Chefaro International BV v. Barrère et autre, Cass. Civ. 1, Mar. 13, 2007, 2007(3) *Rev. Arb.* 499, comment by L. Jaeger.

[35] Société SNF v. Société Cytec Industries BV, Cass. Civ. 1, June 4, 2008, No. 06-15.320.

arbitration for performance of the contract (bearing in mind however that the amount of the claim initially made was subsequently increased during the course of the arbitration). Thus, by awarding damages in such an amount, the arbitral tribunal had arguably (according to a particular interpretation) penalized the party that had tried to annul the contract. The award was annulled by the Belgian court, but, in the meantime, it had been recognized in France where the system is faster. The recognition was confirmed by the Paris Court of Appeal, and the case was brought before the *Cour de Cassation*. The question upon which the case reached the French Supreme Court was to what extent should the court review the work of arbitrators when it concerns international public policy?

The French Supreme Court decided that there would be no review of the merits of the case: only if the award is flagrant, actual, and concrete would they annul the award, a very high threshold for review.

This decision was rendered quite recently and is likely to attract commentary, since it means in practice that the French Court will not review the merits of an award, even for the purpose of controlling international public policy.

The new official position of French courts, as expressed by the *Cour de Cassation,* should be approved because the essence of the arbitration agreement is the parties' consent to submit their dispute to arbitration, whereas appeal is solely a way to perform the agreement. In conclusion, there remains no possibility in French law of modifying the means of recourse against international arbitral awards by the parties' agreement. However, the arbitration agreement remains in force, excluding the provision providing for the possibility of appealing the award.

Recent Austrian, German, and Swiss Judicial Decisions Involving International Arbitration

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INTRODUCTION

Austria, Germany, and Switzerland as Players in International Arbitration

It is my task to report on important decisions related to international arbitration by (in alphabetical order) Austrian, German, and Swiss Courts. All three countries are major players in international arbitration but for different reasons (now in inverse alphabetical order):

1. Switzerland serves as one of the important host countries of international arbitrations, competing in this capacity with cities like Paris, London, and New York. It is highly regarded as a perfect neutral place, having a qualified multilingual legal community hard to find elsewhere.[1] It has beautifully located cities like Geneva, Zurich, or Lausanne. Swiss chairpersons of an arbitral tribunal sitting in Switzerland seem to be more conscious of the time and costs of an international arbitration[2] than arbitrators from other countries. In general, evidentiary hearings taking place in Geneva or Zurich tend to be shorter than those run in London or New

[1] It is not surprising that in institutional arbitrations run under the auspices of the International Chamber of Commerce (ICC) Switzerland scores the significantly highest number of international arbitrators with 16.02 percent, followed by the United States with 11.17 percent, Germany with 10.12 percent, the United Kingdom with 7.80 percent, and France with 7.59 percent (18(1) *ICC Int'l Court of Arb. Bull.* 10 (2007)).

[2] Saving time and costs has become a must in international arbitration, if it wishes to remain competitive within the different dispute settlement systems; see ''Techniques for Controlling Time and Costs in Arbitration,'' 18(1) *ICC Int'l Court of Arb. Bull.* 23 (2007).

York. And one has never heard that the awards rendered in Geneva or Zurich, after having taken half the time needed elsewhere, are of lesser quality. Swiss efficiency also applies to annulment proceedings before the court at the seat of arbitration. There is only one opportunity allowed. The Swiss Federal Supreme Court seated in Lausanne is the first and final court in annulment proceedings against a Swiss award rendered in an international arbitration according to Article 191 of the Swiss Private International Law Act (PILA).[3] Switzerland is also the seat of the Court of Arbitration for Sport (CAS) which resides in Lausanne. CAS is not only involved in deciding anti-doping issues with athletes during major events like the Olympics, but is also settling commercial disputes within commercialized sports like tennis or soccer, which have turned into major international businesses. Some of the Swiss judgments discussed below therefore relate to decisions rendered by CAS arbitral tribunals.

2. Germany clearly ranks behind Switzerland as far as the number of chairpersons in international arbitrations are concerned or as chosen place of an international arbitration. There it is only midfield. But it is still the major exporting country of the world. It is only natural that it ranks high as far as the number of users of international arbitrations are concerned. The major significance of its court decisions on international arbitration therefore lies in enforcement proceedings of foreign arbitral awards under the New York Convention[4] against German parties. Germany is a federal country with major arbitration centers in Hamburg, Cologne (seat of the German Arbitration Institution (DIS)), Frankfurt, and Munich, which all belong to different *Länder* (states). Enforcement or annulment proceedings start at the *Land* (state) of the German party involved, but always at the level of a Higher Regional Court (*Oberlandesgericht*), Section 1062 German Code of Civil Procedure

[3] PILA art. 191:

(1) The action for annulment may only be brought before the Federal Supreme Court. The procedure applicable to the annulment is governed by the provisions of the Federal Statute of the Organisation of the Federal Judiciary regarding the constitutional complaint.

(2) The parties may agree that the state judge at the seat of the Arbitral Tribunal decides in lieu of the Federal Supreme Court; his decisions is final. For this purpose the cantons shall designate a sole cantonal authority.

[4] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

(GZPO).[5] Appeals against their judgments are possible to the *Bundesgerichtshof* (German Supreme Court) but accepted there only in true landmark cases. The ratio at present stands approximately 5 to 1 against acceptance. So there are only 3-5 decisions by the *Bundesgerichtshof* annually on matters of international arbitration.

3. Austria has traditionally been a major player in East-West arbitration during the East-West divide under the auspices of the International Arbitral Center of the Austrian Federal Economic Chamber. Not surprisingly, Austria has been able to hold its ground after the fall of the Berlin Wall in 1989. Polish and Czech parties still prefer to settle their disputes by arbitration in Vienna instead of Munich, Zurich, or London. However, judicial proceedings in matters of international arbitration may be a bit cumbersome there. One has to start at ground level at a *Landesgericht* as court of first instance, with an *Oberlandesgericht* as court of appeal, and the *Oberste Gerichtshof* as the final and third instance.

Significance of the United Nations Commission on International Trade Law Model Law

Austria[6] and Germany[7] are both countries that have almost one to one enacted the United Nations Commission on International Trade Law Model Law (UNCITRAL-ML) as their national law for domestic and international arbitration. However, the UNCITRAL-ML of 1985 was only concerned with

[5] GZPO § 1062(1)(1)-(4):

(1) The Higher Regional Court (''Oberlandesgericht'') designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to

1. the appointment of an arbitrator (§§ 1034 and 1035), the challenge of an arbitrator (§ 1037) or the termination of an arbitrator's mandate (§ 1038);
2. the determination of the admissibility or inadmissibility of arbitration (§ 1032) or the decision of an arbitral tribunal confirming its competence in a preliminary ruling (§ 1040);
3. the enforcement, setting aside or amendment of an order for interim measures of protection by the arbitral tribunal (§ 1041);
4. the setting aside (§ 1059) of the declaration of enforceability of the award (§1060 et seqq.) or the setting aside of the declaration of enforceability (§ 1061).

[6] Austrian Arbitration Act of 2006, Austrian Code of Civil Procedure (AZPO) §§ 577-616.

[7] Schiedsverfahrensreformgesetz of 1997, AZPO §§ 1025-1066.

arbitrations between two parties and did not provide for rules that could be used to set up a tribunal for multiparty-arbitration. In spite of the famous *Siemens/Dutco* decision by the French *Cour de Cassation* of 1992[8] the German law maker in 1997 was not bold enough to develop the arbitration law further in this respect. The Austrian Parliament in its new law of 2006 devised in AZPO Section587(5)[9] a very simple rule, whereby the missing arbitrator in a multiparty arbitration is appointed by the court, should the parties that are jointly under the obligation to appoint only one arbitrator turn out to be unable to do so. However, for the time being (fall 2008) there is not yet a decision by the Austrian Supreme Court on the appointment of a multiparty arbitral tribunal.

Switzerland, when it enacted in 1987 the Private International Law Act—PILA—by intent did not incorporate the UNCITRAL-ML. But strikingly to any outside observer, the decisions of the Swiss Supreme Court on the PILA-provisions related to international arbitration are very similar or sometimes even close to identical to judgments rendered by the Austrian or German Supreme Court: This is particularly true with respect to the independence or impartiality of arbitrators, the right to be heard (*rechtliches Gehör*) or due process and public policy. In fact, as far as the development of a jurisprudence on international public policy is concerned, the Swiss Supreme Court seems to have taken the lead with the Austrian and German Courts following.

INDEPENDENCE OR IMPARTIALITY OF AN ARBITRATOR

Swiss Decision of March 20, 2008

The provisions of Swiss law, on the one hand, and Austrian/German law, on the other, could not be more different in allowing for annulment or challenge proceedings due to a lack of independence or impartiality of an arbitrator. PILA Article 190(2) reads as follows:

> The award may only be annulled:

[8] Siemens/Dutco, 19 *Y.B. Com. Arb.* 140 (1993).

[9] AZPO § 587(5):

> (5) If several parties who together must appoint one or more arbitrators cannot agree on the appointment(s) within four weeks of receipt of a written request to do so, then the arbitrator(s) shall be appointed by a court in response to a request by a party, unless the agreement on the appointment procedure provides other means for securing the appointment.

> (a) if . . . the Arbitral Tribunal was not properly constituted . . .

The wording of UNCITRAL-ML Article 12(2) = AZPO Section 588 (2) = GZPO Section 1036(2) is more complex:

> An arbitrator may be challenged only, if circumstances exist that give rise to justifiable doubts as to his impartiality or independence . . .

But the landmark decision rendered be the Swiss Supreme Court on March 20, 2008,[10] in the French language, would most probably be very similar if a similar case had been decided by the Austrian or German Supreme Court.

The award, which gave rise to the annulment proceedings under PILA Article 190(2) lit. (a), was rendered by a CAS tribunal sitting in Lausanne, on a dispute related to alleged damages suffered while organizing friendship soccer matches between national soccer teams just prior to the Football (Soccer) World Cup, which took place in Germany during the summer of 2006, run by the Féderation Internationale de Football Association (FIFA). In its final award the CAS arbitral tribunal had dismissed the claim. The claimant then started annulment proceedings before the Swiss Supreme Court, alleging that the impartiality and independence of the members of the CAS arbitral tribunal had been lacking during the arbitration. Two members of the tribunal belonged to a scientific association related to sports, having only 26 members. The Swiss Court made five important points that could almost be qualified as ''best international practice for decisions by state courts concerning the independence and impartiality of international arbitrators.''

1. *Arbitrator has same function as a judge:* In deciding a dispute falling under an arbitration agreement between the parties, an arbitral tribunal fulfills the same function as does a state court. The requirements related to the independence and impartiality, which have to be observed by a state court judge, are in principle also applicable to an international arbitral tribunal. However the nature (*spécificités*) of international arbitration and the particularities of the actual case to be decided need always to be taken into consideration. Arbitration in matters related to sports does not justify a lesser standard.
2. *Impartiality must be objectively justified:* Impartiality is an internal disposition the absence of which is hard to prove. It is therefore sufficient if the circumstances of the case give rise to a suspicion

[10] 4 A 506/2007, *available at* http://www.bger.ch/juridiction.

that there may be a lack of impartiality. But the personal or subjective impression of the party doubting the impartiality of an arbitrator is not sufficient. Such doubts must be objectively justified as if considered and evaluated with the eyes of an independent third party. Only if existing doubts are objectively justified will the challenged arbitrator be removed from his office.

The views of the Swiss Supreme Court are fully compatible with Art.12 (1) of the UNCITRAL Model-Law, requiring ''justifiable'' doubts and therefore an objective test. For the potential arbitrator to be able to accept the office offered to him, his subjective view is sufficient. If he personally feels impartial and independent there is no need for him to decline the appointment or resign once appointed. The subjective impartiality in favor of the arbitrator is to be presumed until the court has found the contrary.

3. *Challenge must be made immediately:* Any challenge must be made immediately, once the circumstances giving rise to the challenge have become known to the party. This obligation on the challenging party is part of the procedural good faith. The party may not sit and wait until in its own opinion the ongoing arbitration has taken a turn to his disfavor. The Swiss Supreme Court did not determine the length of time available to the aggrieved party to make a challenge before the competent authority (court or institution, whatever would be applicable). It may be safely assumed that the period of 15 days as provided for in Art.13 (2) of the UNCITRAL Model-Law would satisfy the requirement of an ''immediately'' raised challenge.

4. *Sources open to public inspection must be used:* A party may not choose to stay ignorant in light of publicly available information related to the arbitrator which a reasonable party would use. The obligation to make use of reasonably accessible public information derives again from the principle of procedural good faith. The Swiss Supreme Court even called it ''*la plus élémentaire prudence*'' to make use of such available information. Sources open to public inspection must be used at the time the arbitrator is appointed. They may not be used to justify a challenge at a later date which is not ''immediately'' with respect to the appointment procedure.

5. *Reference to IBA Guidelines:* The Swiss Supreme Court referred to the *IBA Guidelines on Conflicts of Interest in International Arbitration* of 2004. It was obvious to the Court that the IBA-Guidelines do not have the force of law. But it attested them to be ''*un instrument de travail précieux, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage*

> *international pour le règlement des conflits d'intérêts,"* which will influence the practice of the arbitration institutions and the courts. One may only hope and wish that some courts in other jurisdictions will take note of this attitude.

The Swiss Court then specifically referred to the Green, Orange, and Red lists of the International Bar Association (IBA) Guidelines and agreed with the Green list[11] that membership in the same professional, scientific, or social associations as such does not give rise to objectively justifiable doubts related to the impartiality or independence of an arbitrator. There must be additional elements present to objectively justify a challenge based on a joint membership, which were lacking in the eyes of the Court in the case decided.

Arbitrator's Loss of Fees Due to His Lack of Disclosure

The Austrian Supreme Court, in a decision of November 30, 2006,[12] in the German language, dismissed the claim of an arbitrator for fees normally earned, while sitting in Vienna under the rules of the International Arbitration Center of the Austrian Federal Economic Chamber. The arbitrator had been successfully challenged and replaced by the arbitral institution, because he had violated his obligations to disclose *sua sponte* serious facts to the parties that later on gave rise to the successful challenge. In the words of the Austrian Court the violation of the arbitrator's duty to disclose any circumstances that may give rise to challenge ''takes away'' his right to claim the customary fee for services already rendered, if he is removed from office by a successful challenge that is based on the facts the arbitrator failed to disclose in due time.

Under UNCITRAL-ML Article 12(1) = AZPO Section 588 = GZPO Section 1036(1), any arbitrator has a continuing duty to disclose automatically to the parties any circumstances that may give rise to doubt his impartiality or independence. This duty commences at the moment he is asked whether he would accept nomination or appointment and lasts until the arbitration is finally closed. These circumstances may directly affect his ability or capacity to be an arbitrator. Only an impartial and independent person is capable of acting as arbitrator and therefore entitled to the customary fee once he has rendered his services. It is then only consequent

[11] *IBA Guidelines on Conflicts of Interest in International Arbitration,* Pt. II, No. 4.4.1 (2004), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[12] 6 0b 207/06; an extensive English summary of the decision rendered in German is published in 2007 *SIAR* 79.

that a person lacking impartiality or independence who has nevertheless acted as arbitrator is not entitled to the customary fee.

KOMPETENZ-KOMPETENZ

Kompetenz-Kompetenz, or in more elegant French *compétence-compétence,* has for a long time been a favorite of dogmatics in the field of international arbitration. In old German doctrine and jurisprudence, it meant that an arbitral tribunal was the first and last to decide whether an arbitration agreement was valid. It was competent to decide the case once it had found the arbitration agreement to be effective. The court could only check whether the arbitration agreement had given to the arbitral tribunal the competence to decide finally on the validity of the arbitration agreement.

The old doctrine has been done away with in UNCITRAL-ML Article 16(3) = GZPO Section 1040(3) = AZPO Section 592. It reads as follows:

> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

It may be directly taken from the wording of UNCITRAL-ML Article 16(3), which is now German law, that an arbitral tribunal has only the first opportunity on the decision of its competence. The second and final opportunity is always with the state courts. Either an interim award in which the arbitral tribunal had confirmed its jurisdiction, or, in the absence of an interim award, the final award on the merits may be submitted to court review within the statutory time limits for a final decision by the state court at the seat of the arbitration, whether or not the arbitration agreement was valid.

The German *Bundesgerichtshof* in a judgment of January 13, 2005,[13] has confirmed this view. In the arbitration agreement subject to the scrutiny of the court, the parties had excluded any review by the courts of the arbitral award. The arbitral tribunal had confirmed its jurisdiction in its final award, holding the arbitration clause to be valid and therefore binding on the

[13] III ZR 265/03, BGHZ 162, 9, SchiedsVZ 2005, 95.

parties. The party having won the arbitration objected to the court review of the award initiated by the loser. The *Bundesgerichtshof* held that the statutory competence of the state courts—to review the validity of an arbitration agreement after an arbitral tribunal has confirmed its jurisdiction is compulsory and may not be abolished by agreement between the parties. It may be taken from this judgment that UNCITRAL-ML Article 16(3) is—at least in Germany—part of procedural public policy.

PUBLIC POLICY

There are two recent but very important decisions on public policy by the Swiss Supreme Court of March 8, 2006,[14] and of March 20, 2008.[15] Both are in the French language and based on PILA Article 190(2):

> The award may only be annulled: . . .
>
> (e) if the award is incompatible with public policy.

This is the corresponding Swiss statute to UNCITRAL-ML Article 34(2)(b)(ii)—which in turn corresponds with New York Convention Article V(2)(b). Both judgments almost summarize the modern doctrine on public policy. Four points may be derived from them, which are detailed in the following sections.

No Final Definition Possible

The Swiss Supreme Court described public policy as a legal notion the limits of which are hard to define once and for all, even though the Swiss Court had tried to do so for the last ten years, beginning with its *Westland Helicopters* decision.[16] It said ''*L'essence, la nature et les contours de l'ordre public restent encore fuyants,*'' and then wisely concluded that whether an arbitral award violated public policy in the sense of PILA Article 190(2)(e) depends on the circumstances of the case under review by the court, because the situations are too different to be summarized in one definition. But it described the subdivisions of public policies existing.

[14] 4P 278/2005, BGE 132 III 389 = ATF 132 III 389.

[15] 4A 506/2007. The decision is not yet published, but is available at the Web site of the Swiss Supreme Court, http://www.bger.ch/juridiction.

[16] Westland Helicopters, BGE 120 II 155 = ATF 120 II 155.

Procedural Public Policy

The Swiss Court considered as core elements of procedural public policy the independence and impartiality of the arbitral tribunal, the equal treatment of the parties by the tribunal, and due process (*rechtliches Gehör*). They are regarded as necessary for any state that is governed by the rule of law (*État de droit*). Any violation of one of these elements will therefore automatically lead to the annulment of an arbitral award. In more general terms used by the Swiss Court, procedural public policy is violated if the award rendered by the arbitral tribunal appears to be incompatible with the values recognized by a state bound by the rule of law (*"incompatible avec les valeurs reconnues dans un État de droit"*).

Substantive Public Policy

The Swiss Supreme Court then continues to define substantive public policy in general terms. Accordingly, an arbitral award is contrary to substantive public policy if it violates fundamental principles of substantive law in a way that may not be reconciled with the legal system (*l'ordre juridique*) and its determining values. These are in particular the principles of *pacta sunt servanda*, good faith, the prohibition of an abuse of rights, discriminating or spoliating measures, and the protection of persons legally incapable. Examples of actions of a criminal nature that violate substantive public policy are bribery or corruption, trade in human beings, and forced labor.

International Public Policy

The Swiss Court equates (Swiss) international public policy with a transnational public policy which is universally valid (*portée universelle*). Citing its earlier decisions, where it has said that the transnational or universal public policy is violated if the award is incompatible with the legal and moral principles recognized in all civilized states[17] or in states bound by the rule of law,[18] it recognized the political incorrectness of its earlier definitions, because they could imply a division of the world into two camps.

The decision of March 8, 2006,[19] was concerned with a possible violation of anti trust law of the European Community by the arbitral tribunal. The parties to an ICC arbitration with the seat of the arbitral tribunal in

[17] BGE 128 III 234, 243 = ATF 128 III 234, 243.
[18] BGE 128 III 191, 194 = ATF 128 III 191, 194.
[19] BGE 132 III 389 = ATF 132 III 389.

Switzerland were both Italian and the contract governed by Italian law. The contract may have involved price fixing during the bidding process for the high-speed train link between Milan and Naples. The Swiss Court used the circumstances of the case to state that (Swiss) international public policy is detached from any substantive national law and is nothing but a security valve (*soupape de sécurité*), which serves to protect only the most elementary principles (*principes cardinaux*) that, in the ideal, should be protected by any state.

Since Swiss anti-trust law and European anti-trust law according to Article 81 of the EC Treaty[20] differ substantially, it follows only naturally that

[20] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, as revised on Dec. 24, 2002, 2002 O.J. (C325) 33. EC Treaty art. 81 provides as follows:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) share markets or sources of supply;

   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   — any agreement or category of agreements between undertakings;

   — any decision or category of decisions by associations of undertakings;

   — any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

EU anti-trust law could not be part of (Swiss) international public policy. The Swiss Court therefore did not decide whether the arbitral tribunal did or did not apply the EU anti-trust law correctly and dismissed the appeal for lack of violation of PILA Article 190(2)(e).

The Swiss Supreme Court is to be applauded for its derivation and justification of international public policy in general terms. It recognizes EU anti-trust law as international public policy within the EU member States (i.e., within territorial limits). Seen with the eyes of someone who is a citizen of an EU member State, one may question whether two parties, which belong to the same legal system, may liberate themselves from a territorially limited international public policy common to both of them by choosing Switzerland as their place of arbitration. Should this Swiss award come up for enforcement proceedings in Germany under the New York Convention, a German Court would decide under Article V(2)(b) of the New York Convention whether the arbitral tribunal had in fact violated EU ant-trust law in its award. I assume that the courts of other EU member States would do likewise. Any violation of EU anti-trust law found by a court of a member State would lead to the non-enforcebility of the arbitral award in that State because it would violate EU international public policy.

WAIVER OF COURT REVIEW

PILA Article 192(1)[21] enables the parties of an arbitration agreement to waive the right to have the arbitral award reviewed by the Swiss Supreme Court in annulment proceedings, if all parties are non-Swiss residents or have their place of business outside of Switzerland. The waiver must be contained in an agreement between the parties, which may be part of the arbitration agreement. In a judgment of March 6, 2008,[22] delivered in the French language, the Swiss Supreme Court summarized its previous decisions on such waivers and at the same time extended its implications.

The agreement between an Italian and a French party on arbitration according to the rules of the Geneva (Switzerland) Chamber of Commerce contained the following clause: ''The parties renounce any ordinary or

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[21] PILA art. 192(1):

> If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment.

[22] 4 A 500/2007, BGE 134 III 260 = ATF 134 III 260.

extraordinary right of judicial review of the decision rendered.'' Nevertheless the party having lost the arbitration tried in vain to have the arbitral award annulled by the Swiss Federal Court. The Court made four important points.

Individual Agreement Necessary

PILA Article 192(1)is to be interpreted restrictively. The waiver of any annulment proceedings before the Swiss Federal Court must be expressly made in an agreement, demonstrating clearly and unmistakably the joint will of the parties to that agreement. An indirect waiver made only by reference to the arbitration rules of an arbitral institution, which contain a clause obliging the parties to waive the review of the final award by a court, is insufficient.[23] Whether the waiver has in fact been made expressly in an agreement between the parties will be decided by the Swiss Federal Court by means of interpretation. Concerning the waiver under review, the Court said it was hardly possible to express more clearly the common intention of the parties to renounce the right of review.

Valid Waiver Is Final

A waiver validly made in an agreement is final and binding on the parties. There will be no review of the arbitral award in annulment proceedings before the Swiss Supreme Court under any circumstances. If the arbitral tribunal assumes its competence where it has none under a valid arbitration agreement and therefore exceeds its competence, its award is nevertheless final and may not be reviewed. This is so even if the arbitral tribunal holds an arbitration clause to be valid that, in reality, is invalid, and the aggrieved party has objected to the jurisdiction of the arbitral tribunal from the very beginning of the proceedings. The loss of the right to court review before the Swiss Supreme Court is final.

As a rule of thumb and in consequence of the Swiss Supreme Court's judgment of March 6, 2008, a waiver according to PILA Article 192(1) is not recommended.

[23] An example of an insufficient waiver is Article 28, Section 6 of the ICC Rules of Arbitration. Any ICC award rendered in Switzerland may therefore be subject to annulment proceedings before the Swiss Federal Court according to PILA Article 190 et. seq.

Waiver of Review by Athletes Invalid

In a judgment of March 22, 2007,[24] the Swiss Supreme Court held the waiver of court review agreed individually between a professional tennis player and the Association of Tennis Professionals Tour (ATP Tour) to be invalid in spite of its full compliance with the words of PILA Article 192(1).

The anti-doping tribunal of the ATP Tour had barred the professional for two years from participating in any ATP tournaments but allowed review of its decision by the CAS in Lausanne under the following agreement: ''The decision of CAS shall be final and binding on all parties and no right of appeal will lie from the CAS decision. The CAS decision shall have immediate effect and all parties shall take actions to ensure that it is effective.'' The CAS tribunal had reduced the suspension from two years to 15 months. In spite of PILA Article 192(1), the Swiss Supreme Court accepted review of the CAS award in annulment proceedings initiated by the professional and at the end had the award annulled.

Ratio Legis *of Swiss Private International Law Act Article 192*

PILA Article 192 had been intended for international commercial arbitrations. There, the losing non-Swiss party could always have the final arbitral award reviewed by a court in *exequatur* or enforcement proceedings in the country where the winning party tried to have the award enforced. So in international commercial arbitration a losing party would never be without any court protection.

If athletes are suspended or banned from participating in sporting events by an award rendered in sports arbitration, no *exequatur* or enforcement proceedings are necessary. The athlete is simply banned by the organizers from participating in the competition. If a waiver of court review under PILA Article192 were valid, the athlete would be without any court protection at all. This would be in stark contrast to the court review available in *exequatur* proceedings necessary to enforce awards rendered in commercial arbitration.

No Equality Between Sports Organization and Athlete

The waiver agreement required by PILA Article 192 assumes the equality of the parties and their free will to enter into the agreement. Both conditions

[24] 4 P 172/2006, BGE 133 III 235 = ATF 133 III 235.

are absent in the relationship between the sports organization and the athlete. The athlete is simply required to accept the conditions imposed on him or her by the organization, if he or she wishes to participate in a competitive event organized by the organization.

If he or she is a professional athlete, earning his or her income from sports, the athlete is even forced to do so. These professionals would be reduced to mere amateurs if they were unable to participate in competitions organized by their professional organizations, thereby losing a substantial part of their income. Where additional sources of income, for example, from sponsors depend on their participation in organized competitive events the athlete could even lose all income.

Award Annulled at the Seat of Arbitration for Domestic Public Policy Reason, but Enforced Elsewhere

The Austrian Supreme Court, in a judgment of January 26, 2005,[25] had to decide in *exequatur* and enforcement proceedings whether an award rendered in Belgrade under the rules of the Yugoslav Chamber of Commerce, with no annulment proceedings there, was compatible with Austrian public policy. The Austrian party, having lost the arbitration, alleged forgery of the arbitration agreement and false testimony of a witness. In addition, the arbitral tribunal had awarded to the Yugoslav claimant interest of more than 100 percent on the principal amount.

The Austrian Supreme Court introduced an almost revolutionary idea not yet expressed in the *Chromalloy* decision by a U.S. district court,[26] where an arbitral award, rendered in Egypt and annulled by the Egyptian Supreme Court, was recognized and declared enforceable in the United States. In a broad general statement, the Court said that is was a natural consequence of international arbitration independent from State courts that an award, which had been annulled by a court in the State of origin for domestic public policy reasons, could be recognized and enforced elsewhere.

If the annulment in the state of origin were to automatically bar an award from being declared enforceable in any other country, this would be the end of an independent international arbitration. It is only for the court in exequatur and enforcement proceedings to decide whether the award violates the ordre public of the state where the award is to be enforced. In order to be held unenforceable in Austria, a foreign award must violate the

[25] 3 Ob 221/04b, JBl. 2005, 661.

[26] *In re* Chromalloy Aeroservs. and the Arab Republic of Egypt, 939, F. Supp. 907 (D.D.C. 1996), *reprinted in* 22 *Y.B. Com. Arb.* 1001 (1997).

most basic values of the Austrian legal order, which the court confirmed is rarely the case.

The Austrian Court then dismissed the allegation of a forged arbitration agreement. The argument should have been raised with the arbitral tribunal at the beginning of the arbitration. Neither was the mere allegation that a witness had given false testimony before an arbitral tribunal sufficient to justify a violation of Austrian public policy. But the interest of more than 100% awarded by the tribunal on the principal amount was held to be contrary to Austrian public policy. The court therefore refused to have the award enforced as far as the interest granted was concerned.

ENFORCEMENT OF A BILATERAL INVESTMENT TREATY AWARD AND SOVEREIGN IMMUNITY

The German *Bundesgerichtshof* in a decision of October 4, 2005,[27] refused to enforce a bilateral investment treaty (BIT) award obtained by a German citizen against Russia in Stockholm, Sweden, under the old Soviet Union-German BIT, which is still in force between Germany and Russia as a successor State of the Soviet Union. The award was a modest U.S.$.2.5 million, which Russia refused to honor even after it had unsuccessfully tried to have the award set aside in all three instances up to the Swedish Supreme Court.

The investor had tried in vain to execute against the fees owed by Lufthansa to Russia for its overflight and landing rights. In the *exequatur* and enforcement proceedings before the German courts, Russia had claimed sovereign immunity with regard to those fees, since they were allegedly part of the Russian State's income necessary to perform its public functions. The *Bundesgerichtshof* simply accepted the assertion that the fees were covered by sovereign immunity without testing its validity. It treated the BIT award as an ordinary commercial award against a State, where it suffices as a matter of customary international law for the State to assert that the assets executed against are protected by sovereign immunity because they are assets necessary for the function of the state with no need to further substantiate or prove the allegation.

The German-Russian BIT obliges Russia to ''immediately'' pay to the German investor the amount due to him according to the award. Russia's obligation to make immediate payment to the investor once the award has become final and binding is an obligation under the BIT treaty and therefore an obligation of international public law. The ''creditors'' of this

[27] VII ZB 09/05, 2006 *German Arb. J.* 47.

obligation are all federal authorities of the Federal Republic of Germany. Since the *Bundesgerichtshof* is the highest judicial authority of the German State, the court is also the ''creditor'' of this obligation of Russia as a ''debtor.''

Even though Germany had, in 1959, invented the BITs, of which there are by now more than 2,600 worldwide, the *Bundesgerichtshof* did not balance Russia's duty of immediate payment that it owes to the German authorities against its assertion of sovereign immunity claimed for the assets against which the investor tried to execute. The Court did not ''see'' Russia's obligation of international law that she had agreed to in the BIT treaty with Germany. If there is an international public law obligation of a State resulting from a BIT treaty to immediately pay the amount due to an investor, from an arbitral award rendered in the investor's favor, the simple assertion by the State that the assets executed against by the investor are protected by sovereign immunity, in my opinion is insufficient. Here the State has to prove its mere allegation. Otherwise, it violates once again its international public law obligation resulting from the BIT treaty.

After the *Bundesgerichtshof* had rendered its decision, one could read in the German newspapers that at Russia's request, Lufthansa would pay the fees it owed to Russia directly to Aeroflot, Russia's State-owned commercial airline—no sovereign immunity there.

Part III

Class Actions and Consolidation in International Arbitration

Overcoming Obstacles to Consolidation of International Arbitrations

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The desirability of consolidating two or more arbitrations, involving common issues of law or fact, first emerged in international trade arbitrations. The term ''trade'' distinguishes the thousands of international arbitrations that arise annually in shipping transactions, reinsurance, and commodities sales, from the very much smaller number of large but essentially isolated international commercial transactions, which are the source of a few hundred institutional arbitral proceedings that arise each year and are administered by the American Arbitration Association (AAA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), International Centre for Settlement of Investment Disputes (ICSID), and the North American Free Trade Agreement (NAFTA) as well as other organizations like the Iran-United States Claims Tribunal.

Characteristically, trade arbitrations often proceed *ad hoc* before lay arbitrators under rules drafted, but not administered, by a trade association. The claims rarely exceed seven figures and lawyers, while tolerated, are not necessarily always welcome.[1] Trade arbitrations have a long history. Maritime arbitration procedures were first codified in the 15th century *Consulate of the Sea*.[2] Marine insurance arbitrations were enforceable as far back as the 17th century *Marine Ordinances of Louis XIV*.[3] And commodities arbitrations took place in the medieval English *pied poudre* courts.[4]

[1] *E.g.*, British Coffee Association Arbitration Rule 26. In New York a party to an arbitration has a statutory right to be ''represented by an attorney'' at an arbitration. N.Y.C.P.L.R. § 7506(d). However, from personal experience of the author, in some trade arbitrations in New York, while an attorney may attend the hearings to counsel a client, he may not necessarily be given a right of audience to address the arbitrators. *But see* Mikel v. Scharf, 444 N.Y.S.2d 690 (2d Dep't 1981).

[2] Stanley S. Jados, *Consulate of the Sea and Related Documents* arts. 1, 22, 36, 41 (1975).

[3] Title Sixth, arts. LXX-LXXII, 30 Fed. Cas. 1203.

[4] Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* 335-39 (1930).

Although, in the past, parties sometimes chartered ships to carry their own goods, or ceded all of their reinsurance business to a single reinsurer, or sold raw commodities to sole end users, it became far more common after World War II for trade arbitrations to affect more than just two parties. Rather, there could be any number of parties in what were essentially a collection of closely related transactions.

The usefulness of consolidating arbitrations was apparent. Indeed, consolidation became mandatory under the arbitration rules of some grain and cocoa trade associations, which provide that where the same parcels of commodities have been sold and resold many times over before physical delivery, quality disputes will be heard only between the original seller and the ultimate buyer, with the results binding all of the other intermediate parties in the string.[5]

Consolidation can, of course, be authorized by agreement of the parties.[6] But, most often, consolidation of trade arbitrations occurs over the objection of one of the parties. And in the post-war years, the issue arose with increasing frequency, especially in New York and Connecticut, two of the states within the Second Circuit. New York is a global center for arbitration of maritime and commodities disputes; Hartford is very prominent in international reinsurance arbitrations.

A typical transaction in shipping occurs when a shipowner charters his ship (i.e., the owner leases the vessel) to a charterer who subcharters it to a third party—the subcharterer. Nearly 40 years ago, a dispute arose among the owner, charterer, and subcharterer of a ship that had carried sand and gravel. The cargo damaged the ship. The owner claimed against the charterer, which in turn sought indemnity from the subcharterer. If the claims had been in court, they would no doubt have taken the form of a third-party action.

Both the charter between the owner and the charterer, and the subcharter between the charterer and the subcharterer, contained separate but identically worded arbitration clauses providing for arbitration by three lay arbitrators in New York, one to be appointed by each of the parties and the third by the two so chosen. The party in the middle—the time charterer—brought suit in a New York state court, to consolidate the two arbitrations before a single tribunal, waiving its right to appoint an

[5] *E.g.*, Cocoa Merchants Association Arbitration Rule 2A; Grain & Feed Trade Association Doc. No. 125, Arbitration Rule 7.

[6] Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir.), *cert. denied,* 543 U.S. 917 (2004); Maxum Found v. Salus Corp., 817 F.2d 1086 (4th Cir. 1987). For a proposal about how to include consolidation of arbitrations in a contract, see J. Gillis Wetter, ''A Multi-Party Arbitration Scheme for International Joint Ventures,'' 3 *Arb. Int'l* 2 (1987).

arbitrator and agreeing to allow its fate in both disputes to be decided by an arbitrator selected by the owner, together with an arbitrator selected by the subcharterer, as well as a third arbitrator chosen by the two of them. The New York Court of Appeals held in the *Vigo* case—as a matter of both state and federal procedural law—that since there were common issues of law and fact in the two related arbitrations, a court could order them to be consolidated.[7]

A few years later, a federal court in New York was presented with a very different fact pattern in the *Nereus* case. There, a Liberian shipowner chartered its vessel to a Venezuelan charterer. An addendum to the charter provided that in the event of a default by the charterer, future performance of the charterer's obligations was guaranteed by a Spanish oil company on the same terms and conditions as the charter. All three parties signed the addendum.

The shipowner demanded arbitration separately, first against the charterer for default, and then against the guarantor. The Second Circuit ruled that as a matter of federal procedural law, the two arbitrations, which raised common issues of law and fact that were subject, not just to identically worded arbitration clauses, but actually the same arbitration clause, could be consolidated by a court in order to avoid inconsistent results.[8]

Following the *Vigo* and *Nereus* decisions, many arbitrations, particularly maritime arbitrations, were routinely consolidated in the New York State courts and the federal courts within the Second Circuit.[9]

Of course, with the exception of commodities string arbitrations, there was party autonomy. Parties could—and sometimes did—include a prohibition against consolidation in their arbitration agreements.[10]

[7] *In re* Vigo S.S. Corp., 26 N.Y.2d 157, 309 N.Y.S.2d 165, *cert. denied,* 400 U.S. 819 (1970). Thereafter, de facto consolidation of maritime arbitrations was often created without the need for a court order when a time charterer appointed as its arbitrator in the first arbitration (between the owner and the time charterer), the same person appointed to be an arbitrator by the subcharterer in the second arbitration (between the time charterer and the subcharterer); and the time charterer appointed as its arbitrator in the second arbitration, the same person appointed by the owner to be an arbitrator in the first arbitration.

[8] Compania Espanola de Petroelos v. Nereus, 527 F.2d 966 (2d Cir. 1975), *cert. denied,* 426 U.S. 936 (1976).

[9] See cases collected in Peter C. Thomas & Edmund C. Burns, ''Consolidation of International Arbitrations in the United States in the Wake of *Boeing*,'' 4 *Am. Rev. Int'l Arb.* 349, 353 n.24 (1993).

[10] American Institute of Architects (AIA) Doc. A201-2007 art. 4.6.4; *see* Del E Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987). The AIA now is more supportive of consolidation. AIA Doc. A 201-2007 art. 15.4.4.

But the ''default rule,''[11] which applied in New York and the Second Circuit, was the one announced in *Nereus*—that the courts had the power to consolidate arbitrations involving common issues of law and fact, under similarly worded arbitration agreements, provided that none of the clauses expressly prohibited consolidation (the ''*Nereus* default rule'').

Other courts disagreed. *Weyerhauser* was a case, like *Vigo,* which involved an owner, a charterer, and a subcharterer. The Ninth Circuit emphasized that arbitration was a consensual private process whose scope was defined by the agreements of the parties. The court adopted as its proper default rule, that consolidation of arbitrations could not be ordered by a court unless it was expressly or impliedly authorized by the relevant arbitration clauses (''the *Weyerhauser* default rule'').[12]

In England, where privacy in arbitration is rigidly enforced, the courts followed their own version of the *Weyerhauser* default rule. They not only refused to consolidate arbitrations—they even imposed restrictions when the same arbitrators were appointed under separate arbitration clauses to hear and decide multiparty disputes, especially about the non-availability of evidence produced by a party in one proceeding for use by the other party in the second proceeding. These restrictions by the English courts led to some shockingly inconsistent arbitral awards.[13]

Some commentators questioned whether an award in a consolidated arbitration might fail to qualify for recognition and enforcement under Article V of the New York Convention[14] because the composition of the arbitration tribunal ''was not in accordance with the agreement of the

[11] A default rule is the decision a court makes on an issue that parties failed to cover in their contract. Parties are free to contract around a default rule. In a statute, often such a rule will be prefaced by the phrase ''unless the parties otherwise agree.'' *See* Ran & Sherman, ''Tradition & Innovation in International Arbitration Procedure,'' 30 *Tex. Int'l L.J.* 89, 108 (1995); David Charney, ''Hypothetical Bargains: The Normative Structure of Contract Interpretation,'' 89 *Mich. L. Rev.* 1815, 1912-20 (1991); Ian Ayres & Robert Gertner, ''Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,'' 99 *Yale L.J.* 87 (1989).

[12] Weyerhauser Co. v. W. Seas Shipping Co., 743 F.2d 635 (9th Cir.), *cert. denied,* 469 U.S. 1061 (1984). The *Weyerhauser* default rule was also adopted by some other circuit courts. *See* Am. Centennial Ins. v. Nat'l Cas., 951 F.2d 107 (6th Cir. 1991). Baesler v. Continental Grains Co., 900 F.2d 1193 (8th Cir. 1990); Protective Life Ins. Co. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989); Del E Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987).

[13] The VIMEIRA, [1984] 2 Ll. Rep. 66 (Ct. App.). *Compare* Focke v. Robinson, 52 Ll. Rep. 334 (K.B. 1935) *with* Focke v. Hecht, 60 Ll. Rep. 135 (K.B. 1938). *See* V.V. Veeder, ''Multiparty Disputes: Consolidation under English Law—The Vimeira—A Sad Forensic Fable,'' 2 *Arb. Int'l* 310 (1986).

[14] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

parties.'' However, the more accepted view is that when parties agree to arbitrate under a particular law, if that law provides for consolidation, the possibility that consolidation may be ordered ''forms part of their agreement.''[15]

To avoid such embarrassing incidents, some States enacted laws adopting the *Nereus* default rule[16] and several arbitration organizations added the *Nereus* default rule to their arbitration rules.[17] But, the *Weyerhauser* default rule was widely accepted by a number of influential attorneys, academics, and jurists active in alternate dispute resolution, including some very senior English judges and lawyers, with the result that consolidation without the consent of all of the parties was deliberately omitted from the United Nations Commission on International Trade Law (UNCITRAL) Model Code and from the 1996 amendments to the English Arbitration Act.[18]

In the nearly quarter century following the decision of the New York Court of Appeals in *Vigo,* cases heard outside the Second Circuit that

[15] A.J. van den Berg, ''Consolidated Arbitration and the 1958 New York Arbitration Convention,'' 2 *Arb. Int'l* 367, 368 (1986). *See also* Ore Sea Transp. v. Burmah Oil Tankers, 661 F.2d 910 (2d Cir.)[table], *cert. denied,* 454 U.S. 966 (1981), an unpublished decision where the argument that an award in a consolidated arbitration would run afoul of the New York Convention was rejected. 50 *U.S. L. Week* 3340 (1981).

[16] Australian International Arbitration Act of 1974, § 24; Bermuda Arbitration Act 1986, § 9; Florida Stat. Ann. § 684.12; Ga. Code Ann. § 9-9-6(e)-(f); Hong Kong Arbitration Ordinance § 6B; Mass. Gen. L. ch. 251, § 2A; Netherlands Code of Civil Proc. art. 1046; Rev. Stat. Ontario, ch. I.9, § 7. In *New England Energy v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), *cert. denied,* 489 U.S. 1077 (1989), a suit was started in a Massachusetts state court to consolidate arbitrations under two maritime contracts. The suit was removed on grounds of diversity to the federal court which consolidated the two arbitrations as authorized by state law. An issue closely related to consolidation is participation of a third party in an arbitration as *amicus curiae.* International Centre for Settlement of Investment Disputes (ICSID), Arbitration Rule 37(2).

[17] British Coffee Association Arbitration R. 26; Society of Maritime Arbitrators R. 2; NAFTA art. 1126(2); Chambers of Commerce for Basel, Berne, Geneva, Ticino, Vaud, & Zurich, Swiss Rules of International Arbitration R. 4(2).

[18] *See* Departmental Advisory Committee of the Department of Trade & Industry, *Report on the Arbitration Bill* ¶ 180 (Feb. 1996); Michael Mustill, ''Multipartite Arbitrations: An Agenda for Law-Makers,'' 7 *Arb. Int'l* 393 (1991); *see also* Bruce Harris, *Report on the Arbitration Act 1996*, 23 *Arb. Int'l* 437, 446-47 (2007). In fairness it must be noted that several English judges at one time or another have expressed the view that consolidation of arbitrations should be accommodated. *See* The AMAZONIA, [1990] 1 Ll. Rep. 236, 240 (Ct. App.) [Staughton, L.J.]; [1984] 2 Ll. Rep. 66 (Ct. App.) [Goff, L.J.]; Willie v. Ocean Laser Shipping, [1999] 1 Ll. Rep. 225 (Comm. Ct. 1998) [Rix, J.]; The GOLDEN ANNE, [1984] 2 Ll. Rep. 489, 491 (Comm. Ct.) [Lloyd, J.].

involved consolidation of international arbitrations were very rare. In New York the *Nereus* default rule—applied by both the state and federal courts—seemed very stable. During that period there were approximately 140 final awards issued in consolidated New York maritime arbitrations (i.e., about six a year).[19] Then, suddenly, application of the rule broke down.

The *Boeing* case involved separate military contracts for helicopters entered into by Her Majesty's government with an American supplier of aircraft components, as well as a third company that installed them. Both contracts contained clauses providing for arbitration in New York. The district court, as might be expected, ordered the two proceedings consolidated. The decision was appealed.

But the case had been sealed in the district court because it involved military secrets. Apart from the parties and their lawyers, virtually no one in the international arbitration community was aware of it until the Second Circuit decided the appeal. In a totally surprising development, a three-judge panel of the Second Circuit stepped away from its own *Nereus* precedent and instead followed the *Weyerhauser* default rule of the Ninth Circuit, ruling that consolidation could not be ordered because the two arbitration agreements failed to provide for it.[20]

Although the reasoning of *Boeing* contradicts *Nereus*, the Second Circuit noted in a subsequent case that since *Nereus* was not overruled in an *en banc* proceeding, it might well still authorize consolidation of multiparty arbitrations arising under the same arbitration clause.[21] Still later the circuit court ruled that *Boeing* did not affect consolidation of labor arbitrations, applying the equivalent of the *Nereus* default rule that had been developed in a separate line of decisions under the Taft-Hartley Act.[22]

Occasionally a substitute for consolidation could be achieved in maritime arbitrations by use of the common law vouching-in procedure, which had been sanctioned in the 1980s for shipping disputes that could not be consolidated because only one charter provided for New York arbitration and the other contract contained a foreign arbitration or foreign forum clause.[23]

[19] The awards are available on LEXIS. *See also* Howard Miller, ''Consolidated Arbitrations in New York Maritime Disputes,'' *Int'l Bus. Law.* 58, 64-65 n. 21 (Mar. 1986); *Index and Digest of the Award Service of the Society of Maritime Arbitrators* (Michael Marks Cohen & David W. Martowski eds., 1983-2001).

[20] Government of the United Kingdom v. Boeing Co., 998 F.2d 68 (2d Cir. 1993).

[21] North River Ins. Co. v. Philadelphia Reins. Co., 63 F.3d 160, 165-66 (2d Cir. 1995).

[22] Labor-Management Relations Act (Taft-Hartley Act), 61 Stat. 138 (1947); *See* Emery Air Freight v. Int'l Bhd. of Teamsters, 185 F.2d 85, 90-91 (2d Cir. 1999).

[23] Universal Am. Barge Corp. v. J-Chem., 946 F.2d 1131 (5th Cir. 1991); SCAC Transp. v. S.S. DANAOS, 845 F.2d 1157 (2d Cir. 1988).

But while consolidated arbitrations continued to be organized voluntarily under arbitration rules that authorized consolidation, or in cases where all of the parties agreed to consolidated arbitration after a dispute had arisen, the former routine practice of the courts in New York and the Second Circuit, to consolidate arbitrations over the objection of a party, simply disappeared after the *Boeing* decision in 1993. The output of consolidated maritime arbitrations fell by two-thirds to only a couple of them annually.[24]

Ten years later there was a successful effort to organize a class arbitration brought by borrowers against a commercial lender under state law. In *Bazzle* the South Carolina courts applied, in effect, the *Nereus* default rule and granted class certification for arbitration. Ultimately the arbitrators awarded the class damages as well as attorneys' fees, and the case ended up in the Supreme Court.

Four justices, constituting a plurality of the Court, described consolidation as implicating ''what kind of arbitration proceeding the parties [had] agreed to,'' which these justices saw as a matter of contract interpretation and arbitral procedure for arbitrators to decide.[25] Since the courts rather than the arbitrators had approved a class arbitration, the plurality voted to remand the issue of whether a class arbitration should have been held to the arbitrators for a determination. Justice Stevens, casting the fifth vote, approved the application of the *Nereus* default rule by the South Carolina courts; nonetheless he joined in ordering a remand to the arbitrators so that there would be a ''controlling judgment of the Court.''[26]

Class actions and consolidations are closely related—both are variations of what the American Law Institute refers to as ''aggregate litigation.''[27] The decision in *Bazzle* had the effect of breathing new life into consolidation of arbitrations. Several cases seeking consolidation have been brought in the last five years, and, while the status of *Bazzle* has been questioned,[28] the courts have unanimously referred all of them to the arbitrators for decision.[29]

[24] The awards are available on LEXIS.

[25] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[26] *Id.* at 454.

[27] American Law Institute, *Principles of the Law of Aggregate Litigation* § 1.02 (Tent. Draft No. 1, April 7, 2007.

[28] *Compare* Certain Underwriters at Lloyds v. Westchester Fire Ins. Co., 489 F.3d 580, 586 n.2 (3d Cir. 2007), *with* Employers Ins. Co. v. Century Indem., 443 F.3d 573, 580-82 (7th Cir. 2006).

[29] *Id.*; Certain Underwriters at Lloyds v. Cravens Dargan & Co., 197 Fed. App'x 645 (9th Cir. 2006); Shaw's Supermarkets v. United Food & Commercial Workers Union, 321 F.3d 251 (1st Cir. 2003). *See also* Stolt-Nielsen v. Animalfeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008) (availability of class arbitration is for arbitrators to decide); Davis v. ECPI Coll. of Tech., 227 Fed. App'x 250 (4th Cir. 2007) (validity of

It is interesting to note that in recent years when maritime arbitrators were invited to order consolidation of separate proceedings, they often, but not always, applied the *Weyerhauser* default rule and found themselves to be without power unless all of the parties had agreed to consolidation.[30] This situation changed after *Bazzle*.

A very significant post-*Bazzle* case involved claims of price fixing asserted by many charterers against a few carriers that dominated ocean transportation of chemical and vegetable oil cargoes. All of the charter parties contained nearly identical clauses providing for New York arbitration. The parties agreed to apply Rule 3 of the American Arbitration Association Supplementary Rules for Class Arbitrations, which provides for arbitrators to decide whether an arbitration clause permits an arbitration to proceed on behalf of a class of claimants. The arbitrators applied, in effect, the *Nereus* default rule and declared that a class arbitration could be maintained.

The shipowner moved to vacate the award on the ground that the arbitrators were required to apply the *Weyerhauser* default rule. The Second Circuit held that the arbitrators were entitled to apply the *Nereus* default rule.[31]

But, of course, the decision of any one panel of arbitrators does not bind another panel. Presumably, a different panel in a separate dispute would be free to apply the *Weyerhauser* default rule and decline to permit consolidation absent express terms in the arbitration clause authorizing joinder.

In such event, there are alternatives to achieve some sort of consolidation of international arbitrations in New York that could also be explored. First, when a party in the middle is the initial target of a demand for arbitration, the technique used by the charterer in *Vigo* can still work to create, if not a formal consolidation, then at least the same panel for two related proceedings.

A second alternative, particularly in cases where a party is exposed to only vicarious liability, would be to try vouching-in as a device to bind a third party at fault to the results of an arbitration award if it refused to take over the defense.

waiver of class arbitration for arbitrators to decide); Pedcor Mgmt. Co. v. Nations Personnel, 343 F.3d 355 (5th Cir. 2003) (availability of class arbitration is for arbitrators to decide); Cable Connection v. DIRECTV, 190 P.3d 586 (Cal. 2008) (same).

[30] The ELISE SCHULTE, S.M.A. No. 3918 (2006); *cf.* The LACERTA, S.M.A. No. 3983 (2007); The HYDE PARK, S.M.A. No. 3934 (2006); The ROUNTREE, S.M.A. No. 2863 (1992).

[31] Stolt-Nielsen v. Animalfeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008); *see also* Cable Connection v. DIRECTV, 120 P.3d 586 (Cal. 2008); *cf.* Dickler v. Shearson Lehman Hutton, 596 A.2d 860, 864-65 (Pa. Super. 1991) (pre-*Bazzle* decision applying *Nereus* default rule in entry of an order authorizing class arbitration).

A party desiring consolidation of arbitration needs to choose its arbitrator very carefully in order to try to put together a panel likely to follow the *Nereus* default rule. It is encouraging that the arbitrators in *Animalfeeds* were all lawyers. But it may well be more prudent to select a non-lawyer as a party-appointed arbitrator, on the ground that he or she would be less likely than an attorney to see issues of grammar, privacy, and evidence as insurmountable obstacles to the more practical and just result offered by consolidation to resolve a multiparty dispute within his or her own industry.

Should No-Class Action Arbitration Clauses Be Enforced?

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The enforceability of so-called no-class action arbitration clauses—clauses referring all disputes relating to the main contract to an arbitration that is to proceed on an individual basis only[1] —is highly topical for several reasons.[2]

[1] A typical example is found in the recent decision of the Ninth Circuit in *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008):

> Mandatory Arbitration. Any controversy, claim or dispute between you and Company arising under this Agreement, excluding actions by Company to collect unpaid charges, shall be submitted to final, binding arbitration under the auspices of the American Arbitration Association (''AAA'') pursuant to its published Wireless Industry Arbitration Rules, incorporated herein by this reference and available by calling the AAA at 800-778-7879 or visiting its web site at http://www.adr.org. Notice of an arbitration commenced by you shall be served on Company's registered agent. All claims shall be arbitrated individually and you agree that no person shall bring a punitive [sic] or certified class action to arbitration or seek to consolidate or bring previously consolidated claims in arbitration. The arbitrator shall have no authority to award punitive damages. YOU ACKNOWLEDGE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO A JURY TRIAL.

[2] On this topic, see in particular Myriam Gilles, ''Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action,'' 104 *Mich. L. Rev.* 373 (2005); Jack Wilson, '' 'No-Class Action Arbitration Clauses,' State-Law Unconscionablility, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action,'' 23 *Quinnipiac L. Rev.* 737 (2004); Jean R. Sternlight, ''As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive,'' 42 *Wm & Mary L. Rev.* 1 (2000); Han Smit, ''Class Actions and Their Waiver in Arbitration,'' 15 *Am. Rev. Int'l Arb.* 199 (2004); Jean R. Sternlight & Elizabeth J. Jensen, ''Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?'' 67 *Law & Contemp. Probs.* 75 (2004); Thomas Burch, ''Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief,'' 31 *Fla. St. U.L. Rev.* 1005 (2004); J. Maria Glover, ''Beyond Unconscionablility: Class Action Waivers and Mandatory Arbitration Agreements,'' 59 *Vand. L. Rev.* 1735 (2006); Bryon Allyn Rice, ''Enforceable of Not? Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard,'' 45 *Hous. L. Rev.* 215

Firstly, use of such clauses has increased significantly in recent years, especially in consumer contracts, but also in other contexts such as labor relations. Moreover, their enforceability has been judicially challenged on numerous occasions, and the decisions often give the impression of lacking in coherence and predictability, revealing not only that the question is by no means an easy one, but also that it is politically quite sensitive. And interestingly enough, the enforceability of no-class action arbitration clauses is not anymore a purely American problem. Indeed, such clauses started appearing in Canadian consumer contracts shortly after the turn of the century,[3] and pro-consumer groups and scholars were quick to mount a vigorous—and to some extent successful—campaign against what they considered to be a clearly illegitimate attempt to rob consumers of their fundamental right to proceed by way of a class action.

The question arises in the broader context of a worldwide movement, which increasingly questions the legitimacy of arbitration as a means of resolving disputes relating to those sensitive private law relationships that are characterized by a significant imbalance of power between the parties—consumer contracts being, of course, a prototypical example. Several countries, even among those that are the most ardent supporters of commercial arbitration, have adopted legislation that either conditions the validity of consumer arbitration agreements on special requirements, or prevents pre-dispute arbitration clauses from being enforced against consumers.[4] The movement has even reached the United States.

Indeed, Congress is currently considering two bills that have been described by Professor Carbonneau as ''the most serious attempt to place restrictions on the arbitral process by modifying the [Federal Arbitration

(2008); Jonnette Watson Hamilton, ''Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?'' 51 *McGill L.J.* 693 (2006).

[3] *See, e.g.,* Kanitz v. Rogers Cable Inc., [2002] O.J. No. 665 (ON Sup. Ct. Jus.); Hamilton, *supra* note 2.

[4] With respect to the European Union Directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC, 1993 O.J. (L 095) 29—which provides that ''terms requiring the consumer to take disputes exclusively to arbitration not covered by legal provision'' are prima facie invalid as unfair—as well as relevant provisions of the U.K. Arbitration Act 1996, see Christopher R. Drahozal & Richard J. Friel, ''Consumer Arbitration in the European Union and the United States,'' 28 *N.C.J. Int'l L. & Com. Reg.* 357 (2002). As for Spain, see David J.A. Cairns, ''The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration,'' 22 *Arb. Int'l* 573, 579-80 (2006). As for Austria, see Christoph Liebscher, ''Austria Adopts the Model Law,'' 23 *Arb. Int'l* 523, 534-35 (2007). As for Brazil see: João Bosco-Lee, ''Le nouveau régime de l'arbitrage au Brésil,'' *Rev. Arb.* 199, 202-03 (1997). As for Japan, see M. Kondo, T. Goto, K. Uchibori & T. Kataoka, *Arbitration Law of Japan* 297 et seq. (2004).

Act]''[5] and that, if adopted, would significantly restrict the effectiveness of arbitration clauses: The first bill, the Fair Arbitration Act of 2007,[6] would limit the enforceability of arbitration clauses through new formal requirements, preserve a plaintiff's right to resort to small claims courts, and introduce mandatory procedural rules relating, for example, to the competence and neutrality of arbitrators and arbitral institutions, representation by attorneys, the administration of evidence, and the reasons to be provided by the arbitrators. The second bill, the Arbitration Fairness Act of 2007,[7] would modify the Federal Arbitration Act (FAA) so as to render invalid and unenforceable pre-dispute arbitration agreements relating to employment, consumer, and even franchise disputes.

What primarily underlies the issue of the enforceability of no-class action arbitration clauses is a tension between two fundamental principles: freedom of contract, on the one hand; access to justice, on the other—access to justice, which we can define broadly as access to a fair and efficient process resolving disputes in final and binding manner. And the problem is not so much to determine which of the two principles is more important and should thus prevail over the other. In most if not all legal systems today, a contractual clause that would effectively deny a party any reasonable possibility of bringing claims relating to the contract to fair, final, and binding adjudication would surely not be enforced, because, ultimately, access to justice does prevail—as it should—over freedom of contract. The difficulty relates to whether—and if so, to what extent—class action waivers, when inserted in arbitration clauses, do indeed jeopardize access to justice.

(UNCONVINCING) CASE FOR ENFORCING ALL CLASS ACTION WAIVERS

We can start the analysis by considering the two extremes of the spectrum and asking whether there should be a blanket rule governing the enforceability of these clauses. At one end of the spectrum is the possibility that the law provide that class actions waivers are always enforceable and will thus never affect the enforceability of the arbitration clauses in which they are inserted. In other words, the ideal solution would lie in a blanket rule to the effect that the inclusion of a class action waiver is simply irrelevant to the

[5] Thomas E. Carbonneau, ''*Hall Street Associates, LLC v. Mattel, Inc.*: A New Englander's Tale of Statutory Supremacy in Arbitration Law,'' 1 *Stockholm Int. Arb. Rev.* 19, 35 n.119 (2008).

[6] S. 1135, 110th Cong., 1st Sess., Apr. 17, 2007.

[7] S. 1782, 110th Cong., 1st Sess., July 12, 2007.

enforceability of the clause. The clause could turn out to be unenforceable, but not merely because it contains a class action waiver.

Party Autonomy and Access to Justice

One can attempt to justify this conclusion by relying on a conception of class actions that minimizes their relationship with the fundamental right of access to justice. Here, the class action is considered to be akin to joinder devices; in other words, it is conceived as a purely procedural mechanism that is primarily—if not exclusively—aimed at increasing efficiency rather than vindicating a fundamental right to an adjudicative decision. Denying the right to proceed on a class-wide basis will thus never, in itself, jeopardize access to justice, and it is all the more true when the person who is denied that right is also granted the right to proceed by way of arbitration, because arbitration is generally fair, neutral, and cheap.

But, so far, neither legislatures nor courts have been very receptive to these arguments. Legislative provisions that specifically allow for class action waivers are very rare; one example is a Utah statute, which applies to certain types of consumer contracts.[8] Even cases in which class actions are mostly conceived as mere procedural devices that do not *per se* engage a fundamental right fall short of embracing the view that class action waivers are always enforceable.

A good example is a 2003 Texas appellate decision in *AutoNation U.S.A. Corp. v. Leroy,*[9] where the plaintiff sought to commence a class action against a company that operated used-car stores and that had allegedly charged its customers documentary and preparation fees that were prohibited under the Texas Finance Code. Each member's claim was very small, not exceeding $100. At first instance, the defendant unsuccessfully relied on an arbitration clause contained in its standard contract, the court finding that the claims fell outside the scope of the clause. The court of appeals disagreed and found the clause to be applicable. It also dismissed the plaintiff's contention that enforcing the clause would effectively prohibit the class treatment of very small consumer claims and would thus be fundamentally unfair. In doing do, the court emphasized the procedural nature of class actions and suggested that the right to proceed collectively is merely a procedural right that cannot trump a contractual undertaking to arbitrate on an individual basis:

[8] *See* Utah Code Ann. §§ 70C-3-104 and 70C-4-105, referred to in Rice, *supra* note 2, at 245.

[9] AutoNation U.S.A. Corp. v. Leroy, 105 S.W.3d 190 (Tex. App. 2003).

> [The Plaintiff's argument] assumes that the right to proceed on a class-wise basis supercedes a contracting party's right to arbitrate under the FAA. However, the primary purpose of the FAA is to overcome courts' refusals to enforce agreements to arbitrate and to ensure that private agreements to arbitrate are enforced according to their terms. The Texas Supreme Court has made it clear that the FAA is part of substantive law of Texas, and has stressed that ''procedural devices,'' such as Rule 42's provision for class actions, ''may not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.'' Accordingly, there is no entitlement to proceed as a class action.[10]

Although AutoNation was subsequently interpreted as ''illustrative of how Texas courts are unwilling to strike down an arbitration provision and class action waiver on the ground of unconscionablility,''[11] the court of appeals did not go so far as to adopt an all-or-nothing approach as it conceded that ''there may be circumstances in which a prohibition on class treatment may rise to the level of fundamental unfairness.''[12]

Despite this caveat, AutoNation's characterization of class-wide relief as a merely procedural device and the underlying suggestion that class actions are in no way concerned with unwaivable fundamental rights are not compelling. While it is surely true that in many cases class actions have been abused and have proved unfair to defendants, the point remains that they serve crucially important social functions, at least in cases involving so-called negative value claims—claims that cannot feasibly be asserted on an individual basis[13]—where denying access to class relief amounts to nothing less than a denial of justice.

As the U.S. Supreme Court famously observed, quoting approvingly from a Seventh Circuit opinion: ''The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.''[14] The implication is that no-class action arbitration clauses will undoubtedly jeopardize access to justice in at least some cases, and this constitutes the most compelling justification for rejecting a blanket

[10] *Id.* at 200.

[11] Provencher v. Dell, Inc., 409 F. Supp. 2d 1196, 1204 (C.D. Cal. 2006).

[12] AutoNation U.S.A. Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. App. 2003).

[13] ''A negative value suit is one in which the stakes to each member are too slight to repay the cost of the suit'': Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4:33 (4th ed. 2002).

[14] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997), quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997).

rule upholding all class action waivers, especially in the adhesionary setting in which they are typically found.

Presumption Doctrine

American companies arguing in favor of such a blanket rule have not only relied on a conception of the class action mechanism that emphasizes its procedural nature, they have also invoked the preemption doctrine—and sometimes successfully, as is illustrated by the recent decision of the Third Circuit in *Gay v. Creditinform; Intersections, Inc.*[15] That case related to allegedly unlawful monthly fees of $4.99 charged to the plaintiff over an eight-month period. In answer to the plaintiff's attempt to commence a class action, the defendant argued that the claim fell within a clause requiring that it be arbitrated on an individual basis.[16] The plaintiff responded by asserting—among other arguments—that the clause was unconscionable under Pennsylvania law, relying on Pennsylvania cases standing for the proposition that ''if the costs associated with arbitrating a single claim effectively deny consumer redress, prohibiting class action litigation or class action arbitration is unconscionable.''[17] However, the Court disagreed, not because it found the plaintiff's argument unconvincing as a matter of Pennsylvania law, but rather because it found that the FAA preempts state law determinations that no-class action arbitration clauses are unconscionable and thus mandates enforcement of all such clauses. But on closer analysis, both conclusions seem to rest on rather shaky foundations.

On the preemption issue, key to the analysis is the distinction drawn by the Supreme Court between ''state law principle[s] that tak[e] [their] meaning precisely from the fact that a contract to arbitrate is at issue,'' which are preempted by the FAA, and state rules that ''arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,'' which remain applicable.[18]

While the FAA does not prohibit courts from resorting to state unconscionability rules to invalidate arbitration agreements, courts may not ''rely on the uniqueness of an agreement to arbitrate as a basis for a state-law

[15] Gay v. Creditinform; Intersections, Inc., 511 F.3d 369 (3d Cir. 2007).

[16] It reads as follows: ''Any claim arising out of or relating to the Product shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association on an individual basis not consolidated with any other claim.''

[17] Thibodeau v. Comcast Corp., 912 A.2d 874, 883 (Pa. Super. Ct. 2006), quoting approvingly from the trial court decision reported at 2006 Phila. Ct. Com. Pl. LEXIS 91 (2006).

[18] Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

holding that enforcement would be unconscionable.''[19] This is exactly what the *Gay* court believed the plaintiff to be doing: ''Nothing could be clearer because . . . she contends that the provision is unconscionable because of what it provides, i.e. arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis.''[20]

But this reasoning has rightly been dismissed by most courts presented with an objection of that nature.[21] When a plaintiff contends that a no-class action arbitration clause is unconscionable, it by no means relies on the uniqueness of the arbitration clause at issue. It rather relies on the uniqueness of the class action waiver that, when it jeopardizes the plaintiffs' access to justice, is equally objectionable when inserted in an arbitration agreement than when inserted in any other contract.

The state law principle relied upon is thus completely arbitration-neutral. And as the Ninth Circuit recently reiterated, a teleological analysis reinforces this conclusion, because ''[t]o hold that [state] unconscionability law may be applied only to invalidate a class action waiver, but not a class arbitration waiver, would place arbitration agreements on a different footing than other contracts, in direct contravention of th[e] principal purpose of the [FAA].''[22]

But even assuming that Gay was correct in holding that state unconscionability law cannot be relied on to invalidate no-class action arbitration clauses, the opinion is not compelling when it holds that the FAA mandates the enforcement of arbitration clauses irrespective of their impact on the plaintiffs' fundamental right of access to justice.

First, the court, rather than explaining why the FAA should be so interpreted, merely assumes the point when—after expressly refusing to opine on the political desirability of its conclusion on preemption—it holds that it is for Congress, not the courts, to lessen the FAA's reach.

Furthermore, that assumption is questionable, because it is quite hard to think of a convincing reason why Congress could possibly have intended to require courts to enforce adhesionary arbitration agreements in circumstances where doing so would effectively deny the plaintiffs a right that is so

[19] *Id.*

[20] Gay v. Creditinform; Intersections, Inc., 511 F.3d 369, 395 (3d Cir. 2007).

[21] *See, e.g.,* Discover Bank v. Superior Court, 36 Cal. 4th 148, 163 et seq. (2005); Gentry v. Superior Court, 42 Cal. 4th 443, 465 (2007); Scott v. Cingular Wireless, 160 Wash. 2d 843, 858-59 (2007).

[22] Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1221 (9th Cir. 2008), citing Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 990 (9th Cir. 2007). In *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006) (reiterated in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 1402 (2008)), the Supreme Court held that ''Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.''

fundamental as the right of access to justice. Again, Section 2's purpose is to favor arbitration by placing arbitration agreements on equal footing with other contracts,[23] not to allow stronger corporate entities to evade substantive obligations by forcing weaker contractual partners into arrangements that may—in some circumstances—deprive them of any feasible redress.

This conclusion is further reinforced by the Supreme Court's holding that statutory causes of actions are arbitrable ''so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,''[24] which clearly recognizes that the FAA does not require courts to enforce arbitration agreement at all costs and irrespective of their impact on access to justice.

TROUBLE WITH A BLANKET RULE OF UNENFORCEABILITY

So does this mean—looking at the other end of the spectrum—that the most ardent critics of no-class action arbitration clauses are right? Should there be a blanket rule to the effect that class action waivers contained in arbitration clauses are never enforceable, irrespective of the specific circumstances of the case?

This solution prevails in three of the four most populous provinces of Canada, Alberta, Ontario, and Québec, further to legislative amendments adopted, respectively, in 1998, 2002, and 2006. These amendments actually go much further than merely invalidating no-class arbitration clauses, because they invalidate all pre-dispute consumer arbitration agreements insofar as they prevent consumers from commencing court actions related to the contract.[25] However, consumer groups recently failed to convince the

[23] *Id.*

[24] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985); Green Tree Fin. Corporation-Alabama v. Randolph, 531 U.S. 79, 90 (2000).

[25] Section 16 of the Alberta Fair Trading Act, R.S.A. 2000, ch. F-12, which is discussed in *Ayrton v. PRL Financial (Alta.) Ltd.*, 2004 ABQB 787, conditions the validity of consumer arbitration agreements on the government's prior approval:

> Despite any provision of this Act, neither a consumer nor the [Director of Fair Trading] may commence or maintain an action or appeal under sections 13 to 15 if the consumer's cause of action under those sections is based on a matter that the consumer has agreed in writing to submit to arbitration and the arbitration agreement governing the arbitration has been approved by the Minister [responsible for the Act].

Section 7(2) of the Ontario Consumer Protection Act, 2002, S.O. 2002 reads as follows:

> any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the

Supreme Court of Canada to judicially extend this solution to cases not covered by those legislative provisions. In a case involving Dell,[26] the global computer manufacturer and seller, the Court acknowledged that no-class action arbitration clauses may be abusive[27] depending on the circumstances of the case, but it refused to hold all class action waivers to be invalid. And as the plaintiff failed to prove that Dell's no-class action clause was abusive, the Court enforced it fully by requiring that the claim be arbitrated on an individual basis. In the United States, a blanket prohibition has the support of several leading commentators,[28] but courts do not seem willing—at least for now—to go that far. A 2007 supreme court of Washington decision in *Scott v. Cingular Wireless*[29] is sometimes said to have found all class action

> consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

Section 8(1) of that same statute invalidates class action waivers in the following terms:

> A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

In Québec, the relevant provision is Article 11.1 of the Consumer Protection Act, R.S.Q. ch. P-40.1:

> Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited. If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.

For a critical analysis of Article 11.1 of the Québec statute, see Frédéric Bachand, ''Le mythe du caractère fondamentalement inéquitable des clauses d'arbitrage insérées dans les contrats de consommation—Observations critiques sur l'article 11.1 de la Loi sur la protection du consommateur,'' in Pierre-Claude Lafond ed., *Le droit de la consommation sous influences* 163 (2007).

[26] Dell Computer v. Union des consommateurs, 2007 SCC 34.

[27] *Dell* came out of Québec, the private law of which is primarily based on the civil law tradition (*see generally* John E.C. Brierley & Roderick A. Macdonald eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (1993)). The functional equivalent of the common law doctrine of unconscionability is found in rules limiting the validity of so-called abusive clauses inserted in contracts of adhesion; *see* Civil Code of Québec, arts. 1379 and 1437.

[28] *See, e.g.,* Smit, *supra* note 2; Sternlight & Jensen, *supra* note 2. For a similar plea from a Canadian commentator, see Hamilton, *supra* note 2.

[29] *Supra* note 21.

waivers inserted in consumer arbitration clauses to be invalid,[30] but that interpretation overlooks a footnote in the majority opinion making it very clear that the court, rather, adopted a case-by-case approach.[31]

A blanket prohibition on class action waivers inserted in arbitration clauses makes most sense if it can be said that enforcing such waivers will always leave the plaintiffs with no other reasonably accessible redress. If that is true, if enforcing such waivers will always effectively deny to the plaintiffs their right of access to justice, then surely a blanket prohibition is justified.

But that premise is most likely flawed, and the point can be illustrated by the Dell case just referred to. The case arose out of a pricing mistake on Dell's Canadian Web site. Over a two-day period, hand-held computers that normally retail at $379 and $549 were mistakenly offered for $89 and $118. Dell refused to honor orders placed by customers at the lower price, and the plaintiffs responded by commencing a class action on behalf of all aggrieved customers. With the compensatory and punitive damages requested, the value of the claim—per member—was at least $1,200 plus interest, which is not an insignificant amount.

And the case on the merits was not particularly complex. The only question was whether Dell had breached Québec consumer protection law by not honoring the orders. The arbitration clause found on Dell's Canadian Web site is similar to the one found on its U.S. Web site: it provides for arbitration to be conducted under the aegis of the National Arbitration Forum (NAF), which means that it gives Dell's customers access to a neutral forum where they can obtain a final and binding decision much faster than if the case proceeded on a class-wide basis in court. And, crucially, they can do so at very low cost, as the rules of the NAF provide that plaintiffs normally have to pay only a fairly modest filing fee.[32] In such

[30] *See, e.g.*, Petition for a Writ of *Certiorari,* T-Mobile USA, Inc. v. Laster, 2008 WL 218932, at 17 (''Most recently, in *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (en banc), Washington's Supreme Court held that *all* class waivers in consumer arbitration agreements are unenforceable because 'class actions are a critical piece of the enforcement of consumer protection law'.'').

[31] Scott v. Cingular Wireless, 160 Wash. 2d 843, 860 n.7 (2007):

> We respectfully disagree with our learned colleague in dissent that this opinion presumes the [Washington *Consumer Protection Act*, Wash. Rev. Code ch. 19.86] invalidates all class action waivers. We mean to say only that class action waivers that prevent vindication of rights secured by the CPA are invalid. We agree with our dissenting colleague that whether any particular class action waiver is unenforceable will turn on the facts of the particular case. We can certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the CPA and would thus be enforceable. E.g., *Hangman Ridge*, 105 Wn.2d at 778.

[32] The NAF procedure applicable in consumer cases was described as follows in *Provencher v. Dell, Inc.,* 409 F. Supp. 2d 1196, 1202-03 (C.D. Cal. 2006), a case in which the no-class action arbitration clause found on Dell's American Web site was upheld and enforced by the court:

circumstances, can it really be said that upholding the class action waiver will effectively deny to the plaintiff his or her right of access to justice? Would it really be unreasonable to require the plaintiff to assume the responsibility of bringing this relatively simple claim to NAF arbitration? Let us not forget that the very existence of small claims courts shows that there is general agreement on the idea that unrepresented plaintiffs can be expected to effectively prosecute straightforward and modest claims in a simplified process.[33] Not all modest consumer claims are negative value claims.

The Dell example shows that no-class action arbitration clauses will not always leave plaintiffs with no reasonably accessible redress. A blanket rule of unenforceability is thus problematic in that it is unnecessarily broad, which probably explains why even California courts—which are known to be particularly wary of class action waivers—have refused to go so far as to hold them to be systematically unenforceable.[34] That being said, the flaws in that approach do not necessarily entail that it should be discarded as undesir-

> Finally, and most significantly, the NAF is an inexpensive, convenient, and efficient forum for Mr. Provencher to resolve his disputes with Dell. It certainly is not a device that Dell can use to escape liability for alleged wrongful conduct. *Cf.* Ingle v. Circuit City Stores, 328 F.3d 1165, 1173-79 (9th Cir. 2003) (holding that arbitration provision in employment context was unconscionable where only employee was forced to arbitrate her claims, statute of limitations was limited, class action method was precluded, remedies were limited, costs and fee splitting arrangement were burdensome for employee, and employer had unilateral power to terminate or modify the agreement). Under the NAF, Mr. Provencher has a say in selecting the arbitrator. (Defendants' Request for Judicial Notice in Support of Reply Brief, Exh. 6.) His filing fee is at most $ 35. (*Id.*, Exh. 1.) Dell pays all other mandatory fees, including a commencement and administrative fee. (*Id.)* Mr. Provencher can file a claim simply by mail or online. (*Id.*, Exh. 3.) If he proceeds by mail, Mr. Provencher can use a form available from the NAF or draft his own document. (*Id.*) If Mr. Provencherelects to proceed on the papers, he is not required to pay any more fees, meaning that he could prosecute his entire claim for only $ 35. (*Id.*, Exh. 1.) If he cannot afford any fees, Mr. Provencher can request an indigent fee waiver through a simple process that need not be disclosed to the other parties. (*Id.*, Exhs. 2, 4.) If Mr. Provencher prefers an in-person hearing, one will be scheduled near his residence in California, instead of Dell's home office in Texas. 8 (*Id.*, Exh. 1.) As Justice Ginsburg of the United States Supreme Court so aptly noted, the NAF has developed ''models for fair cost and fee allocation.'' 9 *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 95 n.2, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) (Ginsburg, J., concurring in part and dissenting in part).

[33] ''In the United States, one of the principles behind the small claims court movement was to provide an expensive, speedy forum for resolving disputes where lawyers would not be needed'' (Leslie G. Kosmin, ''The Small Claims Court Dilemma,'' 13 *Hous. L. Rev.* 934, 957 (1975-1976)). Small claims courts similar to those set up in the United States are found throughout Canada.

[34] Discover Bank v. Superior Court, 36 Cal. 4th 148, 162-63 (2005); Gentry v. Superior Court, 42 Cal. 4th 443, 454, 462 (2007).

able, because it may nevertheless turn out to be the best available option when compared with a third approach, which is to determine the enforceability of no-class action arbitration clauses on a case-by-case basis, by considering whether to deny the plaintiff the right to proceed collectively would—on the facts of the case—be unconscionable.

THEORETICAL APPEAL AND PRACTICAL PITFALLS OF A CASE-BY-CASE APPROACH

Unconscionability and Preferability in Recent Cases

This unconscionablility-based approach is currently favored by U.S. courts. Looking at factors such as the nature of the claim, the amount in dispute, the arbitral forum chosen in the clause, and the possibility of recovering attorneys' fees, courts essentially consider whether the claims could realistically be asserted on an individual basis. In cases like *Provencher v. Dell, Inc.*,[35] where the value of each class member's claim is not minute (approximately $1,600) and the clause directs consumers to a fair, efficient, simplified, and cheap arbitration process, class action waivers have been upheld. But in other cases, such as *Muhammad v. County Bank of Rehoboth Beach*,[36] which involved a complex consumer fraud complaint and claims worth less than $600 per class members, courts have been willing to make a finding of unconscionability on the basis that the claims could not realistically be asserted on an individual basis. Courts are also increasingly mindful of non-pecuniary obstacles that may discourage some plaintiffs

[35] Provencher v. Dell, Inc., 409 F. Supp. 2d 1196 (C.D. Cal. 2006) For similar cases, see *Snowden v. CheckPoint Cashing*, 290 F.3d 631 (4th Cir. 2002); *Livingston v. Associates Fincance, Inc.*, 339 F.3d 553 (7th Cir. 2003); *AutoNation U.S.A. Corp. v. Leroy*, 105 S.W.3d 190 (Tex. App. 2003); *Walther v. Sovereign Bank*, 386 Md. 412 (2005).

[36] Muhammad v. County Bank of Rehoboth Beach, 189 N.J. 1 (2006), *commented on* in C.B. McKinney, ''Low Value' & 'Predictably Small': When Should Class-Action Waivers be Invalidated as Unconscionable?'' *J. Disp. Resol.* 579 (2007). For similar cases, see *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006); *Scott v. Cingular Wireless,* 160 Wash. 2d 843 (2007); *Cohen v. DirectTV, Inc.*, 48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006); *Fiser v. Dell Computer Corporation*, 2008 NMSC 46. It should be noted that some courts, rather than relying on state unconscionability law, have set aside no-class action arbitration clauses on the ground that the statute upon which the plaintiffs' claims were based implicitly rendered such clauses unenforceable in situations where the denial of the right to proceed on a class-wide basis would prevent the plaintiffs from vindicating the rights arising out of that statute: *see, e.g.,* Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

from suing on an individual basis, even where the sums at issue would normally provide a sufficient incentive to do so. For example, in *Gentry*, the Supreme Court of California, invoking the particularly important risks of retaliation faced by an employee who individually sues his or her employer, recently found that no-class action arbitration clauses inserted in employment contracts could prove unconscionable in overtime pay disputes involving claims in the tens of thousands of dollars.[37] Some American courts have even shown a willingness to strike down class action waivers inserted in franchise[38] and purely commercial contracts.[39]

Canadian courts have also adopted a case-by-case approach while dealing with cases that are not covered by the legislative amendments discussed earlier. However, there is some inconsistency in the cases as to the legal framework applicable to the enforceability of no-class action arbitration clauses. Initially, courts analyzed the validity of such clauses through the prism of the unconscionability doctrine.[40] However, they subsequently moved to a less stringent standard, according to which the clause is given no effect upon a finding that class-wide proceedings would be ''preferable'' to individual arbitrations.

That approach was first adopted in the leading decision of the British Columbia Court of Appeal in *MacKinnon v. National Money Mart Co.*,[41] which concerned allegations that the defendants had offered payday loans at criminal interest rates. The court saw the enforceability of the no-class action arbitration clauses at issue as raising a conflict between two statutes: the British Columbia Class Proceedings Act, 1992,[42] which provides that courts must certify an action as a class action when certain conditions are met, and the British Columbia Arbitration Act,[43] which provides—in Section 15(2)—that courts must stay an action that falls within the ambit of an arbitration agreement, unless that agreement is found to be ''void, inoperative or incapable of being performed.''

The court held that those two statutes could be reconciled by considering that an order certifying a class action renders arbitration

[37] Gentry v. Superior Court, 42 Cal. 4th 443, 459-60 (2007).

[38] Indep. Ass'n of Mailbox Center Owners, Inc. v. Mail Boxes Etc., USA, Inc., 133 Cal. App. 4th 396 (2005).

[39] *In re* Yahoo! Litigation, 2008 U.S. Dist. LEXIS 33999 (C.D. Cal. 2008). That case involved a class action waiver inserted in a forum selection clause rather than an arbitration clause.

[40] Kanitz v. Rogers Cable Inc., [2002] O.J. No. 665 (ON Sup. Ct. Jus.). On the Canadian version of the unconscionability doctrine, see Rick Bigwood, ''Antipodean Reflections on the Canadian Unconscionability Doctrine,'' 84 *Can. Bar Rev.* 171 (2005).

[41] MacKinnon v. Nat'l Money Mart Co., 2004 BCCA 473.

[42] R.S.B.C. 1996, ch. 50.

[43] R.S.B.C. 1996, ch. 55.

agreements covering the claims ''inoperative'' within the meaning of Section 15(2), a holding that effectively amounts to giving precedence to the class action legislation over the arbitration statute. However, because the test for certification requires courts to consider whether ''a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues,''[44] certification will not be granted—and the arbitration clause will remain operative and thus fully enforceable—if the court finds that the class proceedings would not be preferable to individual arbitrations.

The court added that a no-class action arbitration clause's impact on the preferability analysis should be assessed by considering whether ''individual . . . arbitrations would likely create an economic bar to the resolution of the individual claims.''[45] But a finding that the claims could realistically be asserted in the individual arbitration contemplated in the clause will not necessarily be as determinative as it would be in an analysis based on the doctrine of unconscionablility, because courts are authorized to consider other factors[46] when determining whether a class action would indeed be preferable.

The Mackinnon approach has been problematic since its inception, as it rests on a completely unexplained assumption that an arbitration clause, which is valid and applicable as a matter of contract, ceases to be binding when the plaintiff seeks to commence a class action in court, as the clause is

[44] Class Proceedings Act, *supra* note 42, Sec. 4(1)(*d*).

[45] MacKinnon v. Nat'l Money Mart Co., 2004 BCCA 473,¶ 47. In that case, the first instance judge had found that the claims could not realistically be asserted on an individual basis because the amounts at issue were ''very small'' and ''an expert's report would be required to establish a criminal rate of interest'' which ''alone would make the litigation uneconomical'' (2004 BCSC 136, ¶ 22). See also, in the same vein, *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018, ¶ 65 et seq. The approach articulated in *MacKinnon* was adopted by the Ontario Court of Appeal in *Smith v. National Money Mart Co.*, [2005] O.J. 4269; *see also* Smith v. Nat'l Money Mart Co., 2008 CanLII 27479 (ON Sup. Ct. Jus.).

[46] *See, e.g.,* Section 4(2) of the Class Proceedings Act, *supra* note 42:

> In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following: (*a*) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members; (*b*) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions; (*c*) whether the class proceeding would involve claims that are or have been the subject of any other proceedings; (*d*) whether other means of resolving the claims are less practical or less efficient; (*e*) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

treated as merely one of several factors considered while a decision is made on whether the action ought to be certified as a class action.

The validity of this approach is even more doubtful after the Supreme Court of Canada's 2007 decision in *Dell*, as in that case the Court expressly dismissed an argument by the plaintiffs that the arbitration clause had ceased to become binding because they had decided to proceed by way of a class action. The Court did so after having found that, as class actions are procedural vehicles that do not create additional rights, they cannot be used so as to allow plaintiffs to bring in court claims that—because of the presence of an arbitration clause—they would have no right to assert judicially on an individual basis.[47]

The Court's decision thus stands implicitly, yet unquestionably, for the proposition that a no-class action arbitration clause that is valid (and thus neither unconscionable nor abusive) and applicable as a matter of contract is fully binding even when invoked against an attempt by the plaintiff to commence a class action in court. While that proposition is of course inconsistent with the assumption underlying the approach adopted in *MacKinnon*, three recent first instance decisions have held *Dell* to be limited to Québec and thus inapplicable in Canadian common law provinces.[48]

But those decisions are not convincing, because, by overly focusing on the fact that *Dell* was governed by provisions of the Québec Code of Civil Procedure and the Civil Code of Québec, they overlook the fact that the Court's ruling on this point turns not on Québec-specific legislation, but rather on a general principle—that class actions are procedural vehicles that do not create additional rights—that is just as important and accepted in Canadian common law provinces.[49] A proper understanding of *Dell* should

[47] *See* Dell Computer v. Union des consommateurs, 2007 SCC 34, ¶ 105 et seq. Paragraph 108 is particularly relevant:

> In the case at bar, the parties agreed to submit their disputes to binding arbitration. The effect of an arbitration agreement is recognized in Quebec law: art. 2638 C.C.Q. Obviously, if Mr. Dumoulin had brought the same action solely as an individual, the Union's argument based on the class action being of public order could not have been advanced to prevent the court hearing the action from referring the parties to arbitration. Does the mere fact that Mr. Dumoulin instead decided to bring the matter before the courts by instituting a class action affect the admissibility of his action? In light of the reasons of LeBel J., writing for the majority in *Bisaillon*, at para. 17, the answer is no: ''[the class action] cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so.''

[48] *See* MacKinnon v. Nat'l Money Mart Co., 2008 BSSC 710; Smith v. Nat'l Money Mart Co., 2008 CanLII 27479, ¶ 218 (ON Sup. Ct. Jus.); Seidel v. Telus Commc's Inc., 2008 BCSC 933.

[49] This point was expressly recognized in one of the two cases just referred to (''[I[t is accepted in Québec and in Ontario that class action legislation is procedural and it does not create new substantive rights: *Bisaillon v. Concordia*, 2006

thus lead courts to conclude that the *Mackinnon* approach has effectively been overruled by the Supreme Court of Canada.[50]

A Fatal Flaw

In theory, a case-by-case approach relying on the doctrine of unconscionability seems to strike an almost ideal balance between the principle of freedom of contract and the fundamental right of access to justice. However, to evaluate it properly, it is crucial to consider how it operates in practice, and two points are particularly important here. The first is that a plaintiff who challenges the validity of a class action waiver bears the burden of proof, so he or she has the responsibility of establishing that the waiver is unconscionable.

The second is that courts tend to refuse to make findings of unconscionability on the basis of mere assumptions or generalizations.[51] They rather require specific and compelling evidence about the practical and economical feasibility of asserting the claims at issue on an individual basis. As a result, establishing unconscionability often turns out to be a rather costly endeavor—in both time and money. It is not rare to see plaintiffs being forced to spend two years or more in discovery, hearings, and appeals just to establish that a class action waiver is unconscionable, and studies have shown that in some cases the plaintiffs' attorneys' investment in that aspect of the case had run in the hundreds of thousands of dollars.[52]

SCC 19 (CanLII), [2006] 1 S.C.R. 666 at para. 22; *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158; *Kanitz v. Rogers Inc.*, 2002 CanLII 49415 (ON S.C.), (2002), 58 O.R. (3d) 299 (S.C.J.); *Ontario New Home Warranty Program v. Chevron Chemical Company* 1999 CanLII 15098 (ON S.C.), (1999), 46 O.R. (3d) 130, (S.C.J.) at para. 50; *Serhan Estate v. Johnson and Johnson*, [2006] O.J. No. 2421 (Div. Ct.) at para. 41'' (Smith v. Nat'l Money Mart Co., 2008 CanLII 27479, ¶ 218 (ON Sup. Ct. Jus.))), but the Court surprisingly found it to be irrelevant to *Dell*'s applicability in Canadian common law provinces.

[50] As the Saskatchewan Court of Queen's Bench found in *Frey v. Bell Mobility Inc.*, 2008 SKQB 79. Shortly before this article went to press, the Court of Appeal for British Columbia concluded that the *Mackinnon* approach had been overruled by the Supreme Court's decision in *Dell: Mackinnon v. National Money Mart Company*, 2009 BCCA 103.

[51] Which is precisely why the Supreme Court of Canada swiftly dismissed the plaintiffs' argument that the impugned clause was abusive: Dell Computer v. Union des consommateurs, 2007 SCC 34, ¶¶ 104, 229.

[52] Sternlight & Jensen, *supra* note 2, at 100 et seq., discussing Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002). In *Muhammad v. County Bank of Rehoboth Beach,* 189 N.J. 1 (2006), the arbitration clause's validity was litigated for more than two years, up to the Supreme Court of New Jersey. In some jurisdictions, such as Canada (*see* Dell Computer v. Union des consommateurs, 2007 SCC 34,; Frédéric Bachand &

And since it seems perfectly reasonable to assume that these costs will have a strong deterring effect in at least some cases, this case-by-case approach risks denying access to justice to plaintiffs faced with negative value claims who would have found attorneys willing to represent them in a class action but for the waiver.

So the question ultimately boils down to choosing between two options. The first is a blanket prohibition on class action waivers—which is flawed because, as we saw, it unduly restricts freedom of contract in some cases. The second is the case-by-case approach—which is also flawed, because of a legitimate risk that it will leave some plaintiffs without any access to justice. That choice should be informed by the observation made in introduction to this article: Because the fundamental right of access to justice generally prevails over the principle of freedom of contract, a solution that risks unduly restricting freedom of contract ought be preferred over a solution that effectively risks leaving plaintiffs without any redress. For that reason, a blanket prohibition on class action waivers seems, on balance, to be the least problematic of these two flawed solutions.

Pierre Bienvenu, ''L'affaire *Dell* et le contrôle de la compétence arbitrale au stade du renvoi à l'arbitrage,'' 37 *R.G.D.* 477 (2007)), the problem is compounded by the fact that arbitrators normally have a first kick at the can on jurisdictional issues, which entails that plaintiffs would first have to argue unconscionability before the arbitrators, subject to subsequent review—and appeals—before courts.

Desirability of International Class Arbitration

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It is now well established and well documented that class arbitrations are possible, at least in the United States.[1] But are they desirable? The answer to this, as to so many questions, is it depends. It depends on the particulars of the case and the claim, and whether you are a claimant or respondent, a bank or consumer, an issuer or shareholder, an employer or employee, and your country of origin.

But make no mistake, the issue has been joined and positions staked out. In the United States, where the courts have ruled that the permissibility of a class action in arbitration is essentially a question of clause construction that is left up to the arbitrators (at least in the first instance), the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Services (JAMS), two leading arbitral institutions, have promulgated rules for class arbitrations and are actively administering them. In stark contrast, the International Chamber of Commerce (ICC) has promulgated a policy statement that ''implementing class action systems has adverse consequences for business and consumers that outweigh the perceived benefit to society,'' including ''exposure to 'legal blackmail.'''[2] The ICC's International Court of Arbitration has not taken any action to date to create rules to accommodate class arbitration.

* The authors would like to thank their colleagues Marco Schnabl, Julie Bedard, and Jennifer Cabrera for access to their as-of-yet unpublished article on class arbitrations, and Amanda Raymond for her assistance in preparing this article.

[1] *See, e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Stolt Nielsen SA v. Animalfeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008); JSC Surgutneftegaz v. President and Fellow of Harvard Coll., 2007 U.S. Dist. LEXIS 79161 (S.D.N.Y. Oct. 11, 2007).

[2] ICC Commission on Commercial Law and Practice, Class Action Litigation, Policy Statement, Document No. 460/585 (2005), *available at* http://www.iccwbo.org/uploadedFiles/ICC/policy/clp/Statements/Class_action_litigation.pdf.

On both the international and domestic fronts, public policy and due process concerns are among the greatest obstacles to the acceptability of class arbitration. Many of the same procedural concerns that implicate due process also inform the debate over whether class arbitration is consistent with the conventional notion of arbitration as a prompt, inexpensive proceeding. As Professor Stacie Strong has pointed out, overcoming these concerns may require ''a radical reconceptualization of both (1) acceptable procedure in international arbitration and (2) the nature of individual rights in arbitration.''[3] The path toward rethinking time and costs in arbitration has already been paved, to some extent, by the large, complex individual arbitrations that have become commonplace. Coming to terms with broader concerns over policy and justice may not be as easy.

While the debate rages, international class securities arbitrations may make their debut in a case brought by Harvard College against JSC Surgutneftegaz (''Surgut''), currently pending before an AAA tribunal, which serves as a useful paradigm for considering some of the issues relevant to the desirability of class arbitrations.[4] Harvard commenced an arbitration pursuant to a 1998 deposit agreement governing American depository receipts. The parties to the deposit agreement were Surgut, a Russian oil and gas company, Bank of New York as depository, and the owners and beneficial owners of the Surgut American depository receipts. Harvard brought claims on behalf of all owners of the American depository receiptss, alleging that Surgut had violated U.S. securities laws and the deposit agreement.

After Surgut's court challenges to arbitrability were denied,[5] the distinguished AAA panel issued two interim awards, one of which addressed the issue relevant here: Did the arbitration clause in the deposit agreement permit the arbitration to proceed on behalf of a class?[6]

The deposit agreement provided that disputes arising out of or relating to the American depository receipts or the deposit agreement would be settled ''in accordance with the rules of the American Arbitration Association.''[7] It did not specify what rules. The arbitrators applied the AAA Supplementary Rules for Class Arbitrations, which had become effective before the arbitration was commenced but some five years after the deposit

[3] S.L. Strong, ''Enforcing Class Arbitrations in the International Sphere: Due Process and Public Policy Concerns,'' 30(1) *U. Pa. J. Int'l L.* 1, 5 (2008).

[4] President and Fellows of Harvard Coll. v. JSC Surgutneftegaz, AAA Case No. 11 168 T 01654 04.

[5] *See* JSC Surgutneftegaz v. President and Fellows of Harvard Coll., 167 F. App'x 266 (2d Cir. 2006).

[6] President and Fellows of Harvard Coll. v. JSC Surgutneftegaz, AAA Case No. 11 168 T 01654 04, Partial Final Award on Clause Construction, Aug. 1, 2007.

[7] *See id.* at 2.

agreement was entered into, and which require in Rule 3 that the arbitrators ''determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.''

Over the dissent of one arbitrator, the panel found that the arbitration clause was very broad and covered any claim brought by any party and did not preclude the arbitration from proceeding on a class basis. Writing in the shadow of a U.S. federal court decision rendered in New York the prior year—*Stolt-Nielsen SA v. Animalfeeds International Corp.,*[8]—which ruled that another AAA panel's decision to allow an arbitration to proceed on a class basis was a manifest disregard of the law,[9] the *Harvard v. Surgut* majority discussed in detail why the deposit agreement and its arbitration clause were particularly hospitable to class arbitration. Among other things, they noted the following:

- All members of the proposed class (i.e., all holders of the American depository receipts, were parties to a single deposit agreement. Unlike many potential class arbitrations, the panel did not have to consider consolidating claims under separate agreements that were similar or identical. Here, by the terms of the deposit agreement, all of the holders became parties to the same agreement when they purchased the American depository receipts, even though they purchased them at different times.
- The arbitration clause permitted the parties to submit any claims arising under the federal securities laws of the United States either to arbitration or to U.S. courts, in effect implicitly agreeing to class action litigation, since a class action clearly would have been permissible had the action been brought in the U.S. courts.

Both of these factors could potentially help set the critics of international class arbitration at ease, or at least at relative ease. Where the defendant and all members of the plaintiff class are signatories to a single agreement that evidences a willingness to participate in class actions, it is much harder to complain that they have been unfairly required to participate in a class arbitration. Notably, however, the U.S. Court of Appeals for the Second Circuit has recently reversed the district court's decision in *Stolt-Nielson,* ruling that the AAA panel's decision to construe the contract language at issue in that case to permit class arbitration was not in manifest disregard of

[8] Stolt-Nielsen SA v. Animalfeeds Int'l Corp., 435 F. Supp. 2d 382 (S.D.N.Y. 2006).

[9] *See* President and Fellows of Harvard Coll. v. JSC Surgutneftegaz, AAA Case No. 11 168 T 01654 04, Partial Final Award on Clause Construction, at 16-20 (discussing *Stolt-Nielsen*).

the law.[10] Accordingly, it is possible that future arbitral tribunals seated in New York may not require the sort of extraordinary factors present in the *Harvard v. Surgut* case to find that an arbitration clause permits class arbitrations.

The *Harvard v. Surgut* panel also addressed the respondent's argument that class arbitrations were so inherently ''incompatible with the 'nature' or 'principles' or 'norms' of international arbitration'' that the panel should not allow it to go forward.[11] Noting that the respondent did not ''identify any 'norm' that explicitly bars the class action in the context of international arbitration,''[12] the majority rejected this challenge without determining its merits:

> That reasonable people will inevitably have different views about the merits of the use of the class action device in international arbitration is distinct from the conclusion that the class action device is so incompatible or at odds with the process that an arbitration clause, properly construed in accordance with its governing law and the procedure of the situs of the arbitration, is invalid to the extent it permits a case to proceed on a class basis.[13]

Under the AAA rules, if the case goes forward, the next stage is class certification, at which the panel will still have to decide whether a class action is appropriate in the particular circumstances of the case. However, it has clearly decided that the misgivings of foreign parties and some in the international arbitration community about U.S.-style class actions cannot bear on whether a class action is permissible as a general matter, thus paving the way for what may be the first-ever securities class action in international arbitration.[14]

[10] Stolt Nielsen SA v. Animalfeeds Int'l Corp., 548 F.3d 85, 99-110 (2d Cir. 2008).

[11] *Id.* at 28.

[12] *Id.*

[13] *Id.* at 30.

[14] U.S. courts following *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003), have similarly avoided imposing their public policy view. For instance, in *Johnson v. Long John Silver's Restaurants, Inc.*, 320 F. Supp. 2d 656, 668 & n.7 (M.D. Tenn. 2004), *aff'd*, 414 F.3d 583 (6th Cir. 2005), the court observed that ''foreclosing the possibility of a class action would force an individual plaintiff to bear the entire cost of proving a [violation of the Fair Labor Standards Act] because the benefit to any individual plaintiff is small,'' but found that under *Bazzle*, the question was left up to the arbitral tribunal.

POLICY AND PERSPECTIVE

At its essence, the policy dispute that the *Harvard v. Surgut*[15] panel declined to resolve seemingly had little to do with arbitration *per se*; rather, it stemmed from the respondent's more general contention that ''the class action is a 'pernicious' and 'uniquely American form of collective action,''' which should therefore not be imposed in an international forum.[16] Likewise, much of the broader policy debate about the desirability of class arbitrations appears to have little to do with the unique combination of class actions and arbitration. Rather, many of the disputes focus either on the general desirability of arbitration or the general desirability of class actions.

For instance, if an attorney for a U.S. plaintiffs' class complains about having to bring her class action in arbitration because she prefers to be in front of a jury, she would likely have the same complaint if she were bringing a claim on behalf of a sole aggrieved plaintiff. And like the complaint from the *Harvard v. Surgut* respondent that class actions are pernicious from a non-U.S. litigant's perspective, the ICC's strident policy statement—in which it expresses strong opposition to class actions on behalf of its business constituents—is a statement about class actions generally, not class actions in arbitration in particular.

It would be a mistake, however, for the international arbitration community to simply shrug its collective shoulders and avoid discussion of these issues. The participants in the international class arbitration debate will surely be informed by their long-formed, general perspectives on both arbitration and class actions, but the convergence of class actions and international arbitration does shine some new light on old questions and require a further look.

One interesting feature of this debate is that opposing parties—for example, issuers and investors in securities disputes—may not necessarily be at odds concerning the desirability of resolving a class action in arbitration rather than litigation. Indeed, issuers may feel themselves pulled in both directions. They may hesitate to leave the U.S. courts where heightened pleading standards are often strictly enforced by pre-discovery motions to dismiss, but if international arbitration lives up to its promise of much more limited discovery, it might be worth the trade. They may be concerned by the lack of effective appellate review when such large amounts are at stake, but delighted to leave behind the uncertainty of a trial by jury.

And the starkly different view of class actions taken from the perspective of different national legal cultures and regimes must be considered, not

[15] President and Fellows of Harvard Coll. v. JSC Surgutneftegaz, AAA Case No. 11 168 T 01654 04.

[16] *Id.*, Partial Final Award on Clause Construction, at 22.

because it will be possible to fairly choose between them or to attempt to discern an international public policy—it will not—but to recognize the impact such a choice may have on the public policy balance that has been struck within any one country. Where class actions are permitted, they are often thought to play a quasi-regulatory function, encouraging companies to deal honestly and fairly with their customers, or their shareholders, by giving plaintiffs a mechanism for redress even where no single plaintiff would have a sufficient incentive to sue.[17] Denying arbitration claimants the opportunity to act on behalf of a class in an action that would otherwise have been brought in a court in such a country may degrade an important public function. Likewise, many countries that forbid class actions undoubtedly do so in the belief that their regulatory structure appropriately enforces, through other means, the rights of shareholders and consumers without this particular litigation mechanism. To permit class actions in cases that would otherwise be brought in such a country may result in a double-enforcement regime that is unreasonably onerous for defendants.

But how should this be resolved? Are class actions in international arbitration appropriate only in cases that, absent an arbitration clause, could have been brought in the courts of a country that permits class actions? The *Harvard v. Surgut* majority clearly was encouraged by the fact that the claimant could have chosen to bring the case as a class action in a U.S. court. It would be difficult to impose such a standard, however, even by national arbitration legislation. The *situs* of an arbitration is not necessarily the only place where litigation over the claim would have been brought; in fact, it might not have even been an available forum. One very rough approximation might be to treat class actions as a substantive right rather than a procedural one;[18] thus, tribunals would take the approach to class actions taken by the country whose substantive law applies to the dispute. Whatever the resolution, consideration of the impact on a country's regulatory policy likely will have a place in this discussion.

PROCEDURE AND DUE PROCESS

Even the most ardent proponents of class actions in arbitration are faced with the enormous reality of developing and administering the complex set

[17] *See, e.g.*, Dell Computer Corp. v. Union des consommateurs, [2007] S.C.C. 34, ¶ 106 (Canada) (''It is accepted that the class action has a social dimension: Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights.''—internal quotation marks omitted).

[18] *But see id.* (''[A]s important as it may be, the class action is only a legal procedure.'').

of procedural mechanisms necessary to conduct the proceedings fairly and efficiently. In the United States, class action procedures have been adjusted and refined for decades through legislation and judicial innovation, often openly attempting to remedy perceived unfairness to class action plaintiffs or defendants, or both, and to strike a balance that is consistent with prevailing U.S. public policy.[19] Even if we set aside the due process concerns of those who believe the class action mechanism is inherently unfair (perhaps to defendants or to absent class members who are included unless they opt-out), due process can surely be implicated by a failure to appropriately craft a set of procedures to adapt the class action to arbitration. The AAA has adopted probably the most sophisticated set of procedures for class action arbitrations, and they are modeled after the class action procedures in Rule 23 of the U.S. Federal Rules of Civil Procedure, but they do not incorporate wholesale the extensive body of statutes and case law that guide U.S. courts adjudicating class actions.

It is far beyond the scope of this article to propose a set of procedures to be followed in international class arbitrations, or even to mention all of the procedural challenges they will face, but it is worthwhile to raise some of the challenges of process and administration, the resolution of which may greatly impact the desirability of international class arbitrations.

Pleading Standards

In the United States, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA),[20] which, among other things, sets heightened pleading requirements for federal securities class actions, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA),[21] which ensures that certain types of securities actions be brought in federal court where the PSLRA's standards apply, rather than in state court where they might be avoided. Should those relatively strict pleading requirements be grafted onto class arbitrations as a necessary protection for defendants?

Also, considering that these two laws expressed significant policy statements by Congress, query whether these statutes might (or should) be

[19] *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, codified as amended in various sections of 28 U.S.C. (2005) (purporting to address ''abuses of the class action device that have,'' among other things, ''harmed class members with legitimate claims and defendants that have acted responsibly'').

[20] Pub. L. No. 104-67, 109 Stat. 737, codified as amended in various sections of 15 U.S.C. (1995).

[21] Pub. L. No. 105-353, 112 Stat. 3227, codified as amended in various sections of 15 U.S.C. (1998).

invoked to preclude class arbitrations, or worse, their enforcement, if the pleading requirements and other standards set out in these laws are not available in arbitration.

Participation of Absent Class Members

In class actions in U.S. courts and in the AAA class action rules, notice to prospective class members is required both at the time the class is certified and at the time of any settlement. Prospective class members are given the right to opt out of the class or object to settlement. Would it make more sense to operate an opt-in policy, where potential class members are only included in the class if they affirmatively request inclusion (even by merely returning a form)?

An opt-in policy could make class actions less lucrative and thus less attractive to plaintiffs' lawyers working for a contingent fee, who often are the key drivers behind class action litigation. It might also make it harder for defendants to achieve peace, since they could face serial opt-in class actions. But perhaps it would resolve some due process and policy concerns if members of the class were given notice and had to affirmatively choose to have their claims adjudicated by opting in rather than being bound by a proceeding and result merely because they had failed to opt out. Would an opt-in approach thus help to facilitate enforcement in countries that are reluctant to recognize class actions?

If notice is to be required, who pays for the notice? What form of notice is required? Should actual notice be required, or should the tribunal deem a certain notice procedure constructive notice, and would it make a difference for enforcement? Are there other steps that should be taken to protect the rights of absent class members?

Settlement Fairness and Administration

In U.S. class action practice, cases are far more likely to settle than to be tried to a final judgment, and class action settlements raise complicated questions of administration and fairness.

U.S. courts have a duty to scrutinize settlements for fairness, reasonableness, and adequacy.[22] This is a core element of due process in court-based class actions. Under the AAA rules, the arbitrators will have a similar duty. But how will this be played out in practice, among arbitrators who may lack

[22] Fed. R. Civ. P. 23(e)(2).

both experience in such matters and the public trust invested in national courts? Judges must anticipate poorly equipped class representatives and attorneys, inadequate class settlement provisions, and overly generous fee stipulations. Are arbitrators prepared to assume this role in international class arbitrations? Will this create a bias in class action arbitrator selection in favor of U.S. litigators and former judges?

Administration of the settlement also requires compiling and maintaining mailing lists of class members and providing adequate notice, collecting and evaluating individual proofs of claim from each class member who wishes to benefit from the settlement, and managing the investment and distribution of settlement funds. In the United States, there is a well-developed for-profit industry experienced in notice and settlement administration. But what if class arbitrations are conducted in countries without this infrastructure? And will the arbitrators be available to provide sufficient oversight of class award distribution? Arbitrators ordinarily become *functus officio* after they render an award, whereas courts are available to resolve disputes about class award distribution long after a judgment is rendered.

Discovery

How will international class arbitrations address the discovery process? In U.S. securities class actions, for example, discovery is often largely one sided; the issuer has most of the relevant knowledge and information, and the class plaintiffs who purchased the securities have little or no relevant knowledge other than what is publicly available. This imbalance makes discovery extremely important to the plaintiff class attempting to prove its claims; it also puts undue pressure on the defendant, which will be bearing most of the discovery burden, to settle. If discovery is sharply limited, as it often is in international arbitration, this could substantially alter the balance of power in class actions.

Costs and Fees

No discussion of the arbitration process would be complete without a discussion of costs and fees. Arbitrators' fees will likely be much higher in class arbitration than in ordinary international arbitration, commensurate with a greatly expanded commitment of time and attention from the arbitrators. Under the AAA rules, for instance, the arbitrators are required to address the dispute in several phases—clause construction, class certification, merits—and issue awards at each phase. The process can also involve

disputes among various plaintiffs and various plaintiffs' counsel, objections to settlement, and a variety of issues not present in traditional arbitration.[23]

With respect to attorneys' fees, the routine American system of contingency payments for plaintiffs' lawyers, which is likely a critical structure in many cases if the action is to be brought at all, is anathema to other countries' legal systems. Furthermore, in arbitration, often the loser is required to pay the winner's costs. If the defendant prevails, from whom will the fees be collected—the named plaintiffs, their counsel? Are defendants going to ask for a bond to be posted?

Enforcement

If a comprehensive procedure for the conduct of class arbitrations can be established, there remains the question of enforcement of arbitral awards, which is discussed above to some extent. As Professor Strong explains, ''As class arbitration becomes more international''—if it will, if it does—''state courts, particularly those in civil-law countries, will have to consider whether and to what extent they should permit foreign conceptions of rights to be enforced in arbitration.''[24] She suggests that, in doing so, they consider the purposes and requirements of the New York Convention[25] and other enforcement treaties, because, even if a state domestically prohibits the use of representative actions in its own courts, that may not be an adequate reason rising to the level of international public policy for the state's courts to refuse enforcement on a wholesale basis (i.e., without looking at the way a given class arbitration award evolved).[26]

WHAT LIES AHEAD

The majority of class arbitrations that have been brought to date appear to be domestic consumer and employment arbitrations, but these issues should be of interest to anyone concerned with the future of international

[23] Clancy and Stein have also noted several reasons why a class arbitration may actually be more burdensome on the parties than a class litigation. The clause construction phase is unique to arbitration, as is the need to pay arbitrators, which can be a substantial or even prohibitive burden on the parties. *See* David S. Clancy & Matthew M.K. Stein, ''An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History,'' 63(1) *Bus. Law.* 55, at 63-64, 73 (2007).

[24] Strong, *supra* note 3, at 3.

[25] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[26] Strong, *supra* note 3, at 3.

arbitration, because the considerations that arise and approaches developed in consumer class arbitrations under the U.S. Federal Arbitration Act may ultimately inform the broader international commercial arbitration context. The *Harvard v. Surgut*[27] example may be the first of many.

Are we heading into an era where class arbitration is permitted, but only when allowed by the forum, or by the institutional rules, or both? If an international arbitration is brought in the United States, where class arbitrations are permissible, under the auspices of the ICC, which may not be willing to administer them, what is the result? Are parties going to avoid the United States as a forum, and AAA or JAMS rules, for contracts that could give rise to class actions? Perhaps certain class actions will be redirected, by statute or by institutional rules, into the courts, as currently required by the New York Stock Exchange rules.[28]

The enforceability of class action arbitration waivers—arbitration clauses that expressly disallow class action—is also an evolving issue. Should the United States and other countries consider statutory amendments to address the permissibility of class arbitrations and, if they are going to be permitted, create consistent standards for class action waivers and other disputed issues? And should courts expand judicial review of class arbitration awards to address the critical due process issues discussed above?

The debate is just beginning, and its implications for the arbitration world could be enormous.

[27] President and Fellows of Harvard Coll. v. JSC Surgutneftegaz, AAA Case No. 11 168 T 01654 04.

[28] NYSE Regulation Rule 600(d).

Feasibility of Class Arbitration

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While the notion of class arbitration has been a theoretical possibility for many years, class arbitration was not viewed as a device of any prominence until the decision of the U.S. Supreme Court in June 2003 in *Green Tree Financial Corp. v. Bazzle*.[1] It is important to stress that, in *Green Tree*, the Supreme Court did not fashion a change in the law; it did not hold for the first time that class actions could be brought in the arbitration context. In fact, the Supreme Court took it as a given that a dispute could be submitted to arbitration on behalf of a class. Rather, the Supreme Court addressed a narrower question: Given that a case may be submitted to arbitration on behalf of a class, who, as between a court and an arbitrator, has the authority to determine whether an arbitration clause that is silent on the issue permits a case to be submitted on behalf of a class? The Court held that it is for an arbitrator to decide.

GREEN TREE

Green Tree arose out of certain agreements between a commercial lending company, Green Tree, and its customers. Those agreements contained an arbitration clause. Green Tree entered into many such agreements with many customers. One was with Lynn and Burt Bazzle, another with Daniel Lackey, and a third with George and Florine Buggs. At the time of these agreements, Green Tree apparently failed to provide its customers with a form, legally required under South Carolina law, that would have informed them that they had the right to name their own lawyers and insurance agents. The failure to provide this form gave rise to a claim for statutory damages.

The Bazzles brought a class action suit in South Carolina state court. Green Tree sought to stay the lawsuit and compel arbitration based on the arbitration clause in the loan agreement. The court entered an order both

[1] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

certifying the Bazzles' claims as a class action and compelling class arbitration. The arbitrator heard the case, and awarded the class $10,935,000 in statutory damages. Green Tree sought to set aside this award on the ground that class arbitration was legally impermissible.

Lackey and the Buggses had commenced a similar suit to that of the Bazzles. Green Tree also moved to compel arbitration, and ultimately the case ended up before the same arbitrator as that in the Bazzles' case. The arbitrator certified the class action brought by Lackey and the Buggses, found in favor of the class, and awarded $9,200,000 in statutory damages. Green Tree also challenged this decision on the ground that class arbitration is legally impermissible.

Both cases ultimately reached the South Carolina Supreme Court, which held that, since the contracts were silent as to class arbitration, they allowed a case to be brought on behalf of a class.[2] An appeal by Green Tree was accepted by the U.S. Supreme Court, which considered the question of whether this holding was consistent with the Federal Arbitration Act (FAA).

The Supreme Court issued a plurality opinion holding essentially that it was for an arbitrator rather than for a court to determine whether, when a contract is silent on the issue, an arbitration clause permits a case to proceed on behalf of a class. It noted that in the case brought by the Bazzles, the South Carolina court rather than the arbitrator had made that determination, that in the case brought by Lackey and the Buggses, the arbitrator, who was also the arbitrator in the *Bazzle* case, had made that determination only ''after the South Carolina trial court had determined that the identical contract in the *Bazzle* case authorized class arbitration procedures.''[3] As a result, for the Supreme Court, ''there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator's decision reflected a court's interpretation of the contracts rather an arbitrator's interpretation.''[4] And so the Supreme Court remanded the case so that the arbitrator could decide that question independently.

SUPPLEMENTARY RULES FOR CLASS ARBITRATION

Less than four months after the *Green Tree* decision, the American Arbitration Association (AAA) issued a set of rules designed for class arbitration. The Supplementary Rules for Class Arbitration (''Supplementary Rules'') became effective on October 8, 2003, and provide that they ''shall apply to any dispute arising out of an agreement that provides for

[2] Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 569 S.E.2d 349 (2002).
[3] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003).
[4] *Id.*

arbitration pursuant to any of the rules of the American Arbitration Association (''AAA'') where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules.''[5] They also go on to set forth procedures governing disputes submitted to arbitration on behalf of a class.

Before considering the procedures established by the Supplementary Rules, it is worth beginning with three preliminary, but not inconsequential, points.

First, it is important to be clear that just because the Supplementary Rules, by their explicit terms, apply to any dispute arising out of an agreement with an arbitration clause designating any of the AAA rules, it does not follow that all such disputes shall be permitted to proceed as class arbitrations. The rules do not in any way mandate that a dispute to which they apply *should* proceed as a class arbitration. Rather, the rules provide a set of guidelines that arbitrators should follow to determine *whether* a dispute commenced on behalf of a putative class should be allowed to go forward as a class arbitration.

Second, although the effective date of the Supplementary Rules is October 8, 2003, they could, in principle, apply to an agreement that was entered into prior to that date, as long as the dispute was submitted to arbitration after that date. Some have argued that it is unfair for the Supplementary Rules to apply to a contract that was entered into prior to that date, even if the dispute was commenced afterwards. However, the application of the Supplementary Rules to contracts providing for arbitration under any of the AAA rules that were entered into prior to the effective date of those Supplementary Rules is simply a specific application of a more general rule applied commonly in the arbitration context. The rules of various institutions, including, for example, those of the International Chamber of Commerce (ICC) or AAA, get changed periodically, and it is generally understood that an arbitration that is commenced pursuant to particular rules designated in an arbitration agreement proceeds under the rules in effect *at the time of the commencement of the arbitration* rather than those in effect *at the time of the contract*, unless the arbitration clause specifically states otherwise.[6] Moreover, it is important to stress again that the fact that

[5] Supplementary Rules, Rule 1(a).

[6] Thus, Article 6(1) of the ICC Rules provides that ''where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.'' Article 1(1) of the International Arbitration Rules of the AAA provides,

> where parties have agreed in writing to arbitrate disputes under these International Arbitration Rules or have provided for arbitration of an Interna-

the Supplementary Rules apply to a particular dispute submitted to arbitration does not entail that the case will proceed as a class arbitration. Rather, the Supplementary Rules simply set forth the procedures that arbitrators in AAA cases should use to decide whether or not a case brought on behalf of a class should proceed as a class arbitration, and, if so, how.

Third, one might be tempted to think that the fact that the AAA has promulgated rules for class arbitration, as has another arbitral institution, the Judicial Arbitration and Mediation Services (JAMS),[7] entails that if one wants to avoid class arbitration, one can simply avoid designating the AAA or JAMS rules and, instead, select the rules of an arbitral institution that has not adopted special rules for class arbitrations. That is not the case.

In determining whether a dispute may be submitted to arbitration on behalf of a class, the decisive issue is not the particular arbitration rules chosen by the parties, but rather the place of arbitration. This is because the place of arbitration determines the procedural law that governs the arbitration,(i.e., the *lex arbitri.*)[8] *Green Tree*[9] has made clear that the *lex arbitri* for cases sited in the United States provides that there is nothing in principle that prohibits a dispute being submitted to arbitration on behalf of a class.[10] This is the case regardless of the rules governing the arbitration, unless those rules themselves prohibit a case being submitted on behalf of a class.[11]

Thus, if a dispute is submitted to arbitration on behalf of a class in the United States under the AAA Rules, an arbitrator is to look to the Supplementary Rules to determine whether it should proceed as a class, and

> tional dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular rules, the arbitration shall take place in accordance with these rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.

[7] *See* http://www.jamsadr.com/rules/class_action.asp.

[8] *See* Albert Jan van den Berg, ''The Application of the New York Convention by the Courts,'' *ICCA Congress Series No. 9* 25 (1999); Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* (2d ed. 1989); Alain Hirsch, ''The Place of the Arbitration and the *Lex Arbitri,*'' 34 *Arb. J.* 43, (1979); Alan Scott Rau, ''The New York Convention in American Courts,'' 7 *Am. Rev. Int'l Arb.* 213 (1996). *See also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas, 364 F.3d 274, 291 (5th Cir. 2004).

[9] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[10] None of this is to suggest that class arbitration is not possible in countries besides the United States. In fact, in an excellent and illuminating discussion of the issue, Professor Stacie Strong has identified other countries where class arbitration may be recognized. *See* Stacie I. Strong, ''Class Arbitration in the International Sphere: Due Process and Public Policy Concerns,'' 30 *U. Pa. J. Int'l L.* 1 (2008).

[11] This raises the question of whether a hypothetical arbitration rule of this type would be enforceable by U.S. courts, which it is beyond the scope of this article.

if so how. But if a class arbitration is commenced in the United States under, say, the ICC Rules, while the ICC has promulgated no rules governing class arbitrations, under *Green Tree* an arbitrator is empowered to construe the arbitration agreement to determine whether it permits or forbids a case to be brought on behalf of a class.

With these preliminary points in the background, let me turn to the guidelines established by the Supplementary Rules by which an arbitrator is to determine whether a case brought on behalf of a class should be allowed to proceed on behalf of a class.

Under the Supplementary Rules, an arbitrator is to approach a dispute submitted to arbitration on behalf of a class by dividing it into four stages: the clause construction stage, the class determination stage, the notice stage, and the merits stage. One of the hallmarks of the rules is that they give the parties the right to apply for review by the courts at the conclusion of the first and second stage. In addition, any party has a right under the FAA to seek to confirm or set aside a final award on the merits, rendered at the fourth stage.

Clause Construction

At the clause construction stage, the task of the arbitrator is to construe the clause pursuant to which the dispute has been submitted to arbitration to determine whether it permits that dispute to be submitted to arbitration on behalf of a class.

Rule 3 provides as follows:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the ''Clause Construction Award''). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator

> may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.
>
> In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

There are three important points to highlight about Rule 3. First, this rule sets forth the authority of the arbitrator, established in *Green Tree,*[12] to determine whether an arbitration agreement permits a case to proceed on behalf of a class. Second, it provides that the arbitrator must set forth her decision in a ''reasoned, partial final award''—called ''the Clause Construction Award.'' Third, Rule 3 provides that once this award is rendered, the arbitrator ''shall'' stay the case for 30 days to permit the parties to move a court of competent jurisdiction to confirm or set aside this award.

Courts have applied the manifest disregard standard in the class arbitration context to review arbitration awards.[13] Since the decision in *Hall Street Associates LLC v. Mattel,*[14] where the U.S. Supreme Court held that the FAA's narrow grounds for *vacatur* are exclusive, there is some debate as to whether that standard is still applicable to review an arbitrator's decision, although the trend appears to be that the manifest disregard standard is alive and well.[15]

When it comes to construing an arbitration clause, there are three possibilities. First, the arbitration clause could be explicitly drafted to permit class arbitration. Second, it could be drafted explicitly to forbid class

[12] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[13] In *Stolt-Nielsen S.A. v. Animalfeeds International Corp.,* 2008 WL 4779582 (2d Cir. Nov. 4, 2008) the Second Circuit reversed a finding by the District Court for the Southern District of New York that arbitrators acted in manifest disregard of the law in construing an arbitration clause, silent as to whether class arbitration was permitted, to permit class arbitration. In another case brought under the Supplementary Rules, which in the interests of full disclosure, I should note I am one of the arbitrators, Judge Berman confirmed a clause construction award finding the clause in question permitted class arbitration, holding that there was no manifest disregard on the part of the arbitrators: ''The 'manifest disregard doctrine [applies] . . . only in the most egregious instances of the misapplication of legal principles.' . . . That is not this case.'' JSC Surgutneftegaz v. The President and Fellows of Harvard College, 2007 WL 3019234, *3 (S.D.N.Y. Oct. 11, 2007) (citation omitted).

[14] Hall St. Assocs. LLC v. Mattel, 128 S. Ct. 1396 (2008).

[15] *See* Kashner Davidson Sec. Corp. v. Steve Mscisz, 2008 WL 2553337 (1st Cir. June 27, 2008) (affirming application of manifest disregard doctrine in a decision after *Hall Associates*); Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 2008 WL 4779582 (2d Cir. Nov. 4, 2008) (same).

arbitration. Third, it could be silent on this issue, not explicitly addressing one way or another whether it forbids or permits class arbitration.

In the first case, the arbitrator's task is somewhat straightforward. She simply announces what the contract explicitly provides. The second situation is complicated by the fact that the AAA has issued a policy statement stating that it will not administer cases arising out of contracts with arbitration clauses, which provide that they prohibit class arbitration on the ground that it is for courts rather than arbitrators to determine the enforceability of a clause prohibiting class arbitration.[16]

The third situation—when a clause is silent as to whether it permits or prohibits a case to be brought on behalf of a class—is by far the most common. Before turning to discuss this situation, it is worth noting that under the AAA Rules, Clause Construction Awards—and all other awards rendered pursuant to the Supplementary Rules—are published on the AAA Web site (http://www.adr.org). In fact, this is explicitly provided for in Rule 9:

> (a) The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.
>
> (b) The AAA shall maintain on its Web site a Class Arbitration Docket of arbitrations filed as class arbitrations. The Class Arbitration Docket will provide certain information about the arbitration to the extent known to the AAA, including:

[16] This policy states that it

> has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement. The Association's practice has been neither to commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

See the American Arbitration Association Web site, http://www.adr.org/sp.asp?id=28779.

(1) a copy of the demand for arbitration;

(2) the identities of the parties;

(3) the names and contact information of counsel for each party;

(4) a list of awards made in the arbitration by the arbitrator; and

(5) the date, time and place of any scheduled hearings.

Based on a review of some of these awards, it appears that, where the arbitration clause is silent, arbitrators have overwhelmingly construed them to permit class arbitration. And while it is not possible to outline the reasoning of all the cases, in general, arbitrators have approached the issue in the following way.

Most arbitration clauses follow a similar form, providing, for example, ''All disputes arising out of or relating to this agreement shall be finally resolved by arbitration'' or ''Any controversy or claim arising out of or relating to this agreement shall be finally resolved by arbitration,'' or similar words to that effect. Arbitrators deciding cases under the Supplementary Rules have tended to reason that ''all disputes'' means *all* disputes—whether brought on behalf of an individual or a class.[17] Similarly, they have reasoned that ''any controversy'' means *any* controversy—whether brought on behalf of an individual or a class.[18]

There is a potential counterargument to this reasoning: the words ''all disputes'' or ''any controversy'' and the like are intended to refer to *the type* of claim being brought *by the particular party* to the contract containing the arbitration clause, not *the procedural device* by which that claim is pursued. The point of such language is that the parties to the contract want to make sure to include all disputes *between those parties*, not just some disputes. And the reason for this is that the parties do not want to be in arbitration, with respect to some disputes, and in litigation, with respect to others. On this view, that language is simply not pertinent to the question of whether any such dispute or claim can be submitted not only on behalf of an individual,

[17] *See, e.g.*, Giovani Depianti v. Bradley Mktg. Enters. Inc., AAA Case No. 11, 114 00838 07, Clause Construction Award, Aug. 1, 2008, at 8 (clause providing that '''[a]ll disputes, controversies and claims of any kind arising or relating to this agreement shall go to arbitration''' was ''clearly a broad one'' such that ''[c]laimants rightly contend that this broad directive would appear to include any claim . . . including a class claim.''). *See* http://www.adr.org/si.asp?id=5442.

[18] *See, e.g.,* Tomeldon Co. Inc.. v Medco Health Solutions, Inc., AAA Case No. 11 193 00546 06, Clause Construction Award, Nov. 22, 2006, at 13 (arbitration clause covering '''any controversy or claim' . . . is so broad as to bring within its sweep all disputes about payments and audits. . . . This language is certainly broad enough to include a claim brought in a representative capacity and would, without more, permit a class arbitration.''). *See* http://www.adr.org/si.asp?id=4516.

but also on behalf of a class. Be that as it may, the argument that has carried the day in cases decided under the Supplementary Rules is that the common, broadly worded arbitration clause referring to ''any controversy'' or ''all disputes'' and the like are best construed to allow a case to be brought on behalf of a class.

Class Determination

If an arbitrator finds at the Clause Construction stage that the arbitration clause, properly construed, does not prohibit class arbitration, and if there is no challenge to that award or, if there is, and the Clause Construction Award is not set aside, that is not the end of the matter. A Clause Construction Award finding that an arbitration clause permits a dispute to be submitted to arbitration on behalf of a class does not entail that it is appropriate for it to go forward on behalf of the particular class in the circumstances of that particular case. Thus, if the arbitrator finds that an arbitration clause permits a case to be brought on behalf of a class, it is an independent and further question whether it is appropriate, in the particular circumstances, for the case to proceed on behalf of a class. For example, if a clause were construed to permit class arbitration, it will likely not go forward on behalf of a class in circumstances where there are only two members of the class. The question of whether it is appropriate for a case to proceed on behalf of a class is assessed as the second stage—the class determination stage, which is akin to the class certification stage in litigation.

Rule 4 provides as follows:

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

(6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

(b) Class Arbitrations Maintainable

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

(2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

These standards are almost identical to the standards courts use to determine class certification in the U.S. litigation context.[19] The only additional standard is the final one, which is appropriate only in the arbitration context, namely the requirement that ''each class member has entered into an agreement containing an arbitration clause, which is

[19] *See* Fed. R. Civ. P. 23.

substantially similar to that signed by the class representative(s) and each of the other class members.''[20]

Rule 5 provides that the decision by an arbitrator as to whether or not to allow a case to proceed as a class shall be set forth in a ''reasoned, partial final award''—the ''Class Determination Award.'' Rule 5 sets forth what the Class Determination Award must address:

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the ''Class Determination Award''), which shall address each of the matters set forth in Rule 4.

(b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.

(c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

[20] Supplementary Rules, Rule 4(a)(6).

Three aspects of Rule 5 are worth highlighting. First, like Rule 3 with respect to the Clause Construction Award, after issuing the Class Determination Award, the arbitrator ''shall'' stay the case for 30 days to allow the parties to confirm or set aside the Class Determination Award. Second, Rule 5 explicitly contemplates an ''opt-out'' system of class arbitration, rather than an ''opt-in'' system.[21] What this means is that once the class is defined, all members of that class are, in principle, bound by the outcome of the arbitration. Class members who wish to opt out, therefore, must have notice and a fair opportunity to do so; otherwise, as in the litigation context, their due process rights can be violated.[22] For this reason, there is a notice stage, which leads to the third point about the Class Determination stage: the Class Determination Award must contain the Notice of Class Determination, which is governed by Rule 6. This will be discussed in more detail below, but it is noteworthy that this notice is attached to the Class Determination Award, which could, therefore, be subject to review by the court.

Notice to Class Members

The Notice to Class Members is very important in both the litigation and arbitration context because in order to protect the due process rights of class members in an opt out system, it is important that the class members be given meaningful notice of the class arbitration and sufficient information to make a determination as to whether or not to stay in or opt out. Rule 6 governs this process:

> (a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the ''Notice of Class Determination''). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.
>
> (b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language:
>
> (1) the nature of the action;
>
> (2) the definition of the class certified;
>
> (3) the class claims, issues, or defenses;

[21] Supplementary Rules, Rule 5(c).

[22] *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

(4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;

(5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;

(6) the binding effect of a class judgment on class members;

(7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and

(8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

It is worth highlighting two aspects of Rule 6. First, it does not require ''actual notice'' to class members, but ''the best notice practicable under the circumstances'' to be ''given to all members who can be identified through reasonable effort.''[23] Second, the rules provide that the Notice of Class Determination must state ''that the arbitrator will exclude from the class any member who requests exclusion, stating how and when members may elect to be excluded.''[24]

Final Award

The notion that an arbitration will result in a final award on the merits is not distinctive to class arbitration. Nonetheless Rule 7 of the Supplementary Rules contains certain requirements for a final award in the class arbitration context. Rule 7 provides as follows:

> The final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity. The final award shall also specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.

Rule 7 requires that the final award on the merits be reasoned and shall define the class with specificity as well as identifying the class.

[23] Supplementary Rules, Rule 6(a). This tracks Fed. R. Civ. P. 23(b)(3).
[24] Supplementary Rules, Rule 6(b)(5).

CLASS ARBITRATION AND THE INTERNATIONAL CONTEXT

The overwhelming majority of the, to date, some 200 cases administered by the AAA under the Supplementary Rules have been domestic cases. And this is not a surprise since most cases pursued as class actions are those arising out of standard form contracts that are more typical in the domestic context. So far, less than a handful of the cases submitted under the Supplementary Rules could be characterized as international. Class arbitration is not likely to affect cases that are typical of international commercial contracts, such as the one-off licensing, distribution, or joint-venture agreement between parties from different countries. But there are certainly likely to be cases where similar or identical contracts are entered into across national borders, such as in the employment, partnership, credit card context, or other consumer contexts, where we are likely to see more class actions in the international context. It remains to be seen how they develop.

Part IV

Intellectual Property and Information Technology Issues in International Arbitration

Choice of Law in International Intellectual Property Arbitrations: A Three-Dimensional Chess Game?

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INTRODUCTION

An arbitral tribunal making a choice-of-law determination in an international arbitration may sometimes feel as if it is watching, or perhaps more to the point is the referee of, a chess match between the parties. Like chess, the analysis may be difficult and two-dimensional and the parties, in arguing their respective choice-of-law positions, often are jockeying for an opening advantage with an ultimate resulting outcome known only sometime later. At the risk, perhaps, of stretching the metaphor too far, in comparison to such a determination in the usual commercial matter, a choice-of-law analysis in an intellectual property (IP) related international arbitration can take on all the complexity of the fictional three-dimensional chess game played on *Star Trek*.

The reasons for this increased complexity are several. Some arise from basic choice-of-law issues that are always present in international arbitrations, some from the inherent nature of IP and IP law, and some from typical characteristics of an international IP commercial transaction.

First, generally speaking, in international arbitrations as opposed to litigation in court, there are more jurisdictions[1] whose law could be

[1] Section 101(5) of the American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* (Proposed Final Draft) (current through Mar. 30, 2007) [hereinafter Principles] provides a convenient definition of ''State.''

> ''State'' means an entity with a defined territory and a permanent population, under the control of its own government, that engages in, or has the capacity to engage in, foreign relations with other such entities. The allocation of authority between a State and its territorial subdivisions is determined under the law of that State.

Under this definition, the United States would be a State and a state of the United States (e.g., New York) would be a sub-division.

applicable to one aspect or another of the arbitral proceedings. Also, the scope of the application of the law of the site of the arbitration can be less clear than the scope of the application of the forum's law in a court proceeding.

Secondly, there are different types of IP—patents, copyrights, trade secrets, and so on. Some have no validity except under the law of the State under which they arose, while some in essence have international effect by treaty or because they arise under contract. Also, in some States there are public policy defenses to a claim that sounds in an IP right. Indeed, for example, some States make arbitration unavailable for the determination of patent validity.

Thirdly, the typical international commercial IP transaction may involve multiple forms of IP, IP arising under the laws of multiple States, or both. This complication is often ignored at the drafting stage of the contract in issue, as it is not unusual for the parties to choose the law of only one jurisdiction for the choice-of-law provision, and that jurisdiction may even be one under which none of the IP in question arises.[2]

And if the reader thinks that these issues are more academic than real, it is useful to consider the following not atypical international IP transaction: a license[3] of computer hardware and software technology from a Massachusetts company to a Japanese company for the making of a product in Japan to be sold in Asia. The IP rights of the Massachusetts licensor would include a copyright in the software, trade secrets in at least the source code

The Principles do not formally apply to arbitration. However, the Reporters note that ''they may be used by analogy in jurisdictions that do not have specific rules on the arbitrability of intellectual property disputes.'' Principles § 202 Reporters' note 6, *supra*. Accordingly, and while the Principles are not final and perhaps not without some controversy, they can provide some guidance on the general state of the law. The same is certainly true of the more general, but final for many years, *Restatement (2d) of Conflicts* (1971) [hereinafter Restatement]. It is therefore reasonable to use them both for statements on the general state of the law on the specific issue or issues in question, at least in those cases where there is no specific law or precedent on point; and we will be returning to both throughout this article.

For a history and discussion of the Principles, see Rochelle Dreyfuss, ''The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?'' 30 *Brook J. Int'l L.* 819 (2005).

[2] For example, an international patent license between a U.S. entity and a foreign one might reference the law of the state of the principal place of business of the U.S. entity (e.g., New York). Yet, the foreign licensed patents arise only under the laws of the foreign States that granted them, and even the U.S. patent arises under federal and not state law.

[3] While IP issues can arise in a number of contractual contexts—distributorship agreements, asset purchase agreements, and so on—the license is the most common form of IP agreement.

of the software and perhaps in manufacturing techniques in the hardware and United States, and foreign counterpart patents in the hardware and perhaps the software. While licensors usually can impose both the jurisdiction of the choice-of-law clause and the seat for the arbitration, sometimes licensees are able to bargain for what they perceive as more neutral law and a less unequally convenient arbitration location. In this case, the choice-of-law provision might reference New York law and the arbitral forum might be San Francisco. In any event, in this author's experience, most parties do not expressly provide for choice of any law other than the substantial law of the contract.

In a dispute over this hypothetical transaction, the following should be noted:

1. The dispute involves an international agreement involving IP.
2. The parties are from two different States.
3. The rights licensed include patents, trade secrets, and copyrights.
4. The license grant covers IP rights of multiple States.
5. The license has a choice-of-law provision that provides for the application of the substantive laws of one of the United States—state L. State L may or may not be the domicile of the U.S. party. Except for trade secrets, law on IP validity and attributes is at the federal level in the United States.
6. Other than as set forth in (5), there are no other choice-of-law provisions.[4]
7. The license provides for arbitration that is to take place in one of the United States—state F. State F may or may not be the same as state L and may or may not be the domicile of the U.S. party.
8. Various defenses under U.S. IP and IP-related law, that of Japan, and perhaps that of other States as well, might be raised.

These factors are typical of the complications that may arise in any choice-of-law analysis in an international IP-related arbitration. Indeed, as will be seen, international IP arbitrations may involve circumstances that

[4] In very complex international transactions, parties sometimes provide for a choice of *lex arbitri*. This usually would be the case in agreements where the seat of the arbitration is in a State different from that whose law was chosen as the substantive law of the contract. In any event, at least in the United States, the interplay between the substantive choice-of-law provision and the arbitration clause can be complex, with the former potentially defeating the later. *See V*olt Info. Scis., Inc. v. Stanford Univ., 489 U.S. 468 (1989).

may make a traditional choice-of-law analysis difficult, if not impossible. This article will explore this interplay of choice-of-law and IP considerations.

GENERAL CHOICE-OF-LAW PRINCIPLES IN INTERNATIONAL ARBITRATION

The first step in the analysis of the interplay of choice-of-law and IP issues in international arbitrations is a review of the general choice-of-law principles applicable in such arbitrations.[5] However, a true international analysis,

[5] At some point, and this is as good as any, one needs to confront the question as to whether arbitral tribunals are bound to follow any of the choice-of-law principles discussed in this article and whether a party has a remedy for a tribunal's failure to do so. Neither the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the ''Act''), nor the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. (''New York Convention''), the statute and treaty applicable to international arbitrations conducted in the United States, denies award enforceability merely because of a mistake in law. Some courts in the United States have denied enforceability on the grounds of manifest disregard of the law or capricious or irrational decision. But neither of these grounds has been universally accepted in the United States, and the continued viability of each remains in some doubt, particularly in light of the Supreme Court's recent decision in *Hall Street Associates v. Mattel, Inc.,* 128 S. Ct. 1398 (2008).

The theory of manifest disregard of the law is based on dictum in *Wilko v. Swan*, 346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed. 168 (1953). Courts apply it very narrowly, if at all. *See, e.g.*, Rodriguez v. Prudential-Bache Sec., Inc., 882 F. Supp. 1202, 1209 (D.P.R. 1995) (''[T]he hurdle [to show manifest disregard of law in commercial arbitrations] is a high one. In order to vacate an arbitration award, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.'') and Fine v. Bear, Sterns & Co., Inc., 765 F. Supp. 824, 827 (S.D.N.Y. 1991) (''[Manifest disregard of the law] is applicable only where the law alleged to have been disregarded is well defined, explicit, and clearly applicable, so that the error was capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.''). Other courts have essentially rejected it. *See, e.g.,* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F. 3d 704, 706 (7th Cir. 1994).

The two theories of capricious or irrational decision are often referred to interchangeably. As with manifest disregard of the law, they are applied narrowly. *See, e.g.,* Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 781 (11th Cir. 1993) (''For an award to be vacated as arbitrary and capricious, [it] must contain more than an error or interpretation, [but rather] there must be no ground for [it].'') and Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) (''An award is arbitrary and capricious only if a ground for [it] cannot be inferred from the facts of the case.'').

Accordingly, it is fair to conclude that it would be difficult, if not impossible, to obtain a court reversal of a tribunal's erroneous choice-of-law analysis, except perhaps if it is basically without any logical relationship to the law or the parties' agreement. *See, e.g.*, Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak

considering, for example, various States as the arbitral location or seat, and thus various *lex arbitri,* is well beyond the scope of this article. Accordingly, while the discussion in this article will be as universal as possible, most cited law, will, of necessity, assume that the arbitral site is in the United States and that the arbitration is therefore between a U.S. entity and a foreign entity.

At least five States' laws may be applicable in any particular international arbitration.[6] These are: (1) the laws of jurisdiction or jurisdictions governing the parties' ability to agree to arbitrate, (2) the law of the jurisdiction governing the agreement to arbitrate, (3) the law of the arbitral forum, (4) the law of the jurisdiction or jurisdictions where the award will be recognized and enforced, and (5) the substantive law of the contract.[7] In addition, the rules of the administering body, if there is one, may also have an impact.[8] Let us consider each in turn.

Laws of Jurisdiction or Jurisdictions Governing the Parties' Ability to Agree to Arbitrate

Presumably this would be the law of one of the states for a U.S. entity, either the state of its organization or principal place of business (assuming it is not a natural person) or the state of its residence (if it is a person). It would likewise be the State of organization or the principal place of business or residence for the foreign entity. However, in the typical and normal sophisticated international commercial transaction, there is usually no issue

Dan Gas Bumi Negara, 364 F.3d 274, 290 (5th Cir. 2004) (''Under the New York Convention, the rulings of the Tribunal interpreting the parties' contract are entitled to deference. Unless the Tribunal manifestly disregarded the parties' agreement or the law, there is no basis to set aside the determination that Swiss procedural law applied.'' (footnotes omitted)). Nevertheless, in the experience of this author, most tribunals attempt to follow applicable law. And this article will assume such for the issues under consideration.

[6] *See, e.g.,* Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 91 (4th ed. 2004) [hereinafter Redfern & Hunter).

[7] *Id.*

[8] An arbitration can either be administered by a body, such as the American Arbitration Association (AAA) or the International Chamber of Commerce (ICC), or be *ad hoc.* Most parties with experience in international arbitration will chose to have an administered arbitration. Because *ad hoc* arbitrations are not administered by any administering body, they can be difficult for both the parties and the tribunal. For example, there are no administering body arbitral rules, and the parties either need to agree on procedures or the tribunal would only be allowed to use those permitted by applicable law. This is often not easy. *See, e.g.,* Kuwait v. Am. Indep. Oil Co., 66 I.L.R. 518 (1984). *See also Advanced Micro Devices, Inc. v. Intel Corp.,* 9 Cal. 4th 362, 36 Cal. Rptr. 2d 581 (1994) for another example of the pitfalls an *ad hoc* arbitration.

pertaining to the parties' ability to arbitrate, and we can accordingly eliminate this consideration to simplify our analysis.

Law of the Jurisdiction Governing the Agreement to Arbitrate

It is well settled that the arbitration clause in a larger contract is a separate agreement, or, in other words, that defenses that go to the enforceability of the contract as a whole do not as a general rule go to the enforceability of the arbitration clause.[9] That being the case, the choice-of-law analysis for an arbitration clause is nevertheless usually governed by the choice-of-law provision for the contract as whole, if for no other reason than that the parties usually do not choose or think to adopt a separate choice-of-law provision for the arbitration clause.[10] Nothing, or practically nothing, however, stops the parties from choosing one State's laws for the operative part of the contract as a whole and another State's laws for the arbitration clause, even if the latter is different from the arbitral forum.[11] Doing so, however, does add unnecessary complexity.[12] There is also an overarching question—which we will return to later—of whether the parties can avoid the application of a law of the seat of the arbitration by use of a choice-of-law provision in the arbitration clause, specifically, or in the contract's choice-of-law provision, in the more general case.

Whatever may be the pros and cons of a separate choice-of-law provision for the arbitration clause, in its absence the law governing the arbitration clause will generally be the same as that which governs the contract as a whole. Since most international IP agreements will usually contain a choice-of-law provision for substantive law but no separate choice-of-law clause for the agreement to arbitrate, we can also simplify our analysis by eliminating this consideration.

Law of the Arbitral Forum—The *Lex Arbitri*

Before we can even consider *what* laws of the forum jurisdiction should apply, we need to briefly consider *whether* they should apply at all. In a typical international arbitration, the site of the arbitration might be chosen for no better reason than that it was a neutral location (i.e., not the home

[9] *See, e.g.,* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[10] See, for example, *Volt Info. Scis., Inc. v. Stanford Univ.,* 489 U.S. 468 (1989), as an example of just such an instance.

[11] *See, e.g.*, Redfern & Hunter, *supra* note 6, at 103.

[12] *Id.*

State of either party) that either was equally convenient, or inconvenient, to both parties or was simply just a ''good'' place in which to stay during the hearings. Note also that the hearings themselves could be in multiple locations and states.[13] Finally, in some international arbitrations, the parties leave the choice of the location of the hearings to the arbitral tribunal's decision. For these and other reasons, many have argued that the choice of the seat of the arbitration should have no effect on the laws to be applied in the proceedings.[14] This is the so-called delocalization theory,[15] which is exemplified by decisions such as those in the *Aramco*[16] and *Texaco*[17] arbitrations. The view contrary to delocalization is the ''seat'' theory, which maintains that an arbitration, even an international one, ought to be governed by the law of the jurisdiction in which it takes place. Support for this theory is found in the New York Convention, the treaty that governs most international arbitrations.[18] It is implicit in the Act[19] and U.S. courts have adopted it in principle, if not in name.[20]

[13] A traveling arbitration proceeding—one that has hearings in multiple locations—must not be conducted in violation of the local law of the States to which it goes, particularly as to those pertaining to the taking of testimony and other evidence. The mere fact, however, that the tribunal has elected to take testimony in various different States should not change the identity of the seat of the arbitration, assuming one has been agreed to by the parties or otherwise designated. *See* Redfern & Hunter, *supra* note 6, at 94.

[14] *See, e.g., id.* at 105 et seq.

[15] *Id.*

[16] Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117 (1958).

[17] Texas Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic, 17 I.L.M. 1 (1978)

[18] Most countries are signatories to the New York Convention. Article V of the New York Convention provides as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can

It is thus reasonable to opt for the seat theory. But this then leads to the next issue, namely, what law of the seat should apply and what should not? Typically, matters to which the *lex arbitri* is likely to cover include the following:

- the validity and form of the arbitration agreement;
- arbitrability;
- the jurisdiction of the arbitrators;
- the appointment, removal, and replacement of arbitrators;
- challenge of arbitrators;
- time limits;
- the conduct of the arbitration, including possible rules for the disclosure of documents;
- interim measures of protection;
- whether there is power to consolidate arbitrations;
- whether the arbitral tribunal is able to decide *ex aequo et bono*;
- the form and validity of the arbitral award; and

be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) *The composition of the arbitral authority or the arbitral procedure* was not in accordance with the agreement of the parties, or, failing such agreement, *was not in accordance with the law of the country where the arbitration took place;* or

(e) *The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made* [emphasis added].

[19] *See, generally* 9 U.S.C. §§ 1-16.

[20] *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (''Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction. In this case, however, '(t)he laws of the State of Illinois' were explicitly made applicable by the arbitration agreement.''); Yusuf Ahmed Alghanim & Sons v. Toys ''R'' Us, Inc., 126 F.3d 15, 21 (2d Cir. 1997) (''We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA [Federal Arbitration Act], to a motion to set aside or vacate that arbitral award. The district court in *Spector v. Torenberg,* 852 F. Supp. 201 (S.D.N.Y. 1994), reached the same conclusion as we do now, reasoning that, 'because the Convention allows the district court to refuse to enforce an award that has been vacated by a competent authority in the country where the award was rendered, the court may apply FAA standards to a motion to vacate a nondomestic award rendered in the United States.'''').

- the finality of the award (including any right of recourse against it under national law).[21]

It takes only a cursory glance at this list to see that all of the items in it appear explicitly to be only issues of ''procedure''[22] rather than those going to the substance of the matters in dispute, although implicitly one or two (i.e., the jurisdiction of the arbitrators and the form and validity of the arbitral award) could be argued to reach some substantive issues. The question flowing from this distinction, which is relevant to the topics under consideration in this article, is then to what extent must or should or can an arbitral tribunal consider the substantive laws of the seat of the arbitration if the choice-of-law clause in the contract points to the laws of another jurisdiction.[23]

Or, to put it more precisely in terms of an IP-related arbitration, should the arbitral tribunal consider the seat's laws relating to the validity and enforcement of IP?[24] And does it make a difference if the seat's law in question relates to public policy since public policy issues have a special significance, both under the New York Convention and U.S. arbitration

[21] Redfern & Hunter, *supra* note 6, at 95.

[22] There is, of course, one other source of procedural rules that is applicable, the arbitration rules of the administering body, assuming there is one, or whatever rules the parties adopt in an *ad hoc* arbitration.

[23] Note that for this part of the analysis, it will be assumed that the seat is not the State whose laws would be pertinent if the parties had not elected any choice-of-law provision or if they could not choose an alternative State for the particular issue in question under the principles discussed in ''Substantive Law of the Contract'' below. In either of those cases, the analysis reduces to the discussion in ''Substantive Law of the Contract,'' as the seat is the substantive law State as well. One example of such circumstances in an IP arbitration might arise if some or all of the IP in question was the seat State IP.

[24] Actually there are several different possible scenarios, depending on the State whose law is applicable to the IP, the jurisdiction chosen in the choice-of-law forum, and the identity of the seat. No separate choice-of-law issue relating to the *lex arbitri* is presented if the later two or the first and third are the same. On the other hand, at the other extreme, the tribunal will be likely forced to decide the applicability of the seat's substantive law if all three are different. For example, assume the seat has some law that affects the enforceability of the IP in question if it had been IP issued by the seat. Assume also, however, that the IP was issued by a State other than the seat and that the choice-of-law clause points to yet another jurisdiction. Is the tribunal required to take that law of the seat into account in deciding whether the IP is valid and enforceable? In other words, does a tribunal sitting in New York need to take U.S. IP law into account in deciding the validity and enforceability of French IP licensed to a U.S. entity by a Japanese entity under a license with a Japanese choice-of-law provision?

law.[25] However, note that both the New York Convention provision and the public policy grounds adopted by the U.S. courts apply to the enforcement of an award and are thus more to the point with respect to the impact of the law of the enforcement jurisdiction rather than that of the seat.[26]

This distinction is not without some significance as it can be expected that, except in case of enforcement proceedings (or similar *vacatur* proceedings), pertinent court decisions on the appropriate substantive scope of the *lex arbitri* will be rare, if they exist at all. This can be seen from the following: If you assume that nearly all court actions regarding an arbitral award are in enforcement or *vacatur* proceedings, then either the State of enforcement will be the same as the seat or it will not be. In the first situation, any *lex arbitri* public policy grounds for denial of enforcement will be found in the law of the enforcing State as well since the two States are the same. In the second situation, it can be presumed that a court of one State

[25] Under the New York Convention, the only substantive grounds for which an award can be denied enforcement are in Article V(2), which provides as follows:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

There is no comparable provision under the Act, but the courts have fashioned a public policy grounds for non-enforcement. That theory owes its foundation to *United Paper Workers' International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). That case involved a labor arbitration, but it has been followed in the commercial context. *See, e.g.,* Brown v. Rauscher Pierce Refsnes, Inc, 994 F.2d 775, 782 (11th Cir. 1993). However, the public policy is only available as grounds for reversal if it is both ''explicit'' and ''well defined and dominant . . . ascertained by reference to laws and legal precedents.'' *Id.*

Finally, compare generally Principles Section 403, *supra* note 1, which provides in pertinent part as follows:

> *Judgments Not To Be Recognized Or Enforced*
>
> (1) The enforcement court must not recognize or enforce a judgment if it determines that: . . .
>
> (e) recognition or enforcement would be repugnant to the public policy in the State in which enforcement is sought.

See also the Reporters' notes to that section:

> Given these other avenues for addressing policy concerns, subsection (e), which echoes provisions of other instruments [citations omitted] should be reserved for cases where enforcing the judgment would cause extreme—manifest—incompatibility problems.

[26] *Id.*

would be reluctant to deny enforcement to an arbitral award based upon a public policy of another State whose policy did not exist in the enforcing state. Thus, it is not surprising that there is a little guidance on the issue in U.S. court decisions.[27]

Turning now to the issue of the scope of the applicable law of the seat, the more expansive view that such law can or should be relevant would seem to run contrary to at least the spirit, if not the underlying facts, of decisions like that of the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[28] where the Court held that an American entity can be compelled to arbitrate U.S. anti-trust claims in Japan notwithstanding the strong U.S. public interest in the enforcement of the anti-trust laws and notwithstanding that wholly domestic anti-trust disputes would not be arbitrable. The literature also seems consistently to view, or at the very least assume, that the law of the seat applicable in an international arbitration is restricted to procedural matters.[29] The Principles are also explicit, at least for matters that do not rise to the level of public policy. Section 301 on territoriality provides in pertinent part (emphasis and footnotes added) as follows:

> (1) Except as provided in §§ 302 and 321-323,[30] the law applicable to determine the existence, validity, duration, attributes, and infringement of intellectual property rights and the remedies for their infringement is: . . .

[27] A Westlaw search of all federal case for the term *"lex arbitri"* turned up only five hits of which four were different stages of the same case. One of those decisions did involve a public policy defense to the enforcement of the award, but the public policy was that of the enforcing state not the *lex arbitri*. Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004).

[28] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[29] *E.g.*, Redfern & Hunter, *supra* note 6, at 95.

[30] Section 302 provides that the parties' choice-of-law clause should be given effect except for matters such as ''(a) the validity and maintenance of registered rights; (b) the existence, attributes, transferability, and duration of rights, whether or not registered; and (c) formal requirements for recordation of assignments and licenses.'' Section 321 deals with the situation of infringing activity in multiple jurisdictions and is discussed further in ''Subsantive Law of the Contract'' below. Section 322 deals with issues of public policy and is discussed immediately following the text to which this footnote applies. Section 223 deals with mandatory laws and provides as follows:

> The court may give effect to the mandatory rules of any State with which the dispute has a close connection if, under that State's law, the rules must apply regardless of the law that is otherwise applicable.

(b) for other intellectual property rights, *the law of each State for which protection is sought.*

To the extent there is any doubt in the language that the Principles do not intend that the forum State may generally apply its own substantive law, that doubt is dispelled in the Reporters' notes.[31] Finally, at least the rules of some of administering bodies are consistent with the view that only procedural law of the seat should be considered by the tribunal.[32]

On the other hand, there is support for the contrary view in the previously cited *dictum* in footnote 13 in *Scherk v. Alberto-Culver Co.*[33]

[31] *See* Principles § 301, Reporters' note 2, *supra* note 1, which provides as follows:

Characterization of connecting factors. The international conventions on intellectual property, when applicable, do not characterize with certainty the connecting factor or factors, nor do they, as a general matter, clearly set forth a choice-of-law approach. For example, although art. 5(2) of the Berne Convention states that ''the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed,'' many scholars contend that art. 5(2) of the Berne Convention should not be construed as a rule on conflicts of law [citations omitted].

Article 5(2), moreover, is unclear as to the precise characterization of the connecting factor, that is, ''*where* protection is claimed,'' especially when the infringement is committed on the Internet, and also as to the exact scope of the applicable law. For example, the reference to the country ''where'' protection is claimed could mean the substantive or the conflicts law of the forum State, or it could mean the substantive law of the country (or countries) ''for which'' protection is claimed. As an example, suppose a copyright-infringement suit brought in the United States regarding an unauthorized transmission from Canada of a U.S. work, received in France. ''[T]he country where protection is claimed'' in this instance might mean the *lex loci delicti*, which, in turn, might mean the place(s) of commission/initiation of the infringement (Canada), or the place(s) of its impact (France). Alternatively, ''where protection is claimed'' might mean the *lex fori,* the law of the forum State where the action is brought (the United States). In other words, even if the Berne Convention, see *infra* note 72, purported to announce choice-of-law rules, the disagreement as to what those rules are counsels clear enunciation of choice-of-law rules in these Principles.

Art. 9 of the European Commission's Amended Rome II Proposal designates that for intellectual property:

> rights other than a ''unitary Community industrial property right,'' ''the law of the country *for which* protection is sought'' controls infringement (emphasis added). The same approach is taken here.

[32] *E.g.*, AAA International Arbitration Rules, Rules 1(b) and 28(1). *See* the discussion in ''Substantive Law of the Contract'' below.

[33] Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

> Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction.

There is also *dictum* that is arguably to a similar effect in one of the opinions in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*[34] series of cases.

By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the New York Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award. For instance, Article (V)(1)(d) enables a losing party to challenge enforcement on the grounds that the arbitral panel did not obey the law of the arbitral situs, that is, the *lex arbitri*, even though such a claim would undoubtedly be raised in annulment proceedings in the rendering State itself. In addition, this case illustrates that enforcement proceedings in multiple secondary-jurisdiction states can address the same substantive issues.[35]

And Section 322 of the Principles on the impact of public policy provides as follows:

> The application of particular rules of foreign law is excluded if such application leads to a result in the forum State that is repugnant to the public policy in that State.[36]

Finally, at least one rule of one administering body would support this more expansive view.[37]

Where then does that leave us? Perhaps the best that can be said is that a tribunal probably may apply the substantive law of the seat of the arbitration, unless either (1) the parties have chosen another jurisdiction's laws, and the matter is one on which they can make such a choice[38] or (2)

[34] Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 335 F.3d 357, 368 (5th Cir. 2003).

[35] It should be noted, however, that Article (V) (1)(d) speaks in terms of ''the arbitral procedure . . . not [being] in accordance with the law of the country where the arbitration took place.''

[36] However, the Reporters' notes to that section make it clear that this is a rule that is to be applied in extreme circumstances and with care. Principles § 322, Reporters' note 2, *supra* note 1.

[37] Appendix II to the ICC Rules of Arbitration, art. 6.

> When the Court scrutinizes draft awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.

[38] *See* ''Level of the Jurisdiction'' below.

another jurisdiction's law must be applied.[39] If the matter is one of public policy, the argument for applying the seat's law is stronger and may even trump the parties' choice of law. Finally, and perhaps this goes without saying, a tribunal should not issue an award that would directly or indirectly violate the seat's law.[40]

Law of the Jurisdiction or Jurisdictions Where the Award Will Be Recognized and Enforced

Under the New York Convention, a State need not enforce an arbitral award if either its subject matter is not capable of settlement by arbitration under the law of that State or the recognition or enforcement of the award would be contrary to the public policy of that State.[41] U.S. case law[42] is in accord, as are the Principles.[43]

The identity of this jurisdiction—or jurisdictions—is, of course, somewhat of a wild card. To be sure one or more of them could, probably will, be one or more of the jurisdictions identified in ''Laws of Jurisdiction or Jurisdictions Governing the Parties' Ability to Agree to Arbitrate'' above, namely the respective States of organization or locations of the principal places of business or residences of the parties. But a jurisdiction where enforcement may be sought could just as well be some other jurisdiction where, for example, one of the patents under dispute was issued. In fact, an international patent agreement may license a master patent (issued, for example, in the United States) and corresponding patents issued in a number of countries around the world and the number of possible enforcement jurisdictions may be significant. Even more numerous are the possible enforcement jurisdictions for a worldwide copyright license. Since a

[39] *See, e.g.,* Principles § 323, *supra* note 1.

[40] An example of this might arise under a law such as the regulations in the United States that govern export control. *E.g.*, 15 C.F.R. pts. 730-774. Not only do those regulations cover direct export from the United States of covered technology, they also pertain to shipment of the technology from one foreign country to another. 15 C.F.R. § 730.5.

Consider then an arbitration in the United States between two foreign entities over a transaction in yet another country, which, if it takes place, would violate those ''re-export'' regulations. If part of the relief the claimant is requesting is an order compelling that the respondent complete the transaction, should, or could, the tribunal grant it?

[41] New York Convention art. V(2).

[42] *See supra* note 25.

[43] Principles § 322, *supra* note 1.

copyright issued in one Berne Treaty country is valid in all,[44] an award relating to an international copyright license may well be subject to enforcement in well over 100 countries.

Should, or must, a tribunal take the law of these jurisdictions into account in its award? Can it? The tribunal could be faced with either an insurmountably large task or the danger that the award might be a nullity or both. Perhaps not surprisingly, there is some difference of opinion in the literature as to whether, in the general case, a tribunal has a duty to ensure that an award is in fact enforceable, at least if the jurisdiction in which it will likely be enforced is different from the seat of the arbitration or the jurisdiction whose laws were chosen, either by the parties or the tribunal, as the substantive ones applicable to the dispute.[45]

Again, there is no easy answer and again the best that can be done is to draw some general conclusions. Certainly nothing would seem to prevent the arbitral tribunal from taking into account the law of a jurisdiction in which the award may be enforced. Whether it should or must do so in all likelihood must depend on the specific circumstances in the arbitration in question. Thus, at one extreme is the case where one of the States, which have issued the patents in question, is a State that prohibits the arbitration of the validity of patents.[46] Can a tribunal sitting in a State that does permit the arbitration of the validity of its patents decide the validity of patent in a State that does not? Even if it can, should it? At the other extreme is the previously mentioned worldwide copyright license. It is simply impractical, if not impossible, for any tribunal to consider whether its award would be enforceable in all jurisdictions in which such enforcement might be sought.

Substantive Law of the Contract

There is wide agreement that the parties have substantial latitude to choose the substantive law that is applicable to their contract, at least certainly on matters to which they could have contracted[47] and that, in the absence of

[44] *See infra* note 72.

[45] *See, e.g.*, Michael W. Buhler & Thomas H. Webster, *Handbook of ICC Arbitration* 221 (2005).

[46] *See* ''Arbitrability'' below.

[47] Many jurisdictions follow the rule that a contractual choice-of-law provision can only pertain to those aspects of a contract about which the parties could have contracted. In those jurisdictions, matters such as capacity to contract, adhesion, and other issues relating to the legality cannot be the subject of a choice-of-law provision. *See* Restatement § 187, *supra* note 1, which provides as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties

such a choice-of-law selection by the parties, the tribunal has substantial discretion in choosing the jurisdiction or jurisdictions whose laws apply to the dispute.[48] That agreement, however, does not end the analysis. At least three questions remain. First, can the choice-of-law provision be trumped? Second, if so, what circumstances trump the parties' express choice-of-law provision? Third, to what factors should the tribunal look to determine the identity of the jurisdiction or jurisdictions whose laws would either (1) trump a choice-of-law clause or (2) apply in the absence of such a clause?

The first and second questions may be more effectively considered together. Here, the case law specific to choice-of-law in international IP arbitrations, such as it is, seems on first glance to be somewhat at odds with the positions espoused by the Principles and the Restatement. The later in essence allows the parties to choose the law applicable to contracts *except* in certain specific circumstances, namely, where the parties could not have contracted on the issue in question and if the jurisdiction they choose ''has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice or . . . the law of the chosen

> could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

See also Principles Section 302, *supra* note 1, which provides as follows (emphasis added):

> *Agreements Pertaining to Choice of Law*
>
> (1) Subject to the other provisions of this Section, the parties may agree at any time, including after a dispute arises, to designate a law that will govern all or part of their dispute.
>
> (2) *The parties may not choose the law that will govern the following issues:*
>
> *(a) the validity and maintenance of registered rights;*
>
> *(b) the existence, attributes, transferability, and duration of rights, whether or not registered; and*
>
> *(c) formal requirements for recordation of assignments and licenses.*

[48] *See, e.g.* ''Rules of the Administering Body'' below.

state [is] contrary to a fundamental policy of a state which has a materially greater interest than the chosen state.''[49] More specifically, with respect to IP, the Principles provide that the parties' choice of law cannot reach issues such as the (1) validity of registered rights; (2) the existence, attributes, transferability, and duration of any rights; and (3) formal license recordation requirements.[50]

The issue of the parties' power to contract on choice of law in an international IP arbitral context with respect to IP-related issues has been reached in only one U.S. decision, an opinion by the Court of Appeals for the Federal Circuit, the court of appeals that is responsible for appeals in patent-related cases. In *Deprenyl Animal Health, Inc. v. University of Toronto Innovations Foundation,*[51] a patent licensee of a U.S. patent brought a declaratory judgment action against the Canadian licensor claiming, among other things, patent invalidity. The case was on appeal from a final judgment of the district court dismissing the action. The license in question contained an arbitration clause requiring arbitration in Canada and a choice-of-law clause selecting the laws of the Province of Ontario, Canada.

The court first held that ''the enforceability of forum selection, choice of law, and arbitration provisions are questions of law subject to *de novo* review.''[52] It then went on to respond to the licensor's argument that the dismissal should be affirmed because the arbitration clause covered all issues regarding the patent, including validity and infringement, and the licensee's position that the clause was not so broad as to encompass the infringement and invalidity claims. The court held that the scope of the arbitration provision was an issue in the first instance for Canadian courts and accordingly remanded the case with instructions to stay it pending the outcome of the arbitration. In so doing it responded to the argument that its ruling might result in the determination of the validity of a U.S. patent in accordance with Canadian law:

> Nothing prevents patent-related disputes such as this one from being resolved in binding foreign arbitration. As with other property rights,

[49] Restatement § 187, *supra* note 1.

[50] Principles § 302, *supra* note 1.

[51] Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343 (Fed. Cir. 2002). Acknowledging that the state of the law on the parties' power to choose foreign law to apply in arbitrations regarding U.S. patents is unclear; at least one commentator has described this case as standing for the proportion that the parties do in fact have the power to do so. Matthew A. Smith et al., ''Arbitration of Patent Infringement and Validity Issues Worldwide,'' 19 *Harv. J.L. & Tech.* 299, 326 (2006).

[52] Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1349 (Fed. Cir. 2002).

patent-related rights can be contracted away. [citation omitted] Parties may agree to arbitrate patent infringement and validity issues, and such agreements bind the parties. 35 U.S.C. § 294 (2000) (''A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. . . . Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.''). Section 294 is not limited to domestic arbitration, nor is there any compelling reason to so interpret its authorization of the arbitration of disputes over patent-related rights. [citation omitted]

Moreover, the Supreme Court has recognized a strong federal policy in favor of arbitration, particularly in the international realm. *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614, 628-29, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). In *Mitsubishi Motors,* the Supreme Court held enforceable an agreement to resolve an antitrust claim by foreign arbitration. *Id.* at 640, 105 S.Ct. 3346. The Court explained that international comity, respect for foreign tribunals, and the commercial system's need for predictable dispute resolution required holding the plaintiff to its agreement to arbitrate. *Id.* at 629, 105 S.Ct. 3346. These concerns apply with vital force to the resolution of disputes regarding patent rights.

[The licensee] contends that, notwithstanding the arbitration clause in its agreement, it should not be bound to arbitrate. This is so, it maintains, because the Canadian arbitration proceedings may apply Canadian law to the issue of the validity of the '164 patent, and Canadian law may estop DAHI, as a licensee, from challenging the patent's validity. In *Mitsubishi Motors,* the Supreme Court rejected a similar argument. *Id.* at 636, 105 S.Ct. 3346. . . .

Likewise, we see no reason to presume that the Canadian arbitral panel will apply Canadian law to determine the validity of the United States patent. In fact, it is uncertain whether the issue of validity necessarily falls within the scope of what the parties agreed to arbitrate. That is an issue for the Canadian courts to determine, at least in the first instance.

Because the agreement contains a broad arbitration clause, and because the present dispute including [licensee's] allegations of noninfringement and invalidity arose from [licensor's] July 28, 2000 letter contending that the sale of Anipryl is subject to the license agreement, considerations of international comity demand that the

> district court stay proceedings in the present litigation pending the outcome of the Canadian arbitration. Should the Canadian court determine that either the noninfringement or invalidity issues fall outside the scope of the arbitration clause, the district court may address them at that time. We express no view as to whether the decision of the Canadian court regarding arbitrability will be binding in the district court proceedings.[53]

Does the *Deprenyl* case actually stand for the principle that the parties have the power to elect that the validity of a U.S. patent be decided not just by arbitration, but also by arbitration in accordance with the substantive laws of another State? As will be discussed below, it is clear that, at least in the United States, one may arbitrate issues regarding U.S. patents.[54] But the view[55] that the court held that the parties may choose foreign law to apply to the issue of the validity of a U.S. patent in that arbitration is, it is submitted, more than the court intended.

First, as a practical matter, to the extent the language in question can be so interpreted, it is *dictum*. Second, the court itself recognizes the difficulty of applying foreign law to the question of the validity of a U.S. patent and notes that it would be speculative to assume that the arbitration tribunal would do so.[56] Third, the grounds under both the New York Convention[57] and the Act[58] to refuse to enforce an agreement to arbitrate (as opposed to the grounds to refuse to enforce an arbitral award) are limited and do not include the possibility that the arbitral tribunal may make a finding or issue an award that is incorrect or even that is contrary to public policy. The public policy argument, if it is raised at all, must be raised in the proceeding to enforce the award.[59] Although the *Deprenyl* court does not expressly discuss the impact of the New York Convention or the Act, it seems clear

[53] *Id.* at 1357-58.

[54] 35 U.S.C. § 294. *See* ''Arbitrability'' below.

[55] *See supra* note 52.

[56] Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1357-58 (Fed. Cir. 2002). It should be noted that the choice-of-law clause in question selected the Provincial law of Ontario. IP law is at the federal level in Canada. Patent Act (R.S., 1985, ch. P-4). Whether and to what extent a choice-of-law provision that references the law of a subdivision (such as a state of the United States or a province of Canada) incorporates federal or state level law, particularly for IP from a different jurisdiction is open to question. *See* ''Level of the Jurisdiction'' below.

[57] New York Convention art. II(3).

[58] Act § 2.

[59] New York Convention art. V(2).

from the language of the opinion that it was mindful of them.[60] Fourth, the application of foreign law to the validity of a U.S. patent would, at least in the face of a request by one of the parties to apply United States law, be contrary to the very provision of the Patent Act, which permits the arbitrability of patent issues.[61] Finally, for reasons discussed in more detail below,[62] the application of one State's laws to another State's IP in many instances makes no sense and could result in an anomalous award.

It is thus reasonable to assume that the appropriate approach is the one contained in Section 187 of the Restatement or the various applicable provisions of the Principles or both. Having thus concluded that the parties' ability to choose the applicable law is not without limit, and by extension considered the circumstances when such limitation might apply, the remaining question is what factors determine the identity of the jurisdiction or jurisdictions whose laws would either (1) trump a choice-of-law clause or (2) apply in the absence of such a clause.

It should be noted that the two (i.e., a jurisdiction whose laws may trump a parties' choice-of-law selection and a jurisdiction whose law applies in the absence of such a selection) are not, or may not be, the same. In the absence of a contractual choice-of-law clause, most courts in the United States would employ the traditional most significant relationship analysis to determine which substantive law governed the contract.[63] More specifically, the most significant relationship analysis considers the applicability of the laws of a number of jurisdictions including: place of performance, place of contracting, place(s) of negotiation, residence(s) of the parties, and so on.[64] On the other hand, the Restatement restricts the jurisdiction or jurisdictions whose laws may override a choice-of-law clause adopted by the parties in essence to those jurisdictions with ''materially greater interests than the chosen state''[65] and the Principles in essence to the State or States whose IP is at issue or who have applicable recordation requirements.[66]

In summary, then, the parties will have great latitude in choosing any jurisdiction's laws as that applicable to the arbitral resolution of their IP

[60] At least twice the court notes that the issue of the scope of the arbitration clause is ''for the Canadian courts to determine,*at least in the first instance.*'' Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1358 (Fed. Cir. 2002) (emphasis added). *See also id.* at 1357.

[61] 35 U.S.C. § 294(b).

[62] *See* ''Legal Bases of the IP'' below.

[63] New York's conflict rules, for example, apply the ''most significant relationship'' test. *See, e.g.*, Stephens v. Am. Home Assur. Co., 811 F. Supp. 937 (S.D.N.Y. 1993). This is the test set forth in Restatement Section 188, *supra* note 1.

[64] Restatement § 188(2), *supra* note 1. *See also, e.g.,* Principles § 315, *supra* note 1.

[65] Restatement § 187, *supra* note 1, quoted at length, *supra* note 47.

[66] Principles § 302, *supra* note 1, quoted at length, *supra* note 47.

dispute. The only exceptions will be in areas where, under applicable law, they could not contract on the issue. In those cases, the law of jurisdictions with greater interests in the issues in question will prevail. Those jurisdictions should include, among others, any State whose IP is in issue or any State with applicable recording requirements for the IP or matters related to the IP.

Rules of the Administering Body

The rules of an arbitral administering body are not technically speaking ''law'' that is applicable to the parties' agreement or the resolution of the parties' dispute. Rather they are additional contract terms that are incorporated into the parties' arbitration provision if and when the parties make reference to them.[67] In addition, it is to be expected that the rules of most of these bodies will be general in nature and not specific to the issue of choice-of-law in IP disputes. Finally, it is not practical to consider every administrating body.

Nevertheless, there is reasonable consistency among the bodies' rules on matters that do have some bearing on the issues under consideration. Thus, the rules do provide some guidance that is instructional for us. In particular, the rules, as a general matter, typically require a tribunal (1) to apply the rules, themselves, unless in conflict with the laws of the seat of the arbitration and (2) to respect the parties' choice-of-law provision, if there is one, and, in the absence of such a clause, give the tribunal substantial latitude to apply the law of the jurisdiction it thinks is most appropriate.

For example, with respect to the first issue the International Rules of the AAA provide as follows:

> These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.[68]

[67] *See, e.g.,* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

[68] AAA International Arbitration Rules, Rule 1(b). The ICC's applicable rules are slightly different and provide as follows:

> The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration. ICC Rules of Arbitration, Article 15(1).

See also Appendix II to the ICC Rules of Arbitration, art. 6, *supra* note 37.

The rules of the London Court of International Arbitration (LCIA) provide as follows:

And with respect to question of choice of substantive law, the International Rules of the AAA provide as follows:

> The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.[69]

The administrating bodies' rules are thus reasonably consistent and, to the extent they do anything, they are consistent with and support the conclusions drawn in the previous sections of this article. But in leaving maximum discretion on the issues to the parties' agreement and, failing that, to the tribunal (except as may otherwise be required by applicable law), they provide little in the way of real guidance on the ultimate issues

> The law applicable to the arbitration (if any) shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat. LCIA Arbitration Rules, Article 16.3.

Finally, the rules promulgated by the United Nations Commission on International Trade Law (UNCITRAL), which are frequently used in *ad hoc* arbitrations, provide as follows:

> These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail. UNCITRAL Arbitration Rules, Article 1(2).

[69] AAA International Arbitration Rules, Rule 28(1). Other bodies have similar rules. For example, the ICC's applicable rule provides as follows:

> The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate. ICC Rules of Arbitration, Article 17(1).

The LCIA Rules similarly provide as follows:

> The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate. LCIA Arbitration Rules, Article 22.3.

And the UNCITRAL Rules provide as follows:

> The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. UNCITRAL Arbitration Rules, Article 33(1).

addressed in this article. In particular, most rules tend to provide little help on the identity and scope of the *lex arbitri* jurisdiction[70] or any guidance on whether the parties can choose a particular jurisdiction's law to govern a specific issue or on whether and to what extent the tribunal must assure that the award will be enforceable in other jurisdictions.

ADDITONAL IP-SPECIFIC CONSIDERATIONS

There are at least five characteristics of IP, IP law, IP transactions, or the arbitration of IP that significantly compound a choice-of-law analysis. First, different types of IP spring from different legal bases, and these differences have significance to a choice-of law analysis. Second, IP issues are not always arbitrable in all countries. Third, laws other than the law that created the IP in question may affect the validity and enforceability of IP rights and many of these laws may, and often do, involve public policy concerns. Fourth, IP agreements sometimes involve multiple forms of IP and often involve multiple States. Fifth, the laws pertaining to IP are often at a different level of jurisdiction than those the parties point to in the choice-of-law clause. Some aspects of these characteristics have been mentioned above; this section will consider them in more detail.

Legal Bases of the IP

Some types of IP—for example, patents and, in many States, trademarks—only come into existence after an application for them is made to the appropriate agency of the State and that agency has approved the application.[71] In other words, these forms of IP exist only after application and/or registration, and they are the creatures of the State that created them. They have little or no effect outside the borders of that State and are thus territorial.[72] Other forms of IP, namely copyright, while initially a

[70] *Compare* AAA International Arbitration Rules, Rule 1(b) and ICC Rules of Arbitration, Article 15(1) *with* LCIA Arbitration Rules, Article 16.3.

[71] *See, e.g.,* 35 U.S.C. § 151 et seq. (for patents).

[72] *See, e.g.,* Paper Converting Mach. Co. v. Magna-Graphics Corp., 745 F.2d 11 (Fed. Cir. 1984). Note, however, that there are several international treaties to which the United States is a party that give some ''effect'' outside the United States to a U.S. patent. For example, the Patent Cooperation Treaty, (June 19, 1970), *available at* http://www.uspto.gov/web/offices/pac/mpep/documents/appxt.htm, allows multiple country patent application filings based on a single original filing. The Paris Convention for the Protection of Industrial Property (Mar. 20, 1883), *available at* http://www.uspto.gov/web/offices/pac/mpep/documents/appxp.htm, specifically allows the filing in various foreign countries of coordinated patents based on a U.S. patent.

creature of the State in which they were created, have, pursuant to treaty, international effect without registration.[73] Others, such as moral rights[74] or some trade secret rights[75] arise automatically from a jurisdiction's laws but may vary greatly from jurisdiction to jurisdiction. Trade secret rights also can arise under contract.[76] Finally, rights in domain names arise under what is an essentially private legal regime[77] although there are parallel or additional rights in domain names under many States' laws.[78]

[73] The validity and enforceability of copyrights is the subject of the Convention for the Protection of Literary and Artistic Works (Berne Convention), signed at Berne, Switzerland, on September 9, 1886, *available at* http://www.wipo.int/treaties/en/ip/berne/, effective in the United States March 1, 1989. The Berne Convention, which has been adopted by most of the countries in the world, in essence provides that a copyright that is valid in one signatory country and that meets the requirements of the convention is generally valid in all signatory countries.

[74] Moral rights are certain rights of authors in their works, such as the right of attribution. They exist generally in some foreign countries but, except for works of visual art, not in the United States. For the law in the United States, see 17 U.S.C. Section 106A.

[75] Under the Uniform Trade Secrets Act (drafted by the National Conference of Commissioners on Uniform State Laws, as amended 1985), *available at* http://nsi.org/Library/Espionage/usta.htm, which has been enacted in many states, any information ''that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy'' is entitled to receive protection as a trade secret. Uniform Trade Secrets Act § 1(4).

[76] *See, e.g.,* PepsiCo. Inc. v. Raymond, 54 F.3d 1262 (7th Cir. 1995).

[77] Rights in domain names are adjudicated pursuant to rules promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN), an essentially non-governmental body. While ICANN itself does not administer disputes under these rules, a number of other bodies do, including the World Intellectual Property Organization (WIPO) and the AAA. WIPO's procedures are typical. The parties submit the demand and response to WIPO for forwarding to the panel by e-mail (with a copy by post), no hearings are allowed, and the panel's decision is made on the papers. The award is sent to the parties electronically and posted publicly on WIPO's Web site. For a fuller description of the WIPO's domain name procedures, see http://arbiter.wipo.int/domains/.

The first domain name dispute brought under the ICANN rules was administered by WIPO and decided in January of 2000. World Wrestling Federation Entertainment, Inc. v. Michael Bosman, Case No. D99-0001 WIPO Arbitration and Mediation Center Administrative Panel Decision (January 2000), http://arbiter.wipo.int/domains/decisions/html/1999/d1999-0001.html.

A decision under the ICANN procedures does not preclude a *de novo* court action by either party.

[78] An example of such laws in the United States is the Anticybersquatting Consumer Protection Act, 15 U.S.C. Section 1125(d).

Does it make any sense to adjudicate the validity of IP other than under the law of the State that gave it birth? In most cases, the answer must be no. The following example demonstrates why this is so. Under U.S. law, a patentee has one year from the date it describes the invention in a printed publication to file the application for the patent on it.[79] In the European Union there is no grace period, and any such prior publication destroys the right to patent.[80] Would it make any sense to enforce an otherwise invalid EU patent by applying the U.S. rule or invalidating an otherwise valid U.S. patent by applying the European rule?

Arbitrability

The arbitrability of IP issues varies from State to State. For example, until the doctrine was reversed by statute, the validity of a patent could not be arbitrated in the United States.[81] Patent validity still may not be arbitrated in many countries, such as France.[82] The ability to arbitrate the validity of other types of IP is not universally settled.

Can or should a tribunal sitting in the United States decide the validity of a French patent, even if the choice-of-law provision references, for example, New York law. What is the effect of such an award, particularly if it was to be enforced in France? Alternatively, can or should a tribunal sitting in Paris decide the validity of a U.S. patent, whether or not the choice-of-law provision references French law?

Other Laws that Impact the Validity and Enforceability of IP Rights and Public Policy Implications

In addition to the law that created the IP right in question, other laws affect that right's validity and enforceability. These include laws that may govern the attributes, transferability,[83] and duration of the right and the recordation of contracts pertaining to the right. The parties may have limited or no

[79] 35 U.S.C. § 102(b).

[80] Convention on the Grant of European Patents (European Patent Convention) (Oct. 5, 1973), art. 54, *available at* http://www.epo.org/patents/law/legal-texts/html/epc/1973/e/ma1.html.

[81] 35 U.S.C. § 294.

[82] *See* Smith et al., *supra* note 52, at 333, for a description of the state of the law in France. *See id.,* generally for a survey of such issues in various countries.

[83] For example, in the United States, a license or an assignment of a copyright is subject to a reversionary right on the part of the author. 17 U.S.C. § 203. This right cannot be waived. 17 U.S.C. § 203(a)(5).

ability to choose the jurisdiction whose law would govern many or most of these issues.[84] In addition, there are other laws that go to the use or licensing of IP or that are defenses to claims of infringement.[85] And unlike the usual commercial contract, IP disputes may, and often do, involve public policy concerns such as anti-trust issues.[86]

At first glance, this consideration may seem clear cut: as with the issue of validity, it makes the most sense to decide these issues under the law of the State that issued the IP in question. But there are at least two ''exceptions'' that make this general rule open to question.

First, as discussed previously,[87] there may be public policy issues of the arbitral seat that could affect whether a contract pertaining to foreign IP should be enforced. Second, and generally, whether these concerns should affect the choice-of-law analysis may well depend on the concern in question. At least in the international context, the parties may be able to choose foreign law to avoid the application of U.S. anti-trust or misuse law.[88] On the other hand, should the parties be able to use a choice-of-law clause to avoid the application of a law like that in the United States, which provides for reversionary rights in assigned or licensed copyrights?[89]

Nature of IP Agreements

IP agreements sometimes involve multiple forms of IP and often involve multiple States. An example of the former might be the license of a computer program. IP rights in software always include copyright, may include trade secrets,[90] and, in some States, may also include patent rights.[91] An example of the latter might be an international patent license, which licensed a U.S. patent for the United States and corresponding patents for each jurisdiction in which such patents had been granted.

[84] *See* Principles § 302, *supra* note 1.

[85] Examples of these laws are the anti-trust laws (e.g., 15 U.S.C. § 1 et seq.) and the export control laws (e.g., 15 C.F.R. pts. 730-774)

[86] *See, e.g.,* Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985).

[87] *See* ''Law of the Arbitral Forum—The *Lex Arbitri*'' above.

[88] That would seem to be the implication of cases like *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614 (1985), and *Deprenyl Animal Health, Inc. v. University of Toronto Innovations Foundation,* 297 F.3d 1343 (Fed. Cir. 2002).

[89] *See supra* note 83.

[90] Typically industry practice is to license object code (machine readable code) under a copyright license and source code (human understandable code), if at all, as a trade secret.

[91] For example, computer software inventions may be patentable in the United States but not in the countries of the European Union.

Yet it would be rare for an agreement to provide for more than one applicable law in the choice-of-law clause. Inevitably it is unlikely that a single jurisdiction's laws will be appropriate to deal with all of this complexity.

Level of the Jurisdiction

The laws pertaining to IP are often at a different level of jurisdiction than those the parties point to in the choice-of-law clause. In other words, in the context of a contract involving only U.S. parties and issues, the choice-of-law provision will typically point to a state (such as New York or California), yet many IP issues are federal in nature and can only be resolved by reference to federal law. The same is true in some other countries such as Canada and, to a lesser extent, in the European Union.

In the case, for example, of a multi-State patent license whose choice-of-law provision references the laws of one of the states of the United States, three issues are presented: (1) did the parties intend to incorporate federal level concepts such as misuse with respect to both United States and foreign patents, (2) can they do so, and (3) what should be done in the absence of such an understanding? With respect to the first, it would be surprising to find that the parties had even thought about this level of problem, let alone formed any kind of agreement on it. The second is thus academic. Finally, there is no general answer to the third, as it depends on many factors such as the nature of the law in question, the identity of the seat of the arbitration, and so on.

CONCLUSION

While there may be some rules of application that are useful in analyzing choice-of-law issues in international IP arbitrations, many of these issues cannot be resolved by reference to a general set of rules. In these situations, the good sense of the tribunal will be necessary to balance what may be conflicting considerations to reach an outcome that is fair, reflects as much as possible the parties' intent, and works logically within the framework of the law of the various jurisdictions whose IP may be at issue in the arbitration.

International Arbitration of Intellectual Property Validity

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INTRODUCTION

Intellectual property (IP) litigation is widely perceived to be highly complex, unpredictable, and expensive. IP litigation is also frequently international in scope, involving IP rights emanating under the laws and procedures of multiple jurisdictions. Arbitration offers many obvious advantages over national courts and administrative agencies for resolution of these disputes, including the ability to select arbitrators with specialized expertise, the ability to adjudicate IP rights on an international scale, as well as increased speed, enhanced confidentiality, and the ability to craft case-specific, tailored procedures.

International arbitration is the norm in many areas of commerce. Arbitration permits parties to select procedures that they find reliable and familiar. Parties who are wary of local legal systems and foreign practices often will feel far more comfortable in submitting their disputes to an international arbitral panel. Thanks to United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[1] arbitration awards are generally enforceable in member countries, and, indeed, are more easily enforced than national court decisions.[2] Since international arbitration is a creature transcending national borders and largely untethered from the physical seat at which it is held, disputes concerning IP from ''foreign'' jurisdictions can be heard.

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[2] Many countries, China being a notable example, are signatories to the New York Convention but are not parties to conventions or appropriate bilateral treaties requiring recognition and enforcement of foreign court judgments. Thus, United States money judgments are not typically enforceable in China, while arbitration awards complying with the New York Convention are.

In contrast, national courts may be reluctant to decide cases involving foreign IP rights, on grounds of comity or because they feel that they do not have subject matter jurisdiction. In the United States, for example, it has been held that a federal court does not have jurisdiction to decide patent infringement and validity of a foreign patent, even when the foreign patent dispute is ancillary to an infringement suit under a corresponding U.S. patent.[3]

Even if a national court is willing to entertain an international dispute involving foreign IP rights, its lack of familiarity with foreign law may present significant disadvantages and inefficiencies that could be overcome through selection of an arbitral panel having expertise in the laws of the key jurisdictions involved. Thus, compared to arbitration, the courts may be very unattractive fora for resolution of multinational intellectual disputes. On a best-case basis, resort to the courts may require time-consuming, expensive, and potentially inconsistent overlapping litigation in multiple jurisdictions.[4]

Many IP disputes directly or indirectly implicate issues concerning the validity or enforceability of the underlying IP right involved. While validity issues most commonly arise in patent matters, validity issues may also exist in trade secret, trademark, and copyright matters. However, in many countries, arbitral awards on validity are unenforceable, or are enforceable for some types of IP but not for others. For this and other reasons, despite the obvious attractions and virtues of arbitration, the arbitration of IP validity issues presents special challenges to the parties and arbitrators. This article will explore those challenges and suggest techniques to overcome them.

Putting aside the question of whether IP validity or enforceability is arbitrable, the mechanics of the arbitration should also be considered. Such

[3] Voda v. Cordis Corp., 476 F.3d 887 (Fed. Cir. 2007). In *Voda*, the court concluded that allowing a U.S. court to decide issues relating to a foreign patent would violate United States' treaty obligations that compel it to recognize the national nature of patents and would contravene principles of comity.

> [P]atent right to exclude only arises from the legal right granted and recognized by the sovereign within whose territory the right is located. It would be incongruent to allow the sovereign power of one to be infringed or limited by another sovereign's extension of its jurisdiction. Therefore, while our Patent Act declares that ''patents shall have the attributes of personal property,'' 35 U.S.C. § 261, and not real property, the local action doctrine constitutes an informative doctrine counseling us that exercising supplemental jurisdiction over Voda's foreign patent claims could prejudice the rights of the foreign governments.

Id. at 902.

[4] For example, a patent licensing dispute between Nokia Corp. and Qualcomm Corp. involving cell phone technology spawned parallel litigations in the United States, France, the United Kingdom, Germany, China, and Italy. See ''US Firm Trio Settle Nokia-Qualcomm Dispute,'' The Lawyer.com, Aug. 4, 2008, http://www.thelawyer.com/cgi-bin/item.cgi?id=134047&d=415&h=417&f=416.

issues as selection of an arbitrator or panel of arbitrators, choice of law, presentation of evidence, and form of award deserve careful evaluation. This article will also explore these issues and provide some practical advise for consideration.

VALIDITY ISSUES: CONTEXT

IP validity issues may arise in several contexts. Most commonly, validity issues arise in connection with either an infringement claim or a licensing dispute. Validity issues may also arise in such diverse contexts as joint development or joint venture agreements, merger or acquisition agreements, or employment contracts. A frequent defense to these claims is that there can be no recovery because the underlying IP right is invalid or otherwise unenforceable.[5]

In patent infringement disputes, even if validity is not directly challenged, it may indirectly become an issue in deciding whether there is infringement. The infringement determination requires an arbitrator to first interpret the scope of the patent claims and then compare the claims, as interpreted to the accused product or process.[6] Where there are several plausible claim interpretations, an interpretation that would render the patent invalid is disfavored over one that would sustain its validity.[7] Hence, claim interpretation often occurs against a backdrop of validity issues.

In licensing disputes, the licensee may attack the validity or enforceability of the licensed IP to avoid royalty payments.[8] For example, it is common for royalty obligation to be triggered by the sale of a product that would, but for the license, infringe. The licensee in that situation may argue that there would be no ''but for'' infringement because of invalidity or unenforceabili-

[5] Typical unenforceability defenses include misuse, inequitable conduct in prosecution, laches, and equitable estoppel.

[6] *See, e.g.,* Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1554, (Fed. Cir. 1998) (*en banc*) (''An infringement analysis involves two steps. First, the court determines the scope and meaning of the patent claims asserted . . . and then the properly construed claims are compared to the allegedly infringing device.''); Markman v. Westview Instruments, Inc., 52 F.3d 967, 976, (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996) (''[a]n infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. . . . The second step is comparing the properly construed claims to the device accused of infringing.'').

[7] Klein v. Russell, 86 U.S. (19 Wall.) 433, 466 (1873).

[8] Clauses in licenses that purport to bar validity attacks by the licensee may be held unenforceable. *See, e.g.,* Lear v. Adkins, 395 U.S. 653 (1969) (license clause barring challenge to validity of licensed patent is unenforceable as matter of U.S. public policy).

ty. In mergers and acquisition transactions, there may be a warranty by seller to buyer that the target IP is valid and enforceable. Allegations of breach of such a warranty would ordinarily fall within the scope of the arbitration provisions typical in such transactions.

ARBITRABILITY OF VALIDITY ISSUES

IP, including patents, trademarks, copyrights, and trade secrets, are generally considered to be a form of personal property.[9] However, unlike most other forms of personal property, IP is often the result of a governmental grant, following application and examination by a governmental agency.[10] The national statutes governing the grant of these rights may provide for a presumption of validity based on the presumption that the responsible governmental agency has properly examined and issued the IP grant.[11]

Arbitration is, of course, a matter of private contract. There can be no arbitration absent an agreement among the parties to submit themselves to arbitration as a dispute resolution mechanism. Both the scope of matters to be arbitrated and the process of arbitration are issues defined by the parties' agreement, which may incorporate rules and procedures of recognized arbitration administrators.[12] The rights of the parties to decide what can be

[9] For example, in the United States, Section 261 of the Patent Statute, 35 U.S.C. Section 261, provides ''patents shall have the attributes of personal property.''

[10] This is universally the case for patents, usually the case for trademarks and, at least in the United States, often the case for copyrights.

[11] *See, e.g.,* 35 U.S.C. § 282 (''a patent shall be presumed valid''); 17 U.S.C. § 410(c) (''In any judicial proceedings the certificate of [copyright] registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.''); 15 U.S.C. § 1115(a) (''a mark registered on the principal register . . . shall be prima facie evidence of the validity of the registered mark'').

[12] Whether arbitrability is determined by the arbitrators or by a court depends upon whether the parties agreed to empower the arbitrators to decide this question. ''Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, [citations omitted] so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration?'' *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995). However, ''Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.'' *Id.* at 944. The rules of many arbitration administrators expressly provide that issues of arbitrability are to be decided by the arbitrators. *See, e.g.,* Center for Public Resources (CPR) Rules for Non-Administered Arbitration, Rule 8; American Arbitration Association (AAA), Commercial Arbitration Rules, Rule 7; International Centre for Settlement of Investment Disputes (ICSID), International Arbitration Rules, Article

arbitrated are not absolute, particularly when enforcement of an arbitration award is sought before a national court. Article V of the New York Convention, for example, provides that a member country may refuse to enforce an arbitration award that concerns a subject not arbitrable under the laws of that country or taht would be contrary to the public policy of that country.[13] Because IP rights often stem from government grant and because IP may be viewed as involving important public rights and interests, arbitration of IP validity issues may be prohibited or of limited enforceability under the national law of many countries. Indeed, in some countries, even the courts are without jurisdiction to consider invalidity issues in infringement disputes, and this power, at least in the first instance, is relegated to the issuing administrative agency.[14]

In some situations, the arbitrability of IP validity issues is established by specific statute.[15] More often, arbitrability of these issues is based upon case law interpretation of general arbitration law and principles.[16] While there is

15. Accordingly, by agreeing to arbitrate under the rules of one of these organizations, the parties may have agreed to permit the arbitrators to decide arbitrability.

[13] Art. V, § 2 of the New York Convention provides as follows:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[14] For example, the United States, England, and France all permit courts to declare patents and trademarks invalid. *See* United States: 35 U.S.C. § 281 (patents) and 15 U.S.C. § 1115 (trademarks); England: Trade Marks Act 72 (1977) and Patents Act 72 (1977); and France: Code de la Propriete Intellectuelle, Art. L. 613-25 (patents) and Art. L. 714-3, L. 714-5 (trademarks). But, in Japan, invalidity of patents and trademarks must be raised before the Patent Office. Patent Law, Art. 123, Trademark Law, Art. 46.

[15] In the United States, arbitration of patent validity is expressly permitted under 35 U.S.C. Section 294:

> A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.

[16] For example, in *Les Editions Chouette (1987), Inc. v. Hélène Desputeaux*, 2003 Can. Sup. Ct. LEXIS 16, 2003 SCC 17 (2003), the Supreme Court of Canada has broadly interpreted the Civil Code of Quebec's arbitration provisions as permitting

an increasing trend to permit invalidity issues to be arbitrated, it is imperative that this question be investigated on a case-specific basis before embarking on arbitration that may entail IP validity issues.[17]

It has been suggested that parties who wish to arbitrate IP validity issues that touch on jurisdictions where arbitrability of validity is questionable can ''contract around'' this uncertainty by agreeing to arbitrate whether, in the panel's view, a court or agency of competent jurisdiction would uphold the validity of the IP right. The International Chamber of Commerce (ICC) recommends use of the following language.[18]

> In the event that determination of this dispute necessitates consideration by the Tribunal of any issue relevant to the validity, enforceability or infringement of any [IP right] of any party with respect to another party, the Tribunal shall have the authority to consider all such issues and to express a view with respect to all such issues. It is expressly agreed that the Tribunal shall not have authority to declare any such [IP right] valid or not valid, enforceable or not enforceable or infringed or not infringed, provided, however, that the Tribunal may render an opinion to the parties as to whether in the Tribunal's view a court or other government agency of competent jurisdiction would uphold the validity, enforceability or infringement of any such [IP

arbitration of IP validity issues. In so doing, it rejected the lower court's ''view that cases relating to ownership of copyright, as well as cases concerning the scope and validity of copyright, must be assigned exclusively to the courts because the decisions made in such cases may, as a rule, be set up against the entire world.'' *Id.* at *61. Similarly, in *Energy Absorption Syss., Inc. v. Carsonite Int'l Corp.*, 377 F. Supp. 2d 501 (D.S.C. 2005), the United States District Court for the District of South Carolina relied on the ''liberal federal policy favoring arbitration agreements'' as embodied in the Federal Arbitration Act, 9 U.S.C. Section 1 et seq., in ordering the parties to proceed with arbitration of trademark validity in accordance with the terms of their settlement agreement. The arbitrability of copyright validity had been upheld by the United States Court of Appeals for the Seventh Circuit in *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987). Citing the Federal Arbitration Act, the court held that a license agreement's arbitration clause required arbitration of the dispute, including the defense of copyright invalidity. ''We hold that federal law does not forbid arbitration of the validity of a copyright, at least where that validity becomes an issue in the arbitration of a contract dispute.'' *Id.* at 1199.

[17] In a report published in 1998, the International Chamber of Commerce (ICC) surveyed the status of the law of the arbitrability of IP disputes in major jurisdictions. ''Final Report on Intellectual Property Disputes and Arbitration,'' 9(1) *ICC Int'l Court of Arb. Bull.* 37 (May 1998). This report provides a useful starting point for considering whether or not specific countries will permit and enforce arbitral awards of validity.

[18] ''Final Report on Intellectual Property Disputes and Arbitration,'' 9(1) *ICC Int'l Court of Arb. Bull* App. E (May 1998)

right]. The Tribunal shall specify [may state] the Tribunal's reasons underlying any such opinion. However, neither the opinion nor the statement of reasons by the Tribunal shall be regarded by any party as a declaration of validity or invalidity, enforceability or unenforceability, or infringement or non-infringement of any such [IP right].

The Tribunal's Award:

(a) shall state what acts, if any, each party may or may not undertake with respect to any other party;

(b) shall be final, binding and effective only between or among the parties;

(c) shall not be appealable by any party; and

(d) shall not be regarded or asserted by any party as having any effect on any person or entity not a party.

This approach was seemingly adopted by the ICC arbitral tribunal in rendering its Interim Award in Case 6097.[19] The tribunal considered the arbitrability of claims of patent infringement and license breach between a Japanese claimant and German defendant. The arbitration clause in the licenses between the parties simply read as follows:

All disputes, controversies or differences which may arise between the parties hereto, out of or in relations to or in connection with this Agreement, of for the breach thereof, shall be finally settled by arbitration pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris. The award of the Court of Arbitration shall be final and binding.

The parties had agreed that their contract should be interpreted under Japanese law, that German law should apply to the infringement claim (of German patents) and to any resulting legal or contractual consequences, and that arbitral procedure would be controlled by the Swiss Concordat (with Zurich as the seat of arbitration). The defendant had raised as a defense that the claimant's patents were invalid.

The tribunal examined Japanese law ''which favours arbitration over recourse to the national courts in the settlement of disputes,'' but recognized that ''it is well established under German substantive law [citations omitted] that it is not possible for the parties to empower an Arbitral Tribunal to invalidate a patent'' and that even an ordinary German

[19] Interim Award in Case 6097, 4(2) *ICC Int'l Court of Arb. Bull* 76 (Oct. 1993).

court would be powerless to decide validity in the context of an infringement dispute.

Accordingly, the tribunal struck a middle ground and held that it is

> entitled to confirm whether the Claimant can substantiate the allegations based on its patents despite Defendant's objections, or whether Defendant can prove that the material covered by the patents in question was not in fact patentable [citations omitted]. The Arbitral Tribunal believes that the parties have entrusted it with the task of examining this issue by using their right to enter into an agreement as to the extent of the protection provided by a patent.

However, the tribunal made clear that ''this power to decide does not affect the formal validity of the patent registered in West Germany by means of a sovereign governmental act, and that it will carry no consequences vis-à-vis third parties.'' While it is unclear whether an effort to enforce the arbitral award in court in Germany or Japan would be successful, the panel clearly felt that it had the power to decide the validity issue, *inter partes*.

ARBITRATION OF VALIDITY: THE MECHANICS

Parties facing arbitration of IP validity issues, as well as arbitral panels charged with the task of hearing and deciding the dispute, face a variety of choices and challenges: What law applies to the issues? What background should we look for in the arbitrators? To what extent should discovery be permitted? How should evidence be presented? What should be the form of the award?

Since arbitration can be ''customized'' to meet the specific needs and goals of the parties, the parties, either as part of their agreement to arbitrate, or by agreement in structuring the arbitration once instituted, have significant freedom to control the way in which these questions will be answered. Further, since IP issues, in general, and validity issues, in particular, have unique needs and present unique demands, standard commercial arbitration rules may not provide the best solution.

Choice of Law

IP rights are territorial in nature. While various international treaties exist that require harmonization of aspects of patent, trademark, and copyright

law,[20] individual countries may have disparate views on fundamental issues of IP scope and validity. As an example, the United States is unique among industrialized countries in requiring as a condition of patentability, that inventors disclose their subjective ''best mode'' for practicing their inventions.[21] A U.S. patent that fails to disclose this best mode, is invalid, while the British counterpart of such patent would suffer no infirmity on these grounds.[22] Consider a dispute between a British patentee and an American licensee concerning a license under U.S. and British counterpart patents. Consider further, that the license agreement has a broad American choice-of-law clause (or more likely, but also more ambiguous, selects law of an American state, such as New York).

Whose law applies in deciding whether the British patent is invalid for failure to disclose the best mode for practicing the invention? Since patent law is a creature of federal law in the United States, individual states, such as New York, have no patent law, *per se*. Does the selection of state law by the parties also result in selection of U.S. federal law? If so, does the parties' selection of U.S. law require it to apply to the question of validity of the British patent? (Put another way, did the parties agree that notwithstanding British law, as between them, the validity, *vel non*, of the British patent would be based upon whether or not it complied with requirements of U.S. law?) Finally, to what extent would an *inter partes* arbitral award of ''invalidity'' of a British patent, based on failure to meet American best mode requirements, be enforced in the United Kingdom?

While, there are no easy answers to these questions, what can be stated with a high degree of confidence is that a mechanism should be established

[20] For example, the Paris Convention for the Protection of Industrial Property (Paris Convention) (http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html); the Berne Convention for the Protection of Literary and Artistic Works (http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html); the Patent Cooperation Treaty (PCT) (http://www.wipo.int/pct/en/texts/articles/atoc.htm); and the Madrid Agreement Concerning the International Registration of Marks (http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo015.html), each impose requirements that signatory countries provide mechanism to protect foreign IP and/or minimum standards for the protection to be afforded.

[21] *See* 35 U.S.C. § 112(1).

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and *shall set forth the best mode contemplated by the inventor of carrying out his invention* [emphasis added].

[22] A ''counterpart'' or ''corresponding'' patent is generally understood to refer to a patent in one country that is based upon a Paris Convention or PCT filing of a patent application in another country. Such patents will have the same disclosures and same effective filing dates.

for resolution of these potentially dispositive threshold issues at an early stage of the proceeding. Arbitrators, through the use of conferences or similar procedures, should encourage the parties to identify choice-of-law issues at the outset and should consider establishing a rigorous time line for briefing, hearing, and ruling on which law will apply. Of course, parties should not be shy in bringing these issues to the fore, as, ultimately, the parties and the process will benefit from their prompt airing.

Selection of Arbitrators

Most international arbitrations are before a three-member panel, with one member selected by each party and the chair selected by the two-party selected arbitrators. Of course, each party has great flexibility in selecting its party appointed member. The objective background and qualifications of the members of the panel can also be specified in the arbitration agreement or clause. Where IP is at issue, parties may wish to draw the panel based on substantive legal expertise (e.g., patent law, trademark law, or the law of a particular jurisdiction), technical expertise (particularly in patent cases), industry expertise, licensing expertise, or accounting expertise (if damage calculation will be complex).

While in some cases, there may be an advantage to selecting panel members who have differing backgrounds, on the theory that the collective expertise of the panel will be broadened, this approach also has potentially significant disadvantages. A panel having members with non-overlapping areas of expertise may result in an undesirable segmentation of responsibility based upon subject matter. Where validity is expected to be a dominating issue, substantive legal expertise and technical expertise would likely be more important factors than industry, licensing, or accounting expertise.

Discovery

Traditionally, at least as compared to the broad discovery available in U.S. court litigation, international arbitrations have provided limited pre-hearing discovery. This is often viewed as an advantage, as it fosters expedited resolution and minimizes both expense and burden. The extent to which discovery will be permitted is influenced in part by the arbitration rules that are specified, the seat of the arbitration, and the background of the panel. It is reasonable to expect that arbitrations seated in the United States, with a U.S. trained panel, will likely permit more wide-ranging discovery than one centered in a civil law jurisdiction.

The parties to an international IP arbitration should carefully consider the special attributes of IP litigation that may favor specifying broader, or at

least more comprehensive, targeted discovery than might be typical in other commercial controversies. While in many commercial disputes, the parties have an established business and/or contractual relationship so that each side has relatively equal access to relevant information concerning the issues in dispute, this is often not the case in IP matters, particularly infringement disputes.

The parties are often direct competitors, and the issues may revolve around highly confidential and closely guarded commercial or technical facts. Proof or defense of a claim may depend upon information that is not publicly known (such as computer source code or internal industrial processes), and *inter partes* discovery may be the only way to obtain this information. One of the major advantages of arbitration is that, unlike a court proceeding, which will likely be open to the public in some significant respect, arbitration is generally a purely private proceeding. Proprietary information can be disclosed in the context of the arbitration, without fear of further dissemination.

Presentation of Issues and Evidence

The flexibility of arbitration procedures provides the potential for advantages in the way in which issues and evidence relating to validity are presented. IP disputes often require the presentation of detailed and complex technical information. The use of panel appointed experts may facilitate the decision-making process. Rather than acting as ''fourth panel member,'' a panel-appointed expert can sharpen the issues for panel decision and reduce miscommunication.

The parties themselves will typically retain their own experts to offer their opinions and present underlying facts. Frequently, in an effort to promote efficiency, in lieu of expert testimony, experts will submit a written report. However, such efficiency may come at a significant price in the loss of effective advocacy. In technology-centered cases, the opportunity to see and hear an expert's explanation may be invaluable. An advantage of arbitration, which also should not be overlooked, is the possibility of on-site visits to plants and facilities of the parties to see the technology in action.

Phasing, by issues, should also be considered. For example, conflict-of-law issues can be dealt with in a preliminary hearing, including presentation of expert testimony with competing opinions on substantive law. In patent disputes, preliminary hearings can be held on claim interpretation and level of skill in the art, so that these basic parameters that frame the issues of validity and infringement are established.

Form of Award

In most international arbitration, a reasoned award, setting forth in detail the evidence and analysis supporting the panel's ultimate conclusions, is the norm. A reasoned award is believed to enhance the decision-making process and provide a safeguard against arbitrary action. It also can provide a sense of closure to both parties who can feel some level of comfort that their positions were carefully and thoughtfully considered. In addition, where enforcement in a potentially skeptical court is required, a well-reasoned award will enhance the likelihood that the public policy exception to the New York Convention will be invoked.

But, in IP disputes, a reasoned award may have certain disadvantages as well. In infringement cases, a reasoned award may provide a ''road map'' for a competitor to design around and avoid infringement, or for a patentee to target alternative designs. Further, where necessary to enforcement, the filing of a reasoned award may compromise confidentiality of proprietary information.

CONCLUSION

There are clear benefits that can be derived by arbitration of international IP validity issues. However, in many countries, there is reluctance to permit arbitration of the validity of government-issued rights. By carefully crafting the scope of the arbitration and expressly limiting it to *inter partes* effect, this reluctance may potentially be overcome. When validity of IP is arbitrated, in recognition of the unique attributes of the issues likely to arise, care should be taken in crafting the procedures that will be adopted for carrying out the arbitration so as to maximize its efficiency and utility.

Using Information Technology Efficiently in International Arbitration

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What is the main purpose of thinking?

The main purpose of thinking is to abolish thinking. The mind works to make sense out of confusion and uncertainty. The mind works to recognize familiar patterns in the outside world. As soon as such pattern is recognized the mind switches into it and follows it along—further thinking is unnecessary.

The natural tendency of thinking is to support a view arrived at by other means.

—Edward de Bono, *de Bono's Thinking Course* 21, 35 (rev. ed. 1994 [1933])

INTRODUCTION

Information technology (IT) has been around for longer than one normally thinks. Telephone, telex, radio, and television have been in wide use since the first half of the 20th century. However, when we refer to IT, we tend to mean the advent of the personal computer (PC) and—more importantly—computer networks in the early eighties when desktop PC's started to invade offices and later homes. This was more than 20 years ago, and one might wonder why using IT in arbitration should be a topic for a conference at all. One answer could be that the topic is simply ''fashionable.'' Another answer could be that IT poses new procedural problems. Finally, one could state that IT offers potential for increasing the efficiency of the proceedings and may change the way they are conducted. The answer to the first question would be yes, to a certain extent. The answer to the second one would be yes, but the problems are overrated and in substance not new. The answer to the third one would b yes, but the word *may* must be written in bold capital letters.

This short article will provide the author's opinion as to where we stand in regard to using IT (or ''electronic technical aids'') in international arbitral proceedings and how actual use could be improved. This will be followed by an attempt to look at the more distant future.

HOW IS IT USED IN INTERNATIONAL ARBITRATION TODAY?

IT has not fundamentally changed the work flow and processes in international arbitration that follows the traditional adversarial approach.

Procedural Culture and IT

The basic principles of adversarial proceedings remain untouched. Arbitral proceedings commence with a request for arbitration followed by further memorials, gathering and introducing documentary, witness or other evidence, and one or more hearings. Either side has access to any information at least to the extent that such information is made available to the arbitral tribunal. The arbitral tribunal is expected to consider only information that is introduced by a party and may not use sources of information of which a party is not aware. This serves to provide procedural justice and may be described as an emanation of the principle of ''equal treatment.'' Irrespective of the proceedings having a civil law or a common law ''flavor'' and any other substantial procedural difference, this remains the basic pattern.

However, in spite of certain trends of procedural harmonization, procedural concepts applied in arbitration remain to be drawn from municipal civil procedures. This depends primarily on the legal systems in which counsel is trained and also the legal background of the arbitrators. This aspect is important since most arbitration laws and arbitration rules are very open in regard to the methods used for arriving at the final award, if procedural justice is respected. Consequently, the broad scope of options for conducting arbitral proceedings is reduced by counsel and arbitrators who ''contaminate'' the proceedings with concepts developed in their municipal court systems for the needs of these systems. Depending on whether any such municipal procedural system is IT friendly and how it controls the use of technology, the attitude of counsel and arbitrators towards IT will change. Methods with which they are familiar, to which their resources and work flows have been adjusted, and for the use of which they know the rules, are likely to be implemented without too much difficulty and vice versa.

Cultural diversity in arbitration is likely to reduce the common ground of accepted procedures. This may cause ''procedural incidents'' that relate

to using IT. However, one may ask whether cultural diversity still has such a significant impact in the average international arbitral proceeding. At least in cases of a certain importance, parties tend to retain counsel from sizeable law firms with teams that are multicultural, albeit without completely eliminating the influence of the firm's respective culture and origin in a specific procedural system. Such law firms also have an advanced IT infrastructure.

Working Methods and IT

Using IT in arbitral proceedings is mainly dependent on the IT capabilities of counsel and, in second place, of the arbitrators.

If it is true that the average counsel in international arbitration works in a sizeable law firm with an advanced IT infrastructure using information technology, the arbitral proceeding should pose no difficulty insofar as working methods or the technology as such are concerned. This, however, appears to be only partially true. Looking at how law firms use IT, one may perceive an ''insular'' approach. Historically, typewriters have been replaced by PCs and printers, copyists by photocopiers, binders with reference material or templates, and books by databases and physically existing files backed up by electronic file management systems. Other areas where IT is internally used are billing, accounting, and internal management processes.

However, information exchanged with the outside world has until recently remained unchanged (i.e., paper-based and in formats that have been in use for a long time). To a certain extent printed documents are scanned and converted into electronic format for advance e-mail transmission (i.e., e-mail is used instead of facsimile). However, since users trust printed facsimile, point-to-point transmission protocols more, this technical aid is not used when capacity to prove receipt on a certain date is important.[1] One exception is electronic filing facilities provided by some national courts that have also issued rules governing e-filing procedures.

Driven by major clients and technical advancement, sizeable law firms in industrialized countries have moved to establish interfaces that allow sharing information in their case management and billing systems with the clients over the Internet. Here we are essentially concerned with electronic filing cabinets and electronic data rooms where electronic documents are stored and drafts exchanged.

Despite the required tools and infrastructure often being in place at counsels' law firms, these systems for jointly storing and exchanging data are

[1] *See* ''Using E-mail as a Means of Communication'' below.

rarely used in arbitration for exchanging information with the adversary and arbitrators.

Regarding the adversary, the causes appear to be a lack of trust in the other side and the practical problems of agreeing on the processes to be followed[2] in an often-heated adversarial setting. Especially in the absence of an administering institution that provides the required technical facilities, the parties would have to agree on setting up technical solutions, and their use and cost issues, at a time when their attention is focused on the substance of the dispute and procedural tactics.

Arbitrators do not often posses a sophisticated IT infrastructure and the resources required to run it efficiently. Even if they are members of a firm with the needed technical infrastructure, they would need to recover the costs of using this IT infrastructure and support personnel. This may encounter difficulties, since they may find it difficult to have the parties agree to assume such costs. Moreover, many arbitrators may be disinclined to deal with the technical details associated with setting up and controlling electronic file sharing facilities that all parties would trust. One additional factor influencing the attitude may be the average age and professional status of the arbitrators.

Legal Issues and IT

Interestingly, discussion regarding using IT more systematically in arbitration has not really focused on the foregoing considerations, which pertain more to the psychological (attitude) or sociological (''arbitration mafia'') realm. The focus has been on legal concerns. At the same time, there are no, or only very few, reported cases addressing such matters.

Legal Status of Electronic Documents and Issues Concerning Safeguarding Authenticity or Privacy

The concerns regarding the legal status of electronic documents and the issue of safeguarding authenticity or privacy appear to be legitimate but overrated. In most arbitrations at least some evidence will be documents that were created and exchanged electronically because electronic communications are standard business practice. Many countries have enacted laws

[2] In State court proceedings, there is a permanent IT infrastructure and users, who are admitted to that court, and are all subject to the same procedural rules and ethical standards with easily applicable sanctions. In arbitration, there is no permanent infrastructure.

dealing with the legal status of electronic communications and qualified electronic signatures. When evaluating such evidence for arriving at a decision, arbitrators should have acquired the knowledge needed to deal with such issues[3] that are now commonplace.

Moreover, these issues have always existed in litigation or arbitration, irrespective of the complexity added by the use of solutions offered by technical advancement.[4] Since arbitration laws and arbitration rules contain only a minimum of formal requirements for memorials, procedural orders, and other communications of the parties and arbitrators (e.g., the proceedings could be theoretically conducted orally[5] to a large extent), using electronic format and IT in arbitral proceedings will normally not meet a legal obstacle concerning the form as such, albeit with one important exception: the arbitral award.[6]

Privacy is an issue since data exchanged via the Internet may be misrouted or subject to eavesdropping. However, this is also true for other methods of communication that are used without such concerns being raised.[7] Moreover, the technical tools for dealing with this concern are available without great expense and are relatively easy to use. Moreover, since e-mails and electronic documents are often used by counsel and parties prior or outside of the arbitration, one may wonder to what extent they are really concerned about threats to confidentiality.

[3] The business community worldwide uses electronic format, mainly e-mail, for internal and external communications. Therefore, a huge part of documentary evidence tends to be electronic documents, even if, in practice, these are submitted as ''photocopies.'' *See* Robert Smit & Tyler Robinson, ''E-Disclosure in International Arbitration,'' 24(1) *Arb. Int'l* 105, 107 (2008).

[4] It has always been possible to forge a handwritten or typed document, and photocopies could be altered. Moreover, using IT, it is relatively simple to scan, alter, and then print any document on paper. Since documentary evidence is mostly submitted as photocopy, it is thus not more reliable than an electronic image contained in a file.

[5] There are, of course, certain exceptions. Awards *must* be in writing (paper format) and signed according to arbitration laws and arbitration rules. The International Chamber of Commerce (ICC) Rules of Arbitration require the terms of reference to be in writing, signed by the e arbitrators and the parties (Article 18, ICC Rules of Arbitration) and to have certain contents. They also require a request for arbitration and an answer to this request in writing.

[6] Even with qualified electronic signatures of the arbitrators, an award in electronic format is not likely to be enforceable: Qualified electronic signatures may not be recognized for that purpose. The ''foreign'' electronic signature may not be recognized as a valid equivalent. The judiciary may simply not have the means to handle and enforce an award in electronic format.

[7] For example, telephone conversations or facsimile transmissions may also be intercepted with electronic means.

Equal and Fair Treatment

Another group of issues concerns equal and fair treatment of the parties as a fundamental principle of arbitration. Arbitration laws and arbitration rules normally require that a standard of equal and fair treatment[8] be observed throughout the proceedings. Violations of this standard may lead to a successful challenge and replacement of arbitrators, or the annulment or non-recognition of arbitral awards.

Basically, the concerns raised revolve around the issue of an inequality of strength resulting from one party using powerful IT solutions for efficiently presenting its case while the other does not, because—for example—it may not be able to afford it. The problems at the core of this issue are not new, since inequalities caused by one party being represented by an able lawyer while the other party is not, or one party being represented by counsel who is a native speaker of the language used in the arbitral proceedings and the other by a lawyer who has difficulty in speaking and writing in that language, have been known for a long time. It also frequently occurs that one counsel was trained in the applicable substantive law or in employing certain fact-finding techniques to be used in the case and the other was not. Furthermore, inequalities in the parties' respective abilities to draw on financial resources are frequent.

Except for a few reported cases, where it was, for example, found that it may be unconscionable to enforce the agreement to arbitrate in the field of consumer disputes,[9] these situations remain unsolved and—strangely—do not receive much attention, even if occasionally the question is raised whether and eventually to what extent the arbitral tribunal might have a duty to do what it can with a view to mitigating manifest inequalities. Since this might be viewed as helping the weaker party, such measures have great

[8] *See, e.g.,* art. 15(3) ICC Rules of Arbitration, R-30 American Arbitration Association (AAA) Commercial Arbitration Rules, art. 30(b), and World Intellectual Property Organizatin (WIPO) Arbitration Rules, art. 18. Of course, the problems are more complex; see Thomas D. Halket, ''The Use Of Technology in Arbitration: Ensuring the Future Is Available to Both Parties,'' 81 *St. John's L. Rev.* 269, 269-85 (2007).

[9] See the European Court of Justice (ECJ) case of Elisa María Claro v. Centro Móvil Milenium Sl, C168/05 (Oct. 26, 2006). For the United States, one may refer to the ''Gateway'' cases— Melissa Westendorf v. Gateway 2000, Inc., 2000 Del. Ch. Lexis 54 (Del. Chancery Court, Mar. 16, 2000) *aff'd,* Del. Sup. Ct., Oct. 12, 2000); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.), *cert. denied,* 552 U.S. 808 (1997), Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (New York Supreme Ct. App. Div. [Aug.] 1998); William S. Klocek, Plaintiff, v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000); *see also* William W. Park, ''Jurisdictional Issues in Financial Arbitration Three Illustrations,'' in Klaus Peter Berger ed., *Festschrift für Otto Sandrock zum 70* 745-58 (2000).

potential for conflicting with the tribunal's duty to remain impartial and to treat the parties in a fair and equal manner.

This group of issues, including inequalities in IT capabilities, needs to be addressed on a case-specific level with delicacy. A red line needs to be drawn in regard to IT usage that would in all likelihood deprive one party from access to information that is made available to the arbitrators. The arbitral tribunal should be mindful about this type of problem and do what it reasonably can, by steering clear of technical procedural solutions that are likely to have a disproportionate financial impact on a party that clearly cannot afford it. Ideally this should be done in consultation with the parties (this includes counsel and parties) to seek their agreement. In the first place, this should aim at keeping the cost of using IT as a technical aid in proportion to what is economically at stake. Second, this may be dealt with in the context of which costs are recoverable and to what extent. It is important to establish these rules at the beginning of the proceedings so that parties can adjust their procedural behavior.[10]

Existing Technical Issues

The underlying problem with systematically and efficiently using IT in arbitration is that counsel, who understand the procedure, want to sit in the ''driver's seat'' without being bothered with technical details. Support staff often understands the technology but not the procedure. Since communication is from the top downwards, potential new or better uses of IT are not identified or exploited. Moreover, support staff attitude towards IT solutions depends on how they adjust to the working habits of counsel and arbitrators. Writing a memorial or award on a word processor with the relevant physical documents on your desk is far more convenient than working with a file that exists in electronic format only. Even a big-screen monitor displaying many documents will not offer the ''creative chaos'' on an attorney's desk when working on a file. Such technical constraints, and the fact that software is developed by software engineers and not by users, greatly affects the users' attitudes to how IT may presently be used.

As mentioned above, prior to oral hearings, IT solutions are presently externally employed mainly for transmitting documents that exist in paper format that otherwise would be sent via mail or courier with an advance facsimile copy to the adversary and the arbitrators. This is done via e-email in the form of attachments, on data carriers such as CDs or DVDs, or using

[10] ICC, ''Techniques for Controlling Time and Costs in Arbitration,'' *ICC Pub. No. 843,* nos. 31 and 85 (2007).

an online file repository to which such documents are centrally uploaded. Using the required technical tools is easy in the vast majority of cases since, irrespective of their location and size, law firms are today equipped with PCs and Internet access. The required programs at the user's end are standard programs that can be obtained at a moderate price. Often free- or open-source software is available to do the job.

The only bottleneck appears to be pricier high-speed scanners that are needed to convert paper format into electronic format. The prevailing format is the versatile PDF format (Portable Document Format), but other formats are also standardized. Thus, the issue of file format that was a concern a decade ago has lost importance and is normally easily agreed.

However, there are some issues that may adversely affect the efficient use of the exchanged electronic documents for the other side or the arbitral tribunal. Some of these issues are trivial but have a certain impact.

Coherent and Meaningful File Naming System

Parties do not always use a coherent and meaningful file naming system. This problem is also not new, since some counsel also do not use a coherent system for identifying their documentary evidence. While counsel who are accustomed to the common law approach of dealing with documentary evidence would frown at such practices, counsel used to systems where the quantity of documents produced in their municipal procedural system is much smaller, are occasionally less disciplined. This difference in attitude is sometimes also reflected in the way documents in electronic format are arranged and handled.

Another cause of complications is that document scanners that convert paper into electronic format will automatically give each file a name (normally a number) that has nothing to do with the naming system used in the physically existing file. While the scanners allow for manually assigning specific names or otherwise configuring the scanner to assign file names that are meaningful for the arbitration, this is often a time-consuming and tedious endeavor that the support staff eschews. For the same reason, the support staff may be tempted to insert a pack of many different paper documents into the document feeder. This results in one single electronic file containing a variety of documents being created and transmitted to the other side and the arbitral tribunal. The result is that the arbitrators and the other side will receive files with meaningless names and different content.

To work efficiently with such electronic data, arbitrators and the other side have to organize it on their respective computers or case management systems. This requires sifting through each electronic file to see whether it contains different ''real'' documents, to split such multidocument-files into separate files representing each one single document, and to give the files

meaningful names. Since this demands a certain level of understanding of the contents and the arbitral process, this type of work may only be delegated to sufficiently qualified persons. Arbitrators may not have such aides. This easily results in frustration with using electronic format.

This type of problem can be avoided easily by seeking and reaching early agreement on coherent file naming systems and of what may be included in a single file, the format of which should also be specified.[11]

Metadata that May Be Associated With Any Electronic Document

Sharing so-called metadata that may be associated with any electronic document or otherwise linked to it is another issue that may effect efficiency. For any user, such meta data can substantially increase the ability to retrieve and work with the electronic documents. Any law firm using a state-of-the art case management system will dedicate substantial resources to creating such metadata. Considering that at least the electronic files that are submitted to the arbitral tribunal will be the same for all parties and the arbitrators as well, at least part of the metadata will be identical at each user's end. Thus, the issue arises, why identical metadata that will exist in each party's case management system should not be shared by spreading cost and work appropriately. In practice this meets considerable obstacles, since the practical arrangements will be sophisticated. This procedural side aspect has much potential for creating protracted discussions among the parties.

The reason for this is also technical. While the files with the electronic documents will contain certain metadata by default, their format is specified by a multipurpose standard that does not include by default all the metadata that is used by the case management systems. Moreover, the case management systems store and process the additional information we are concerned with here not in the file with the electronic document, but in relational database systems to link stored data with the electronic document. Thus, sharing the additional data would require that everybody uses the same case management system or systems that have an interface by which they may exchange such data in a way that maintains the links established between the different bit and bytes of information and each document. Without these links, the information as such is rather useless. Even if sharing

[11] ICC Task Force, ''Issues to Be Considered when Using IT in International Arbitration,'' in Special Supplement ICC International Court of Arbitration Bulletin ''Using Technology to Resolve Business Disputes,'' *ICC Pub. No. 667* 63, 69 (2004); ICC, ''Techniques for Controlling Time and Costs in Arbitration,'' *ICC Pub. No. 843,* nos. 31 and 39 (2007).

metadata between systems would technically be possible, the adversarial setting of arbitral proceedings does not normally foster the trust required to implement such a solution.

Moreover, the sophistication of case management systems may greatly vary. Especially in international arbitration, one or the other party may not use such a system at all. Many arbitrators have no access to such a system. It is hard to imagine that any party would be willing to provide the adversary with an access to its own metadata even in a restricted way. This might be different insofar as arbitrators are concerned, but this would result in the other side being excluded from access to certain information and eventually be conceived as a violation of the principle of procedural fairness. Furthermore, the licenses for the case management software are often dependent on the number of users, and legitimate use might require a change of the terms of license. Moreover, issues relating to cost sharing are likely to arise.

Presently the real and potential problems associated with sharing metadata appear too substantial for it to become a standard practice. This is clearly a field where users should put pressure on software providers to come up with uniform (i.e., portable) standards for software interfaces, to implement such interfaces, and to provide free tools that allow users to view and search files with the associated metadata.

However, this issue may be less important if online filing cabinets are used for filing electronic documents online, since such systems can provide for automated optical character recognition and document indexing. They can also require entering certain basic metadata during the upload. Standard metadata, such as author, addressees, and date of the original document, could also be shared, and the need for multiple creation of such basic data would become superfluous. Since the repository is accessed via a Web browser, issues of inequality of access to data are also avoided.

Data Integrity and Security

While the issues of data integrity and security are often discussed, little is done to technically deal with these problems even if the IT tools for achieving a minimum level of protection are easily available at low cost. The possibilities range from packing transmitted electronic files into compressed archives that are encrypted and password protected to qualified electronic signatures that can be used to digitally sign and encrypt the files that are transmitted. One reason for the difficulty is that such methods require the exchange of additional information (e.g., passwords and/or public encryption/signature certificates) and additional non-standard steps in the internal work flow. However, these technical aids have been rapidly evolving

during the past years and are now easier to use. One example is the software for processing and viewing PDFs.

Dealing with integrity or authenticity mainly concerns ''documentary evidence.'' While it is certainly easier to manipulate any document in electronic format, the issue is not new. It only arises on a limited number of occasions. If one is concerned with the digital copy of a document that was first created on paper, any doubt would normally lead to an order for the production of the original.

Documents that were created in electronic format (e.g., e-mails) are a challenge, since one can hardly speak of ''an original.'' However, as soon as such a document was saved for the first time, one or more copies were created with electronic time stamps. This offers a chance to discover subsequent manipulation. Moreover, even if electronic formats were not used in arbitral proceedings, such evidence would generally only be submitted in the format of a photocopy. This would not alter the underlying problem. Hence, this type of issue exists irrespective of whether or not IT is used in arbitral proceedings.

Using E-Mail as a Means of Communication

The principle of fair and equal treatment or procedural justice comprises the requirement that all other parties receive what is submitted to the arbitral tribunal. Using e-mail as a means of communication has raised concerns in this regard since, unless an acknowledgement is generated and sent manually by the recipient, one may not be sure and cannot easily prove that a communication with file attachments was properly received. As such, this problem is also not new, and arbitration rules, such as the International Chamber of Commerce (ICC) Rules for Arbitration[12] only require that a sending report is generated. However, there remains always an uncertainty about the attitude of national courts dealing with such issues in annulment or recognition proceedings.

Technically, any e-mail client may request a manual acknowledgement of receipt (i.e., an e-mail confirming receipt) and generate one when the e-mail is opened. However, for some reason, many users do not enable or use this feature. Consequently, the parties and the arbitral tribunal will need to establish a rule requiring some form of acknowledgement of receipt that should include a duty to immediately notify any defective or missing file attachments.

[12] *E.g.*, art. 3(2), ICC Rules of Arbitration and art. 4(a), WIPO Arbitration Rules.

However, misuse of e-mail for spam and proliferating malicious software has caused users to implement filters that scan and reject suspicious e-mails automatically. Depending on the configuration, such systems may also reject e-mails and/or attachments sent in the context of arbitration without anybody becoming immediately aware of it. If available, the IT support staff of the parties' counsel and the arbitrators can easily avoid such problems by adding the sender's to so-called white lists or other measures. However, this sort of technical solution may not always be available.

Other problems with e-mail attachments are the size and number of the files. Some e-mail systems impose a maximum size on any e-mail and reject oversized messages. Many file attachments, especially if incoherently named, may cause confusion and require a considerable effort when they are stored and organized by the recipient. To overcome this sort of difficulty some users send a multiple of e-mails with fewer attachments instead of one, and the recipients become even more confused. In most cases, this type of difficulty can be avoided by establishing basic rules early on. Sometimes this does not help, and the result is disruptive.

Since e-mail poses threats to confidentiality, if not encrypted, and can also be intercepted with relative ease, together with the foregoing technical issues, it has been converted today into a tool of secondary choice. The availability of e-mail and the simplicity of its use will, however, preserve its utility for more informal communications, such as agreeing on dates for meetings and the like.

In any event the answer to at least most of the problematic issues relating to electronic e-mail communications is using electronic filing cabinets instead.

IT Solutions as an Aid for Meetings or at Hearings

Using IT solutions as an aid for meetings or at hearings poses fewer technical problems. The main application is the use of projected presentations to increase the efficiency of oral argument or to explain complex factual matters instead of charts and other visualization ''hardware.'' Another technological feature is visualization systems that allow the following of the transcription by court reporters in real time.[13] While there is still a preference for using printed copies of documentary evidence during hearings, these may also be displayed on computer screens or projected using electronic files on a local computer or server that is accessed via the Internet. Occasionally, videoconferencing is used, for example. for

[13] *See* Halket, *supra* note 8, at 294-97.

examining otherwise unavailable witnesses.[14] While such uses of IT create certain logistical problems and may prompt issues regarding cost allocation, they do not seem to pose major difficulties in most cases.

HOW CAN IT BE USED MORE EFFICIENTLY IN INTERNATIONAL ARBITRATION IN THE SHORT TERM?

In the short term, the acceptance and efficiency of transmitting and using information in electronic format may be greatly increased by using central filing cabinets or document repositories that are accessed via the Internet by using a Web browser. These systems use relational databases and other technologies that are also used for case management systems. Since the user is not required to acquire and maintain sophisticated software because the system runs on a server, barriers to entry are low, if a specialized provider for such online facilities is used. Moreover, users do not need extensive training since the interface uses solutions that they know from their other activities on the Internet.

Such central filing cabinets or document repositories are not simply a virtual place where files are uploaded. They can be configured to simplify organizing the data in a meaningful and easily understandable way and to retrieve any document using an index based search. Moreover, they can send an e-mail notification whenever an upload or other change occurs. They can provide for a group calendar function with procedural deadlines or hearing dates. They log all traffic and activities, and it becomes easy to ascertain who accessed what and at what time. They can offer standardized work flows that compel parties to adhere to such things as file naming rules. Last, but not least, they can be configured to always use an encrypted protocol for the flow of data over the Internet without the need for human intervention.

Since secure state-of-the art online repositories are complex and expensive to set up and to maintain, establishing such a system for a particular case does not appear to be a viable solution. Major law firms frequently possess the required IT infrastructure and know-how needed to configure their software for what is needed, while arbitrators will, in most cases, not have this possibility. Since the law firms will usually represent a party to the arbitration, using the system of one of them will normally meet fierce resistance and create potential issues that could affect the integrity of the arbitral proceedings.

[14] *See* E. Schäfer, ''Videoconferencing in Arbitration,'' 14(1) *ICC Int'l Court of Arb. Bull.* 35 (2003); ICC Task Force, *supra* note 11, at 72 et seq.

Under these circumstances, using a neutral service provider is both simpler and more cost-efficient since such providers should be able to achieve economies of scale. Among those providers, one may give preference to those who offer facilities configured for the specific needs of arbitral proceedings. Institutions like the AAA,[15] WIPO,[16] and the ICC (NetCase[17]) already offer such facilities[18].

HOW CAN IT BE USED MORE EFFICIENTLY IN A MORE DISTANT FUTURE?

For assessing the potential of IT solutions for arbitration, the great flexibility of the process that is accepted by most legislators needs to be borne in mind. Fair and just international arbitration proceedings do not require imitating, in whole or in part, any national civil procedure. In many respects, they have never done so, even if most players carry the municipal procedural baggage with them at all times. Thus, subject to known minimum standards, parties and arbitrators can agree on new methods and procedures as they deem fit.

IT offers and further develops tools that make using new and—eventually—more efficient approaches simpler. It is most likely that any such approaches will require more collaboration than would be expected from the adversarial perspective. One such approach could be labeled, Collaborative Case Management (CCM). CCM would rely on an online file repository with its relational database. Superimposed would be software with an interface allowing for visual organization of information in a way we know from decision trees, flow charts, or mind-maps.[19]

Such software would enable the arbitral tribunal to draw up, in consultation with the parties during the first phase of the arbitration, a decision tree or mind map with the claims and the issues being relevant for deciding any given claim. This visual representation could be adjusted and

[15] AAA WebFile, https://apps.adr.org/webfile/.

[16] WIPO ECAF, http://www.wipo.int/amc/en/ecaf/index.html.

[17] ICC Net Case, https://www.iccnetcase.org/Netcase/init.do; Mirèze Philippe ''NetCase: Keep Going Where Progress Leads You,'' 38(1) *U. Toledo L. Rev.* 417 (2006).

[18] Thomas Schultz, *Information Technology and Arbitration: A Practioner's Guide,* Kluwer Law International ch. 3 (2006); Halket, *supra* note 8, at 300-05.

[19] For information on these terms, search http://www.wikidedia.org; since promoting a specific program may be unjust, it is recommended that the reader use an Internet search engine using the following search terms: ''Mindmap,'' ''Knowledge Management,'' ''Visual Knowledge Management,'' and ''Document Management.'' *See also* ''logos,'' http://wwwknowledgetools.de/en/index.htm.

further refined or even completely changed during arbitral proceedings. The parties would add their legal and factual arguments and any portion of supporting evidence for each issue by establishing logical links (e.g., in the relational database) to the corresponding element in the decision tree or mind map.

This kind of software already exists, albeit in versions that are not specifically tailored to the needs of arbitration.[20] Collaborative methods have been developed for other contexts, such as joint decision making or mediation. Properly done, this would permit an understanding of which information is relevant from the beginning of a case, which will allow a focus in the proceedings accordingly. This would also allow easier assessment of the relevance of certain contentious issues. Finally, a good decision tree and the identification of relevant disputed issues can help to avoid flaws in the analysis and streamline the procedure.

However, adopting such a collaborative approach would require abandoning certain procedural concepts. Firstly, the procedure would become more ''front loaded,'' since drawing up the basic visual structure is likely to require more information on the substance of the case. Secondly, the approach would result in more transparency, especially insofar as the thoughts of the arbitrators are concerned. This is in certain respects at odds with the common law approach. Moreover, a party reckoning early on that its position may not prevail may be tempted to abandon and thereby frustrate the cooperative approach. This risk should not be underestimated.

CONCLUSION

More efficient use of IT in international arbitration will require even better software solutions, which have user interfaces and work flows that anticipate the working habits of counsel and arbitrators. More efficient use of IT will also require a better understanding and willingness to understand the capabilities of the huge variety of tools offered by IT. Last, but certainly not least, a more efficient use of IT will depend on our willingness to question our habits and work methods.

The adversarial system, in all its different combinations and permutations, has stood the test of time, but IT may help to change it to a more collaborative approach in certain areas. In my opinion such a collaborative approach will increase efficiency and quality, and may—if used intelligently—enhance the principles of fair and just proceedings.

[20] *Id.*

Electronic Discovery and Arbitration: A Shortcut Through E-Discovery

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The use of discovery in international arbitration is much more limited than its extensive use in U.S. litigation or growing use in U.S.-based arbitration, as litigators try to import litigation discovery practices into arbitration.

INTRODUCTION

As much communication occurs electronically, production and exchange of documents and data in electronic form, e-discovery, is a component of many arbitrations. The amount of electronic interaction results in an exponential increase in the amount of material that is retained. The cost of storage of electronic documents, while expensive, is much lower than the storage of paper records. This has resulted in the retention of a massive amount of electronic data, because there is no need to discard it. Data retention magnifies the amount of material that is potentially subject to a discovery request. For example, an initial e-mail may be sent to ten people, all of whom forward it to ten others, perhaps adding comments, resulting in 100 e-mails. Much of the retained data is on back-up tapes created for emergency uploading to replace lost data. Back-up tapes are not generally retained by subject matter and usually are not easily searchable.

ELECTRONIC DOCUMENTS ARE DISCOVERABLE

Discovery requests for documents in whatever form, however maintained, whether electronic or otherwise, are common and arguably include not only records stored on computers, hard drives, back-up tapes, servers, CDs, work and personal e-mails, but also voice-mail messages and files, PDAs, BlackBerrys, Palms, cell phones, iPods and other portable devices.

There are disputes between parties to an arbitration over the amount of discovery needed for a fair hearing. These range from objections to discovery as ''this is arbitration'' by those seeking to limit discovery and

protestations that even in arbitration ''trial by ambush'' is not fair from those seeking discovery. Counsel's positions often change, even in the same arbitration, when the party trying to limit discovery of itself, seeks discovery from its adversary. The appropriate amount of discovery in an international arbitration will vary with the size and complexity of the arbitration, as well as the practices of the forum.

RULES RELATING TO ELECTRONIC DISCOVERY IN INTERNATIONAL ARBITRATION

Arbitration rules, including those of provider organizations, give some guidance for parties and arbitrators. Efforts by various providers and users of arbitration to keep arbitration as a dispute resolution alternative that provides efficient and cost-effective resolution of disputes include emphasis on the limited discovery traditional in arbitration as well as fairness in the result.

Not all of the rules reference e-discovery and, if they do, it may be in a very limited manner.

International Centre for Dispute Resolution

The International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association, has guidelines for electronic discovery in international arbitrations. The guidelines will apply to all ICDR cases commenced after May 31, 2008, and reflect ICDR's commitment ''to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.''[1]

The ICDR Guidelines for Arbitrators Concerning Exchanges of Information provision for electronic discovery states as follows:

> *4. Electronic Documents.*
>
> When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a

[1] *See* http://www.adr.org/si.asp?id=5288.

different form. *Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible.* The Tribunal may direct testing or other means of focusing and limiting any search [emphasis added].

The ICDR Guidelines also reflect an awareness of the cost of discovery and provide for the requesting party to justify the ''time and expense'' involved in the request and allow for the allocation of costs of discovery.

8. Costs and Compliance.

a. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

The ICDR Guidelines provide for an adverse inference, if a party fails to comply with an order directing discovery.

8. b. In the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.

International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration

The International Bar Association (IBA) Rules[2] provide for the submission of documents on which a party relies to the arbitral tribunal and also provide for requests for production of documents. The Preamble provides as follows:

4. The taking of evidence shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other Parties rely.

[2] Adopted June 1, 1999.

In general, the documents should be ''relevant and material'' to the matters at issue. The rules specifically define documents to include electronic documents:

> ''*Document*'' means a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information.

Article 3 of the IBA Rules provide for parties to submit a request to produce documents to the arbitral tribunal. A party must meet certain criteria:

> 3.2. . . . any Party may submit to the Arbitral Tribunal a Request to Produce.
>
> 3.3. A Request to Produce shall contain:
>
> > (a) (*i*) a description of a requested document sufficient to identify it, or (*ii*) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
> >
> > (b) a description of how the documents requested are relevant and material to the outcome of the case; and
> >
> > (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

The opposing party may object to the request and provide its reasons to the tribunal, which then rules. The opposing party must produce

> 3.4. . . . all documents in its possession, custody or as to which no objection is made.

The IBA rules provide that all documents produced remain confidential and may only be used in that arbitration:

> 3.12. All documents produced by a Party pursuant to the IBA Rules of Evidence (or by a non-Party pursuant to Article 3.8) shall be kept confidential by the Arbitral Tribunal and by the other Parties, and they shall be used only in connection with the arbitration.

Under Article 9, the arbitral tribunal may exclude from evidence documents it determines would entail an

> 9.2. . . . unreasonable burden to produce.

With respect to any document ordered to be produced and not produced,

> 9.4. . . . the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules do not specifically provide for electronic discovery. Rather Article 24 states as follows:

> The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

Presumably this would include electronic records, if a party intends to present such evidence. Note that the UNCITRAL rules provide for the production of documents in support of a party's position.

International Institute for Conflict Prevention and Resolution

The International Institute for Conflict Prevention and Resolution (CPR) Rules for Non-Administered Arbitration of International Disputes provide for disclosure in Rule 11:

> The Tribunal may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed.

CPR Rule 9.3a provides for an initial pre-hearing conference for the early identification and narrowing of issues of the arbitration, which

provides an opportunity to discuss and agree upon procedures for e-discovery.

> 9.3. The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. Such conference shall be held promptly after the constitution of the Tribunal, unless the Tribunal is of the view that further submissions from the parties are appropriate prior to such conference. The objective of this conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct. Matters to be considered in the initial pre-hearing conference may include, *inter alia*, the following:
>
> > a. Procedural matters (such as the timing and manner of any required disclosure; the desirability of bifurcation or other separation of the issues in the arbitration).

The CPR is working on a protocol on disclosure of documents in arbitration that includes provisions relating to e-discovery.

Financial Industry Regulatory Authority

The Financial Industry Regulatory Authority (FINRA) discovery rules are a combination of the former rules of the New York Stock Exchange and the National Association of Securities Dealers. Some FINRA arbitrations are international. The new FINRA Customer Code (Rule 12506) provides as follows:

> [P]arties must produce documents on the relevant Document Production Lists within 60 days from the date that the answer to the statement of claim is due, or explain why production is not possible, or object.

There is no specific reference to e-discovery; nonetheless parties in FINRA arbitrations have exchanged electronic discovery and arbitrators have ordered its production when appropriate.

ADDITIONAL E-DISCOVERY GUIDELINES FOR ARBITRATORS AND PARTIES

When discovery disputes are brought to an arbitration panel and the provider organization, if any, does not address e-discovery, what guidelines should the arbitrators use? If there is a choice of law provision in the underlying contract or arbitration agreement, the arbitrators will look to the

law designated. Arbitrators are likely to consider the discovery practices, if any, of the location of the arbitration and the country of origin of the parties.

Federal Rules of Civil Procedure

In the United States, arbitrators familiar with the Federal Rules of Civil Procedure may look to these rules to provide some guidance, even though the Federal Rules of Civil Procedure provide for very broad discovery not customary in arbitration. These rules and the case law interpreting them can provide some guidance for e-discovery in arbitration, particularly in terms of the types of problems and issues that have arisen in connection with e-discovery.

In 2007, the Federal Rules of Civil Procedure were revised to specifically provide for e-discovery. Since these revisions, federal courts been faced with many cases alleging e-discovery abuse. These cases often allege that the party producing discovery (1) did not place a proper litigation hold to preserve electronic data, ''did nothing to stop its email system from obliterating all emails after sixty days'';[3] (2) has not properly defined it search terms; (3) has not searched all the germane sources such as hard drives, computers, laptops, e-mails; nor (4) provided all responsive materials found.

Case Law

Prior to the revisions of the discovery rules of the Federal Rules of Civil Procedure, U.S. District Court Judge Scheindlin created a framework for the obligations and responsibility of parties and counsel in connection with e-discovery in a series of decisions involving Laura Zubulake who sued USB Warburg LLC,[4] for discrimination. The court found that USB Warburg had engaged in extensive discovery abuse. Judge Scheindlin established a standard of necessary steps that must be taken to preserve and produce electronic data, and the factors a court should consider in determining whether to shift the costs of e-discovery, building on the steps adopted in

[3] Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth., 2007 WL 1585452 (D.D.C. 2007).

[4] Zubulake v. USB Warburg, 02 Civ. 1243 (SAS) May 13, 2003 [hereinafter *Zubulake I*]; Zubulake v. USB Warburg, 216 F.R.D. 280, 290 (2003) [hereinafter *Zubulake III*]; Zubulake v. USB Warburg, 220 F.R.D. 212, 218 (S.D.N.Y. 2004) [hereinafter *Zubulake IV*], Zubulake v. USB Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004) [hereinafter *Zubulake V*]

Rowe Entertainment v. William Morris Agency.[5] The *Zubulake* factors were modified and adopted by the court in *Wiginton v. CB Richard Ellis*.[6] These eight Wiginton factors are as follows:

1. the likelihood of discovering critical information;
2. the availability of such information from other sources;
3. the amount in controversy as compared to the total cost of production;
4. the parties' resources as compared to the total cost of production;
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation;
7. the importance of the requested discovery in resolving the issues at stake in the litigation; and
8. the relative benefits to the parties of obtaining the information.

The issue of who bears the cost of discovery may be less of an issue in international arbitration, as in many jurisdictions the losing party pays the costs and attorneys' fees of the winning party.

Costly and sometimes drastic remedies have been imposed.[7] Reading these decisions leads to the conclusion that judges are likely to require additional and potentially more invasive discovery when they believe that a party has not been forthcoming with producing relevant material. Arbitrators may respond similarly to requests for rulings or sanctions related to discovery.

Obligation to Retain Documents

Once parties are aware of impending litigation and, by implication, arbitration, they are under an obligation to preserve relevant documents. A clear, if extensive, statement of the obligation to preserve records under the Federal Rules of Civil Procedure, once litigation is contemplated is *In re Flash Memory Antitrust Litigation*:[8]

[5] Rowe Entm't v. William Morris Agency, 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

[6] Wiginton v. CB Richard Ellis, 229 F.R.D. 568 (N.D. Ill. 2004).

[7] It was estimated that it would cost over $9 million to produce e-mails from backup tapes in *Rowe* at 425.

[8] *In re* Flash Memory Antitrust Litig., 2008 WL 1831668 (N.D. Cal. Apr. 22, 2008).

> All parties and their counsel are reminded of their duty to preserve evidence that may be relevant to this action. The duty extends to documents, data, and tangible things in the possession, custody and control of the parties to this action, and any employees, agents, contractors, carriers, bailees, or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action. ''Documents, data, and tangible things'' shall be interpreted broadly to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voice mail, E-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as tapes, discs and cards, printouts, document image files, Web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, check statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films, charts, digital or chemical process photographs, video, phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and notes, studies or drafts of studies or other similar such material. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition. Until the parties reach an agreement on a preservation plan or the Court orders otherwise, each party shall take reasonable steps to preserve all documents, data, and tangible things containing information potentially relevant to the subject mater [sic] of this litigation. In addition, counsel shall exercise all reasonable efforts to identify and notify parties and non-parties of their duties, including employees of corporate or institutional parties, to the extent required by the Federal Rules of Civil Procedure.

Parties who fail to place a proper litigation hold on discovery materials have been sanctioned in a variety of ways, including being ordered to produce many more sources of material, pay fees, and expenses of opposing counsel. The searching and production of back-up tapes, which can be very expensive, has been ordered when counsel and the parties have not taken the proper steps to preclude the destruction of electronic data from more accessible media.

For example, in *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority,*[9] the court ordered the production of back-up tapes stating the following:

[9] Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth., 242 F.R.D. 139 (D.D.C. 2007).

> Remarkably, although the complaint in this case was filed on March 25, 2004, WMATA acknowledges it did nothing to stop its email system from obliterating all emails after sixty days until, at the earliest, June of 2006.
>
> More specifically, Mr. Oswald Johnson, Senior Technical Systems Specialist for WMATA, testified at a hearing before this Court on February 28, 2007, that Groupwise is WMATA's official email system and it is programmed with an automatic deletion feature that deletes any email after it has been in existence for sixty days. This applies universally whether the email is unread, in a folder that the sender or recipient has created, or in the user's ''Sent'' or ''Trash'' folders. While the user may defeat this feature by archiving the email, i.e., placing it in a location of the user's choosing in an encrypted format, the majority of WMATA employees apparently did not do this. As a result, with the exception of three individuals, there has been a universal purging of all possibly relevant and discoverable emails every sixty days at least since the complaint was filed three years ago [references and footnotes omitted].[10]

Obligation to Produce Properly Requested Documents

Both parties and attorneys have been sanctioned under the Federal Rules of Civil Procedure for failure to properly perform their discovery obligations. The most egregious recent case is *Qualcomm Inc. v. Broadcom Corp.*[11] This case involved the failure of Qualcomm to produce tens of thousands of documents requested by Broadcom. Magistrate Judge Barbara L. Major imposed sanctions on Qualcomm and many of its counsel, including attorneys' fees of over $8 million and referred ''the Sanctioned Attorneys to the State Bar of California for an appropriate investigation and possible imposition of sanctions.''

The facts and circumstances are instructive. The plaintiff, Qualcomm, sued for patent infringement. Broadcom contended that Qualcomm waived any infringement claim, if it participated in a series of meetings that resulted in the adoption of industry standards (JVT). Qualcomm, through its counsel denied that it had participated in the meetings and communications relating to the industry standards both in pretrial proceedings and throughout the trial. The trial testimony of certain witnesses left the

[10] *Id.,* 145-46.
[11] Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

impression that Qualcomm had not searched for or produced electronic and other data relating to its participation in the industry standards process.

After the trial concluded, ''Broadcom filed a written motion requesting that the Court sanction Qualcomm for its failure to produce tens of thousands of documents that Broadcom had requested in discovery.[12] The court found Qualcomm's conduct violated the standard of good faith and was unacceptable:

> Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or attorney's discovery obligations. Similarly, agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable.[13]

Some of the conduct resulting in sanctions arose during the preparation of Qualcomm's witnesses. During the preparation of one of Qualcomm's witnesses, an attorney discovered an e-mail referencing the industry standard e-mail list. Several days later, the witness's laptop was searched for the e-mail list, and 21 e-mails were discovered.

> The Qualcomm trial team decided not to produce these newly discovered emails to Broadcom, claiming they were not responsive to Broadcom's discovery requests. . . . The attorneys ignored the fact that the presence of the emails on Raveendran's computer undercut Qualcomm's premier argument that it had not participated in the JVT in 2002. . . . The Qualcomm trial team failed to conduct any investigation to determine whether there were more emails that also had not been produced.[14]

Four days after the discovery of the 21 e-mails, Qualcomm's lawyers argued to against admission of the JVT e-mail list stating to the court ''there are no emails.''[15]

In cross-examination of Qualcomm's representatives it was determined that their computers had not been searched for e-mails, which used terms related to the meetings and that Qualcomm had failed to produce 46,000 responsive documents. Magistrate Judge Major held that ''Qualcomm's conduct warrants sanctions'' as does the conduct of its counsel. The client is

[12] *Id.*
[13] *Id.,* at *18.
[14] *Id.* at *4-5.
[15] *Id.* at *5.

required to make an adequate investigation of its ''documents'' and that counsel was complicit in Qualcomm's abuse of the discovery process and sanctioned counsel.

> The Court's review of Qualcomm's declarations, the attorneys' declarations, and Judge Brewster's orders leads this Court to the inevitable conclusion that Qualcomm intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win this case and gain a strategic business advantage over Broadcom. Qualcomm could not have achieved this goal without some type of assistance or deliberate ignorance from its retained attorneys. Accordingly, the Court concludes it must sanction both Qualcomm and some of its retained attorneys.[16]

Magistrate Judge Major found that there was an obligation for counsel and the parties to act ''in good faith'' for the discovery process to work:

> For the current ''good faith'' discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.[17]

As noted above, the court imposed sanctions, including the assessment of attorneys' fees of over $8 million, and reference of certain discovery and trial counsel to the California State Bar for an investigation and possible sanctions.[18]

Other cases on improper e-discovery practices have imposed sanctions on parties and counsel for such abuses particularly assessing attorneys' fees as a sanction when they find a party or counsel acted with a ''culpable state of mind.''[19]

[16] *Id.* at *12.

[17] *Id.* at *17.

[18] Subsequent proceedings on appeal led to the vacation and remand of sanctions against counsel so that they could provide a ''self-defense,'' which they had been prohibited from doing before the trial court in accordance with California laws on attorney-client privilege. Qualcomm v. Broadcom, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

[19] *In re* September 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007).

CONCLUSION

While it is unlikely that most international arbitrations will involve the exhaustive discovery discussed in some of the above cases, parties and counsel should be aware of the intricacies of electronic discovery and the potential consequences in sanctions and costs of discovery.

APPENDIX: EXCERPTS FROM THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO E-DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosures.

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: . . .

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(b) Discovery Scope and Limits. . . .

(2) Limitations on Frequency and Extent. . . .

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. . . .

(5) Claiming Privilege or Protecting Trial-Preparation Materials . . .

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the informa-

tion to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. . . .

(f) Conference of the Parties: Planning for Discovery. . . .

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on: . . .

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General.

A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or . . .

(b) Procedure.

(1) Contents of the Request.

The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced. . . .

(2) Responses and Objections. . . .

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(3) Types of Sanctions.

Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. . . .

(e) Failure to Provide Electronically Stored Information.

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Part V

Mediation: Issues, Solutions, and Expanding Applications

How Confidential Is Mediation Confidentiality?

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In this article I will not take a position on what the level of protection should be for mediation confidentiality, but I will set out what is within the scope of mediation confidentiality and then discuss the status of protection under the common law, under codified common law such as the Federal Rules of Evidence (Rule 408) or the New York Civil Practice Law and Rules (Section 4547), under *ad hoc* statutes or rules for court directed mediation, under the Californian statutory scheme, and, finally, under uniform laws in the United States and Canada and under a recent harmonization directive in the European Union.

I have provided an extract from the *Guide to Enactment and Use for the UNCITRAL Model Law on International Commercial Conciliation* (2002) and particularly the comments on Articles 8, 9 and 10 of the Model Law—pages 38-48 of the Guide.[1] As a model law it sets a common denominator floor but not a ceiling, so states may choose to build on the minimums suggested by UNCITRAL. It is a good starting point for examining confidentiality in mediation.

INTRODUCTION

The scope of confidentiality in mediation ultimately revolves around the tension between (1) private agreements express or implied to keep information private and secret and (2) the traditional appetite for disclosure and transparency in legal proceedings.

Mediation is well known as a means for resolving disputes in contexts such as construction, armed services, insurance, labor, family, and divorce, and it might well be that most mediators are not lawyers. Commercial or business mediation as an alternative or precursor to litigation or arbitration

[1] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf.

is a relatively new development that has given rise to efforts to make special legislation to protect mediation and its confidentiality. Initiatives by lawyers may not be considered welcome or necessary in all quarters of the mediation community to the extent mediation is viewed as not being a legal proceeding but a right to self-determination independent of the judicial process.[2]

Nevertheless, lawyers may be particularly well suited to the task of balancing, on the one hand, public policy and party autonomy encouraging the private, amicable settlement of disputes with, on the other hand, the overriding public policy of ensuring, where possible, that this does no harm —such as promoting injustice, and/or fraud, duress, or illegality.

SCOPE OF MEDIATION CONFIDENTIALITY

Confidential refers to something known only to a limited few and not publicly disseminated and is indicative of something private, secret, intimate and/or hidden.[3]

This suggests that confidentiality can extend from the mediation room to the courtroom, and it is therefore important to look at a number of layers or contexts in which confidentiality is important to the mediation process:

1. Not all that is said or written within the four corners of a mediation is necessarily intended to be shared with all parties, counsel, and the mediator even though the fullest candor is desirable. Sometimes, for example, a party will want to tell the mediator something that is not meant to be disclosed to the other party or its counsel. The UNCITRAL Model Law addresses this point in Article 8, entitled ''Disclosure of Information,'' by requiring that a party make it a specific condition that a particular disclosure to the mediator is to be kept in confidence—this suggested rule is not

[2] See generally under the heading *International Academy of Mediators Oppose the Uniform Mediation Act* the exchange of letters in 2001 and 2002 between the International Academy of Mediators and drafters of the Uniform Mediation Act (UMA), *available at* http://www.mediate.com/pfriendly.cfm?id=878.

> [a]s expressed to you in the past, the more mediation is made to look like a court or litigation procedure, the less social and practical utility it will have and the more it will take on the adversarial characteristics and shortcomings of litigation. . .[o]ne needs only to look at what seems to be happening with arbitration to conclude that speed, cost savings, less formality and less adversarialism are no longer hallmarks of this ADR process. (Stephen L. Schwartz, President, IAM)

[3] Webster's *Third New International Dictionary Unabridged* (1993).

followed by the International Chamber of Commerce (ICC) nor by the American Arbitration Association (AAA), the American Bar Association (ABA)m and the Association for Conflict Resolution (ACR), which all require express authority to disclose be given to the mediator by the relevant party.[4]

2. Outside of the mediation room, there is the potential for disclosures to third parties, such as family, business associates, or the media, of the fact that mediation is taking place as well as what transpired in the mediation. The UNCITRAL Model Law addresses this point in Article 9, ''Confidentiality.'' Lawyers have professional disciplinary rules, but routinely there will be a written mediation agreement or governing mediation rules to prevent disclosure to third parties.

3. Whether a mediation fails or succeeds and leads to an agreement, as between the parties, counsel, and the mediator, there is the potential for recourse to *discovery* in pre-trial proceedings as to the original dispute or the meaning of the settlement agreement and the introduction of evidence at an eventual trial by use of documents or witness testimony. What can be used in subsequent legal proceedings? Can private parties limit what the courts should be allowed to see? The UNCITRAL Model Law addresses these points in Article 10, ''Admissibility of Evidence in Other Proceedings.''

4. *Third parties* who have no privity with the mediating parties (such as competitors) may claim a need for discovery or documentary evidence or testimony with respect to what went on in a mediation. To what extent can the parties to mediation keep their private negotiations off limits to anyone else? The UNCITRAL Model Law addresses these points generally in Article 10, particularly in paragraph 4.

As the UNCITRAL Model Law effectively recognizes, ''confidentiality'' in the context of settlement, compromise and mediation is really confined to the notion of confidential information in the sense of private information not to be given to some unauthorized third party at any time. The admissibility and/or discoverability of this information in subsequent legal proceedings are separate issues as to which the ''confidential'' label is not ultimately relevant or controlling because, for example, in the United

[4] ICC ADR Rules, art. 5(1), Mediation (July 1, 2001); *Model Standards of Conduct For Mediators,* adopted by the AAA, ABA, and ACR, Standard V., B (Sept. 2005).

States, protective orders from the courts protect traditional ''confidentiality.''

A few additional, important limits to the scope of confidentiality in mediation should be mentioned: (1) it should not be possible to turn pre-existing and otherwise discoverable communications or writings into confidential subject matter solely because of use in a subsequent mediation—it is only what is said, made, or prepared for the purpose of the mediation that should attract any special protection; (2) if the parties to a mediation settle their dispute and execute an agreement intended to be binding and enforceable, they cannot reasonably expect to be able to prevent a court from examining the agreement in case of dispute *between the parties* about its terms and/or implementation; and (3) illegality, fraud, or duress can be present even in mediation, so the courts need to have some means of access to the confidentiality of mediation if they are to be able to deal with such instances—concerns about violence and bodily injury, general criminal activity, abuse of children, or protection of consumers, are found in many current laws or drafts dealing with mediation confidentiality.

COMMON LAW

At common law, admissions, which go to the truth of a particular fact expressly or impliedly in issue, are prized exceptions to the hearsay rule, but there developed a practice of making an exception to the exception, as a matter of public policy, for admissions made in compromise or settlement negotiations.[5] Because some uncertainty crept in as to the difference between an offer to compromise something in dispute (protected) and a statement of an underlying *fact* relevant to the dispute (admissible),[6] it became customary to label statements as ''hypothetical'' or ''without prejudice.'' Eventually, most common law jurisdictions treated the without prejudice label as giving a sort of omnibus protection to what was said or written for purpose of negotiation, compromise, or settlement discussions.[7]

[5] See generally the common law background in the excellent case note by then president of the Chartered Institute of Arbitrators, Hew R. Dundas, ''When Does Confidential Mean Confidential? An Important Development in the Law of Mediation and the Without Prejudice Rule,'' 73(3) *Arb.* 335 (Aug. 2007).

[6] Lord Kenyon in *Turner v. Ralton,* [1796] 2 Esp 474: ''Concessions made for the purpose of settling the business for which the action is brought, cannot be given in evidence; but facts admitted I have always received.''

[7] White v. Old Dominion S.S. Co., 102 N.Y. 660, 6 N.E. 289 (1886); McKinney's 1998 Session Laws of New York, Ch. 317, Civil Practice Law And Rules-Settlement Negotiations-Inadmissibility, Memorandum In Support, New York State Senate, at

In modern common law circles, mediation has been characterized as ''assisted 'without prejudice' negotiation.''[8] The basis of this exception to the standard rule on admissions is described as the combination of (1) public policy encouraging the negotiation and settlement of civil disputes without the discouragement or fear that harm will be done to eventual chances in court and (2) the express or implied intention of the parties who engage in settlement negotiations to have candid discussions without risk of having everything thrown back at them in court should mediation fail.[9]

But the common law rule as to without prejudice negotiations does permit admission of evidence if offered not for the truth of any matter asserted or admitted *but for another purpose,* such as that the statement was made at all, irrespective of its truth. For example, there *was* a settlement irrespective of the truth of any of the relevant writings that are available to document it, or there *was* a detailed offer made thus going to the good faith

1745-46; West v. Smith, 101 U.S. 263, 25 L. Ed 809 (1879) opinion for the Court by Justice Clifford: *id.,* 101 U.S. at 270-71*:*

> Admissions by a party or by an authorized agent, either in court or out, may in general be given in evidence; . . . it will be for the jury to determine how the proof stands on the facts in controversy on which the admission is claimed to bear.

Id., 101 U.S. at 273 (internal citations omitted):

> Offers of compromise to pay a sum of money by the way of compromise, as a general rule, are not admissible against the party making the offer; . . .[d]ecided cases may be found where it is said that the evidence is admissible unless the offer made was stated to be without prejudice; but the rule in general, both in England and the United States, is that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise.

[8] From the judgment of May, L.J., in the English Court of Appeal, *Aird v. Prime Meridian Ltd.,* [2006] EWCA Civ 1866, available through the British and Irish Legal Information Institute at http://www.bailii.org:

> It is well-known and uncontentious in this case that mediation takes the form of assisted ''without prejudice'' negotiation and that, with some exceptions not relevant to this appeal, what goes on in the course of mediation is privileged, so that it cannot be referred to or relied on in subsequent court proceedings if the mediation is unsuccessful. In the present case the parties reinforced this by including a provision in their mediation agreement that they would ''keep confidential all information, whether oral or written or otherwise produced for or at the mediation.'' This cannot of course be taken absolutely literally, since it obviously would not apply to documents obviously produced for other purposes which were needed for and produced at the mediation; for example, their building contract or the antecedent pleadings in the proceedings. There was also a note in the agreement to the effect that evidence otherwise admissible would not become inadmissible simply because it was used in mediation.

[9] Dundas, *supra* note 5.

of the party accused of delay (irrespective of its particular content). By far the most articulate jurist on this issue is Lord Hoffmann of the English House of Lords, but he is not always followed by his colleagues, which suggests that the subject matter is difficult and not easy to analyze in every case.[10]

What the common law does to *discovery* of confidential information under civil practice rules for pre-trial preparation is not always that clear since to be discoverable is not the same as to be admissible—standards such as ''appears reasonably calculated to lead to the discovery of admissible evidence''[11] or ''material and necessary''[12] determine discoverability, and protective orders are commonly available to deal with claims of confidentiality in litigation.

Despite ongoing efforts to codify the rules as to discoverability, or admissibility as evidence, of mediation proceedings, there is still good value in having (1) a written agreement as to as broad a range of confidentiality as possible between the parties, counsel and the mediator, and (2) an express understanding that the mediation proceedings are ''without prejudice.''

Finally, it may be that the New York Court of Appeals will be heard from on the common law issues. In the recent case of *Hauzinger v. Hauzinger*,[13] a marital dispute led to a separation agreement negotiated with a mediator by parties who were not represented by counsel. The courts refused to quash a subpoena for the mediator to be deposed and to supply copies of his records for purposes of determining the fairness and reasonableness of the separation agreement when made, irrespective of a confidentiality agreement. The appellate court noted that the Uniform Mediation Act (UMA)[14] was not enacted in New York. Leave to file an appeal with the New York Court of Appeals was granted by the Appellate Division. The appeal was filed in the latter part of March 2008 and is currently subject to a review under Rule 500.11 (Alternative Procedure for Selected Appeals), which may lead to something less than a fully briefed argument.

[10] Bradford & Bingley plc v. Rashid, [2006] UKHL 37, reversing the English Court of Appeal decision [2005] EWCA 1080, *available at* http://www.bailii.org:

> Unanimous decision that letters about a debt constituted a sufficient ''acknowledgement'' for purpose of a statute extending the statute of limitations but multiple opinions with different theories as to English ''without prejudice'' law and consideration of the law of Canada, Scotland and South Africa.

[11] Fed. R. Civ. P. 26(b)(1).

[12] CPLR 3101(a).

[13] Hauzinger v. Hauzinger, CA 07-00659 (NY App. Div. 4th Dep't Sept. 28, 2007).

[14] Uniform Mediation Act, adopted by the National Conference of Commissioners on Uniform State Laws in 2001, *available at* http://www.pon.harvard.edu/guests/uma/.

CODIFIED COMMON LAW

The codification of the common law rule as to compromise or settlement negotiations was prompted by the disparity of treatment between offers to compromise a dispute (protected) and admissions of fact not otherwise protected under the without prejudice rule (admissible).[15] The result is illustrated by Rule 408 of the Federal Rules of Evidence[16] and by Section 4547 of the New York Civil Practice Law and Rules (CPLR),[17] which are

[15] *Weinsteins's Federal Evidence* ch. 408, § 408 et seq. (2d ed. 2008); McKinney's 1998 Session Laws of New York, *supra* note 7.

[16] Fed. R. Evid. 408. Compromise and Offers to Compromise

(a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

[17] CPLR 4547. Compromise and offers to compromise.

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

CPLR 4548. Privileged communications; electronic communication thereof.

No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

substantially similar and seek to protect both the offer of compromise in a dispute and the admission of independent facts. There have also been occasional attempts by federal judges to create a federal, *common law,* mediation privilege under the umbrella of Federal Rule of Evidence 501.[18]

The codification has not removed the inherent common law difficulty as to the issue of whether something is admissible for the purpose for which offered—the ''other purpose''—and not covered by the settlement or compromise negotiation privilege.

Earlier this year, the Second Circuit Court of Appeals handed down a decision in a trademark dispute—the *PRL USA Holdings* decision—which affirmed the admittance into evidence, despite Federal Rule of Evidence 408, of statements allegedly made by plaintiff in settlement negotiations as to plaintiff's consent to defendant using a particular version of its disputed trademarks with the implication that such use would not be ''offensive'' to plaintiff.[19] The background was that a clothing company, Polo Ralph Lauren (PRL), sued the U.S. Polo Association when the latter made a licensing agreement with a clothing company, Jordache. Clearly, in a dispute of this sort, there might well be negotiating sessions in which an offer is made not to assert a claim in the context of back and forth negotiations and bargaining, but the decision does not really explain what this context might have been—the essential legal conclusion of the court is that ''estoppel'' by acquiescence was established, and this was properly offered and admitted at trial for a purpose *other than* liability for or invalidity of a claim in dispute—but the court evidently thought that PRL might have ''lulled'' the defendant during settlement negotiations.

In view of the *PRL USA Holdings* decision, there is as serious question as to whether Rule 408 will provide useful protection to those who do not hold back and are fully candid in mediated or unmediated settlement negotiations. The criticism of the common law was that practitioners were forced to resort to legal niceties such as dressing up statements in settlement talks with the labels ''hypothetical'' or ''without prejudice.'' This led to the modern statutes and rules, but it is precisely because the U.S. Polo Association defendant said it relied on PRL's statements to its detriment that one wonders whether a different result would have obtained if they had been labeled expressly, as a modern legal nicety, to be ''strictly hypothetical for purposes of discussing settlement and not to be relied on absent merger into a binding agreement.''

[18] *See* Folb v. Motion Picture Industry Pension and Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

[19] PRL USA Holdings, Inc. v. United States Polo Ass'n, Inc., 2d Cir. Mar. 4, 2008.

In the New York state courts, a reinsurer has been given discovery, despite CPLR 4547, as to negotiations that led an insurer to settle an underlying claim for which it then sought partial reimbursement from its reinsurer—notwithstanding the so-called follow-the fortunes rule that usually binds reinsurers to the payments made by insurers precisely to avoid ''second guessing,'' litigation, and delay, and to facilitate settlement. The ''other purpose'' was said to be the right of the reinsurer to examine the validity of the settling insurer's claim for reimbursement because of a possible defense available to the reinsurer that the insurer settled to limit a bad faith liability—as compared with the CPLR 4547 protected purpose looking to the settlement of claims of regular liability or not of the insurer as to the underlying claim.[20] This illustrates the difficulties surrounding the application of CPLR 4547 in a specialized field of commerce.

Similarly, a recent New York Supreme Court decision, *NYP Holdings, Inc. v. McClier Corporation*[21] gave some discovery to a defendant indemnitor with respect to a settlement made by its indemnitee in a dispute relating to architectural and engineering services and defects in a building. Settlement negotiations were followed by mediation under court alternative dispute resolution (ADR) procedures, so both CPLR 4547 and court ADR rules as to mediation were in issue. Specifically, the court seems to recognize that while some clear exclusions of both discoverability and admissibility may apply under CPLR 4547, there might be situations where discoverability and admissibility are to be considered separately (''evidence . . . otherwise discoverable . . . may be admitted at trial for any purpose that is not otherwise impermissible''), confidentiality is to be taken care of by protective order, and mediation under court ADR procedures is treated separately from CPLR 4547:

> In opposition to the motions to compel discovery, and in support of a cross motion for a protective order, McClier claims that NYP and McClier engaged in several months of settlement negotiations, ultimately agreeing to mediate their dispute. The mediation agreement provided that the proceedings were confidential and that all ''offers, promises, conduct and statements'' would be privileged, would not be disclosed to third parties and would be inadmissible for any purpose, and that the parties' attorneys prepared presentations that were exchanged during the mediation session.

[20] Am. Re-Ins. Co. v. United States Fid. & Guar. Co., 2005 N.Y. Slip. Op. 04453 (A.D. 1st Dep't 2005).

[21] NYP Holdings, Inc. v. McClier Corp., Index No. 601404/04, Supreme Court, N.Y. County, Cahn, J. (Jan. 18, 2007).

Discussion:

The discoverability of compromises and offers to compromise, as well as statements made and conduct during compromise negotiations, is governed by CPLR 4547. That section sets out the general rule that such evidence is inadmissible as proof of liability or invalidity of a claim, or the amount of damages. To the extent that such evidence is otherwise discoverable, it may be admitted at trial for any purpose that is not otherwise impermissible. Id.

In *Masterwear*, the Appellate Division directed an ''in camera'' inspection of the subpoenaed settlement agreement that had been entered into between plaintiffs and a codefendant, discovery of which was sought to resolve any doubt as to relevance. The term ''settlement agreement'' was defined to include all affidavits and ''confidential documents'' pertaining to the settlement agreement. *Masterwear Corp. v Bernard, 309 AD2d at 510 and 3 AD3d at 307.* The settling parties' interest in confidentiality would be subject to a protective order, if appropriate.

McClier claims that *Masterwear* is distinguishable since there it was ''undisputed'' that the settlement agreement contained admissions by the movant's co-defendant. Here, McClier has already turned its settlement agreement over to Bass, and there are neither admissions nor allocations of liability contained in the agreement. Citing [citations omitted], McClier argues that its confidentiality agreement with NYP precludes any further discovery relating to the settlement negotiations. . . .

McClier claims that it conducted the settlement negotiations with NYP without the third-party defendants' participation since they either had not answered or appeared in the action when the negotiations started. Regardless of McClier's reason for proceeding to negotiate a settlement without such participation, it will have to prove the reasonableness of the settlement at the trial of the indemnification claims. Therefore, third-party defendants are entitled to discovery on this issue. . . .

Documents Submitted During The Course Of Mediation:

As to the documents submitted to the mediator in the mediation, and any drafts of such documents, a privilege log shall be prepared, but need not be served or filed until the further order of the court. It

should, however, be immediately available if the court later directs its production.

It is the policy of this court, and specifically of the Commercial Division to maintain the confidentiality of submissions and statements made during mediation proceedings. See ADR Program, Comm Div, Sup Ct, NY County, Rule 5 [now Rule 6 effective June 15, 2008]. One of the reasons for this is to encourage the parties to be completely open with the mediation and each other during mediation proceedings. Such openness makes resolution of actions and compromise of disputes possible. The policy assures the parties that what they submit or say to the mediator will not be introduced at the trial in the event the action is not settled, and will not be disclosed to the trier of facts, including the presiding judge.

In view of this policy, the court has not now directed disclosure or even production for in camera review of the mediation documents.

In the event that documents were submitted to the mediator, but would be required to be produced by another provision of JHO Cohen's order, they shall be so produced. The partial protective order relating to mediation shall be strictly construed.

McClier's letter request to place that portion of the motion papers which contains an unredacted copy of the settlement agreement under seal is granted.

Both the Second Circuit and New York State court decisions discussed above illustrate that the courts are wary of extending too much privilege to common law settlement negotiations, lest an unfairness or even injustice might result.

AD HOC RULES FOR COURT-DIRECTED MEDIATION

The U.S. Congress enacted the Alternative Dispute Resolution Act of 1998,[22] to reform existing federal provisions for ADR such as arbitration or mediation and require the District Courts to enact rules for ADR. In 1999 the U.S. District Court for the Southern District of New York (SDNY)

[22] Alternative Dispute Resolution Act of 1998, Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, codified at 28 U.S.C. §§ 651-658 (1998)).

adopted Local Civil Rule 83.12 ''Alternative Dispute Resolution'' to further develop its mediation program pursuant to this mandate.[23] This rule provides for overall ''confidentiality'' unless all the parties agree otherwise, incorporates by reference the federal and state rules as to compromise negotiations, and provides for what is essentially a mediator privilege extending in any pending or future action relating to the dispute, even to actions between persons who were not parties to the mediation. The rule is not as detailed as the New York state court ADR rule discussed below and does not deal with discovery and/or admissibility in any suit to enforce an eventual settlement agreement.

The New York County Commercial Division of the Supreme Court, Civil Branch, began an ADR program in 1996 not long after its creation. Rule 6 of the ADR Program ''Confidentiality of Mediation and Neutral Evaluation,'' as amended through June 15, 2008, provides a comprehensive protection for the parties and mediator as to confidentiality of the mediation proceeding in general and deals specifically and sensibly with the elimination of discovery and the ability to introduce portions of an otherwise confidential settlement agreement in any action for breach thereof.[24] Rule 6(c) provides for an exception as to the mediator's obligation of confidentiality ''if required by law'' or to prevent death or serious physical injury—this is consistent with the UNCITRAL Model Law. Evidently the judges and the program administrators wanted to start from scratch and customize thorough rules for mediation. The rights of third parties to discovery or admissible evidence are not dealt with.

As shown by the *NYP Holdings* decision[25] set out above in detail with respect to discussion of the codification of the common law into civil practice rules, the New York County ADR rules are in addition to (and in reality over and above) the provisions of CPLR 4547 and upheld so far in the courts as separate rules governing court-sponsored mediation as opposed to mere settlement negotiations.

While it is left open under SDNY and New York County Commercial Division rules to determine the extent to which third parties can compel discovery or testimony on some showing of need, the question has been more directly addressed by the state of California.

[23] SDNY Local Civil Rule 83.12(k)—Confidentiality—Alternative Dispute Resolution, *available at* http://www1.nysd.uscourts.gov/rules/rules.pdf, at 80. *Compare* the EDNY Local Civil Rule, *available at* http://www1.nysd.uscourts.gov/rules/rules.pdf, at 74.

[24] Supreme Court NY County Commercial Division ADR Rules, Rule 6, Confidentiality of Mediation and Neutral Evaluation, *available at* http://www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment1.pdf, at 3.

[25] NYP Holdings, Inc. v. McClier Corporation, Index No. 601404/04, Supreme Court, NY County, Cahn, J. (Jan. 18, 2007).

CALIFORNIA'S STATUTORY SCHEME

California took its own path in 1998 with very strong statutory protection for mediation particularly as it relates to discovery or admissibility in *any* legal proceedings. The Evidence Code was amended to add Division 9, Chapter 2. Mediation, Sections 1115-1128.[26]

The essential exclusions are set out in Section 1119, which does not mince words:

> Except as otherwise provided in this chapter:
>
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Notable exceptions are for evidence otherwise admissible or discoverable outside of a mediation (Section 1120(a)), and for written, mediation settlement agreements used to show fraud, duress, or illegality that is relevant to an issue in dispute (Section 1123(d)).

That the statutory mediation protection means what it says is confirmed by the case law, for example, *Rojas v. Superior Court of Los Angeles County*.[27] In *Rojas*, the owner of a building sued a building contractor for mold damage and entered into a confidential settlement through private mediation. Hundreds of tenants sought discovery of written statements, reports, and

[26] California Evidence Code; see generally http://www.leginfo.ca.gov/and full text of the provisions as to Mediation §§ 115-1128, *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128.

[27] Rojas v. Superior Court of Los Angeles County, 33 Cal. 4th 407 (2004).

analysis of test data and photographs of the mold for their own suit against the owner and the builder. It was argued that there was no other source of such evidence since the mold had been removed. The Supreme Court of California reversed the intermediate appellate court and refused discovery: the materials were not protected solely by introduction or use in a mediation but were protected if prepared for the purpose of, in the course of, or pursuant to a mediation.

However, footnote 8 of the *Rojas* decision makes clear that, notwithstanding California's broad protection for mediation confidentiality, mediation will not shield from disclosure *facts* presented or set forth in mediation to the extent they are within the exception contained in Section 1120(a), which excludes from the mediation privilege: ''[e]vidence otherwise admissible or subject to discovery outside of a mediation . . . shall not be or become inadmissible or protected from disclosure solely by reason of [its] introduction or use in a mediation.'' At least on this point of not using mediation to shield matters from disclosure, the California statutory protection for mediation is no different from codified common law such as CPLR 4547, which has a similar exclusion from the protection given to settlement negotiations for ''otherwise discoverable'' evidence: ''[t]he provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations.''

In addition to Section 119(c), the words ''confidential'' or compounds or derivatives are only mentioned in Section 1125, dealing with how to fix the time a mediation ends for purposes of confidentiality, and in Section 1126 to the effect that what is inadmissible, protected from disclosure, *and confidential* before the mediation ends remains so after it ends. California has evidently decided that confidentiality, admissibility, and protection from disclosure are separate concepts, and confidentiality is not an adequate word for all three.

UNIFORM LAWS

United States

In the United States, the UMA was approved in 2001 by the National Association of Commissioners for Uniform State Laws and recommended for enactment by the states. The UMA provides for the UNCITRAL Model Law in international cases unless the parties decide otherwise, but the UMA provisions on privilege are overriding. To date enactments of the UMA have been made in DC, Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington, but only in DC and Utah has the incorporation of the UNCITRAL Model Law for international mediation been adopted.

Essentially, a mediation privilege akin to the attorney-client privilege is created for parties and mediators with a set of exceptions that itemize what would be at the very least the crime/fraud exceptions to the attorney-client privilege.[28] The privilege can be waived,[29] and the exceptions to the privilege[30] go to crime, violence, abuse of children and, after an *in camera* hearing, to disputes about a settlement agreement itself. Confidentiality is specifically left to the parties or as provided by other law or rule of a state under Section 8.

The UMA is a long and complicated document and definitely inspired by California's strong protection for mediation confidentiality.

Canada

In Canada, the Uniform [International] Commercial Mediation Act (2005) based on the UNCITRAL Model Law has been adopted for enactment by the provinces and territories of Canada by the Uniform Law Conference of Canada. Nova Scotia has made a partial enactment. The uniform law covers, under the heading ''Communication of Information,'' the confidentiality provisions of the UNCITRAL Model Law:

Disclosure of information between parties

7. (1) A mediator may disclose to a party any information relating to a mediation that they receive from another party unless that other party has expressly asked the mediator not to disclose the information.

Comment: This article is based on article 8 of the UNCITRAL Model Law. *Confidentiality with respect to third parties*

(2) With respect to third parties, all information relating to a mediation must be kept confidential unless

(a) all the parties agree to the disclosure;

[28] UMA § 4, Privilege against Disclosure; Admissibility; Discovery. National Conference of Commissioners on Uniform State Laws (NCCUSL), http://www.nccusl.org, *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf, at 31.

[29] UMA § 5, Waiver and Preclusion of Privilege, *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf, at 37.

[30] UMA § 6. Exceptions to Privilege, *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf, at 40.

(b) the disclosure is required under the law;

(c) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement; or

(d) the disclosure is required for a mediator to respond to a claim of misconduct.

Comment: Clauses 2(a), (b) and (c) of this article are based on article 9 of the UNCITRAL Model Law. Disclosure under the law would include requirements under access to information legislation or requirements of disclosure under rules of evidence or reasons of public policy. Subparagraph (d) is a new provision aimed at allowing the mediator to put forward a defence to a claim of misconduct.

Non-admissibility of evidence

8. (1) None of the following information, in any form, is admissible in evidence in an arbitral, judicial or administrative proceeding:

(a) an invitation by a party to mediate, a party's willingness or refusal to mediate a dispute, information exchanged between the parties before a mediation commences and any agreement to mediate;

(b) a document prepared solely for the purposes of a mediation;

(c) views expressed or suggestions made by a party during a mediation concerning a possible settlement of the dispute;

(d) statements or admissions made by a party during a mediation;

(e) proposals for settlement made by the mediator;

(f) the fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(g) the fact that a party terminated the mediation.

Comment: This article is based on paragraphs 10(1), 10(2) and 10(3) of the UNCITRAL Model Law.

Admissibility in certain cases

(2) However, the information may be admitted in evidence to the extent required

(a) under the law;

(b) for the purposes of carrying out or enforcing a settlement agreement; or

(c) for a mediator to respond to a claim of misconduct.

Comment: Clauses 2(a) and 2(b) of this article are based on paragraph 10(3) of the UNCITRAL Model Law. Clause 2(a) includes disclosure for reasons of public policy including disclosure of threats made by a participant to inflict bodily harm or unlawful loss or damage or under a legislative requirements (ie. access to information, rules of evidence). Clause (c) is a new provision aimed at allowing the mediator to put forward a defence to a claim of misconduct.

For greater certainty

(3) Except for the limitations set out in subsection (1), information created for purposes other than a mediation does not become inadmissible because it was used in a mediation.

Comment: This article is based on paragraph 10(5) of the UNCITRAL Model Law.

For greater certainty

(4) Subsections (1) and (2) apply whether or not the arbitral, judicial or administrative proceeding relates to a dispute that is or was the subject of a mediation.

Comment: This article is based on paragraph 10(4) of the UNCITRAL Model Law.

European Union

In the European Union, the Commission made a proposal in 2004 for a directive by the Council and Parliament on cross-border civil and commercial mediation, the Parliament proposed changes in 2007, and the Council, Parliament, and Commission agreed on a directive that was issued on May

21 and was published on May 24, 2008.[31] The scope of protection given to mediation confidentiality is restricted to the post-mediation testimony of the mediator, and not the parties, because the Commission and the Council did not want to interfere with the rights of member States to regulate mediation, including confidentiality, under their domestic civil procedure laws but only sought to deal with the limited issue of setting a minimum standard for mediator confidentiality in civil proceedings. The directive sets out the requirement for the member States to provide for mediator confidentiality as follows:

Article 7
Confidentiality of Mediation

> 1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
>
> (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
>
> (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
>
> 2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

The Council expressly did not accept proposals that would have required member States to exclude the parties from giving testimony.[32]

[31] Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters.2008 O.J. (L136), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML

[32] Draft Statement of the Council's Reasons, Doc. 150003/07 (Feb. 7, 2008). Subject: Common position adopted by the Council on . . . with a view to the

CONCLUSION

Mediation confidentiality breaks down to component parts of (1) what is disclosed confidentially to the mediator in mediation, (2) what information about the mediation is secret or private information not to be disclosed to any unauthorized person at any time, (3 notwithstanding what the parties and mediator have agreed in (1) and (2) what is discoverable and/or admissible in subsequent legal proceedings between the parties or those in privity with them, and (4) what is discoverable and/or admissible by unrelated third parties who make a showing of need for access to information from a mediation for purposes of their own litigation.

There is no overarching federal law, and the efforts at making uniform law are proceeding slowly because the role of mediation and its relation to judicial proceedings are not generally agreed, and the consequences of a mediation privilege preventing discovery and/or admission as evidence of information from a mediation are not fully accepted as being consistent with traditional legal process.

adoption of a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.
18. As for amendment 28 the Council has accepted the substantive part which is reflected in the text of Article 7 of the common position. The Council has however decided to maintain the provision as drafted in the common understanding from December 2005. This means that the Council has not accepted that it should also be impossible for parties to a mediation to disclose information concerning the mediation process and that the ban on disclosure should cover also disclosure to third parties. By maintaining the text of the common understanding the Council has also decided not to put the member States under the obligation to ensure that those involved in a mediation process would not even have the right to give evidence.

Mediators Take Note: Are We a Cottage Industry? Are We a Profession? Who Will Decide?

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Egg graders have been licensed in Indiana, well diggers in Maryland, farriers in Illinois, plumbers, midwives, manicurists, barbers and hairdressers, masseurs and masseuses in many places, notaries public everywhere–not to mention doctors, lawyers, ministers, and accountants. The sociologist Harold Wilensky observed that ''[a]ny occupation wishing to exercise authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training, and convince the public that its services are uniquely trustworthy and tied to a set of professional norms.''[1]

Since Harvard Professor Frank Sander pondered the notion of the multi-door courthouse at the Pound Conference in Minneapolis in April 1976[2]—one of the doors being a mediation alternative to litigation–mediation has gained traction in the United States and globally. Visualizing cost savings and efficiency, property and casualty insurers in the 1980s brought their claims to mediation, some offering rebates on

[1] Harold L. Wilensky, ''The Professionalization of Everyone?'' 70(2) *Am. J. Soc.* (Sept. 1964), *available at* http://www.jstor.org/stable/2775206. A ''technical'' basis is not to say ''scientific.'' Contrast two of the oldest professions–medicine and the ministry. Both scientific and non-scientific systems of thought can serve as a ''technical'' base for professionalism.

[2] Formally known as ''The National Conference on the Popular Causes of Dissatisfaction With the Administration of Justice,'' the conference celebrated the 70th anniversary of the 1906 Pound Conference of the same name and place, where Roscoe Pound, an early dean of the Harvard Law School and the father of the case study method, chided the newly formed American Bar Association (ABA) about the frustrations of litigants in the procedurally Byzantine and ruinously costly American court system.

premiums for insureds who agreed to mediate, rather than litigate disputes.[3] Courts implemented mediation as a useful tool to clear five-year old dockets. Litigators began moonlighting as mediators and found that, for the first time in their careers, all sides in a dispute loved them.

Among mediators, mediation became a poorly kept secret–it provided a natural high with the endorphins flowing after everyone found their way to yes, and all but blessed the mediator for bringing peace into the room.[4] Gradually, certain mediators found they had a natural skill and calling, and, gradually, a natural cadre developed.

Often unknown to each other, a handful of mediators operated in isolated markets. In the mid-1990s, a group of commercial mediators found each other and formed the International Academy of Mediators (IAM). Several years later, another group, based originally largely in the southern states, formed the American College of Civil Trial Mediators (ACCTM). The cryptically named Center for Public Resources (CPR)[5]—a 1979 consortium of Fortune 1000 companies who committed to mediating any disputes they had against each other—created its Panel of Distinguished Neutrals to mediate member disputes. Four thousand operating companies have now signed the CPR ''pledge'' that ''in the event of a business dispute between our company and another company which has made . . . a similar statement, we are prepared to explore with that other party resolution of the dispute . . . through ADR [alternative dispute resolution].''

Since 1976, mediation has grown exponentially in the United States. Many transactional lawyers write mediation-before-arbitration, or mediation-before-litigation clauses into business agreements. Many corporations require their employees to mediate employment dissatisfaction before filing suit. Almost every litigator will tell you he or she is also a mediator. And almost every retiring judge who does not want to play golf full time hangs out a shingle as a mediator. Mediation panels have sprung up—the American Arbitration Association (AAA) hosts a panel of mediators, as does CPR, as does Judicial Arbitration and Mediation Services (JAMS), as does the Financial Industry Regulatory Authority (FINRA—serving the securities industry), as do innumerable federal and state courts.

Different panels and courts require varying degrees of training, from four to 40 hours, with varying content and rigor. Almost no panel or court requires a demonstration of competency in subject matter or performance,

[3] Design Professionals' Insurance Corporation was one of the carriers with whom one author mediated who incentivized its professional insureds in this way.

[4] David Hoffman, a successful Boston mediator, titled his 2006 book on the magic of mediation *Bringing Peace Into the Room.*

[5] Recently renamed Center for Public Resources International Institute for Conflict Prevention & Resolution.

relying solely on exceedingly rare user complaints to weed out the clearly inept.

A former head of the ABA-ADR Section (the only section to admit non-lawyers) declared that the number of cases the median mediator handles annually is zero. An informal estimate of the volume of paid mediation business in the United States is $500 million—about the book of business of the 50th largest law firm in the United States.

So, although mediation continues to grow, the number of mediators outpaces the number of mediations. And mediators, unlike the majority of lawyers, have no initiating educational requirements, no licensing, no Continuing Legal Education or Continuing Professional Development requirements, and no independent testing or vetting of their skills. There is no barrier to entry. Business networks and word-of-mouth referrals drive business. We are not licensed. We may not be trained. We are unevenly ''credentialed.'' The marketplace decides. Mediators like it that way.[6]

Mediators did not emerge *sui generis* after the Pound Conference in 1976. Aside from the notion of the ''wise village elder,'' the passage of the Federal Arbitration Act in 1925[7] and the National Labor Relations Act in 1935[8] created a profession directed primarily at the need for peace in one important market segment—between organized labor and management.

This need for peace became a matter of national security during World War II, and after the war, labor arbitrators and mediators emerged as a breed apart, vetted by the National Academy of Arbitrators, which still sets the gold-standard for competence and integrity in labor-management relations. Labor arbitrators and mediators are typically full time and are specifically trained and apprenticed as neutrals in the field of collective bargaining. Some are lawyers and some are PhD's in industrial and labor relations. All have an in-depth and sophisticated understanding of labor-management relations, collective bargaining principles, and the governing law.

As a profession, mediators of commercial disputes operate under no universal set of rules, require no training or testing, and are not licensed to practice as mediators by any professional or government body. They are poorly and idiosyncratically self-regulated. Many courts offer mediation alternative, and the commercial mediation providers seek to set a higher standard. They require at least minimum training and an acknowledged competence.

[6] Mediation is a mature market in the United States and arelatively mature market in Great Britain, Australia, and New Zealand. It is less well entrenched in Continental Europe (other than the Netherlands), and it is struggling to find footholds in Latin America, the Middle East, and in much of Africa and Asia.

[7] Federal Arbitration Act, 9 U.S.C. §§ 1-14, 83 Stat. 883 (1925).

[8] National Labor Relations Act (or Wagner Act), 29 U.S.C. §§ 151-169 (1935).

The UMA itself simply defines a mediator as ''an individual who conducts a mediation.'' A business card, a Web site, and a market following make you a mediator. The only confirming ritual left to do, at least under the UMA, is to ''conduct a mediation.'' This is not to say that federal and state courts offering court-annexed mediation, federal and state government agencies seeking mediation, and mediation panel providers like AAA, JAMS, or CPR do not set a higher standard.

However, that standard is unique to each organization, and the various organizations frequently do not publish the standards they set.[9] The most vocal arguments made by mediators, in the United States and England, are against regulation. Recalling our origins as a grassroots response to the overwhelming financial, emotional, and time costs of litigation, mediation appeared first in California, a jurisdiction fond of embracing the new, the far-out, and the magical. Mediation worked its way across the United States, but mediators have always had a protective feeling that what they did was indefinable and captured only in the moment.[10] Mediators talk of healing, of reframing, of communication at many levels, including the spiritual, of the ''ah hah'' moments when irresolvable disputes are suddenly resolved.

We come from all walks of life and from all disciplines—from the law, psychology, psychiatry, social work, the clergy, and human resources. The ADR section of the ABA is unique in admitting non-lawyer members. We have now, a quarter-century into our enterprise, self-sorted into groups that do community dispute resolution, victim-offender mediation, divorce and custody mediation, and commercial mediation. We have elite sub-set practices for construction, intellectual property, employment, and environmental remediation.

Although the market now demands mediator subject matter expertise,[11] it has naively never thought to require process expertise. Perhaps that is because the lawyers who hire the mediators on behalf of the clients understand the law but do not always comprehend the subtlety of mediator

[9] Almost every court allows its panel mediators to say that they are ''certified'' or ''credentialed'' by that court. Texas, where, like California and Florida, mediation is statutorily court mandated, there is a Texas Mediator Credentialing Association, which has a detailed list of escalating standards, allowing one to be Distinguished, Advanced, Credentialed, or a Candidate for a Credential.

[10] That, of course, did not keep mediators from setting up expensive training courses for want-to-be-mediators and issuing certificates of completion to all comers, although—after queries by graduates about a flow of business—with disclaimers that there was no assurance that the training would yield any work.

[11] In the beginning, a mediator mediated everything in the commercial sphere. (Family law always was in its own realm.) Increasingly, parties want a mediator who has specialized subject matter expertise. There is a consensus among mediators that mediation skill far outweighs subject matter knowledge. The marketplace disagrees.

skills or styles. Mediators have talked for decades about self-policing, about ethical standards, about best practices, about the qualities of a good mediator, but we have never talked about competency certification or, even more daring, a competency assessment system.

To date, mediators, at least in the United States—the community with which one author is most familiar—have been notoriously unwilling to self-regulate. Like the proverbial herd of cats, mediators resist definition and categorization. There are paradoxical desires for exclusivity and inclusiveness—the busiest and best paid mediators chant an Adam Smith mantra of letting the market decide, and the larger mediation community as a whole is unwilling to define or set standards for itself for fear of excluding the non-lawyer mediator, the community mediator, or the family mediator. As noted, the ADR section of the ABA is the only section that admits non-lawyers. Mediators resist self-definition, although commercial mediators and family mediators do tend to have little interest in each other. However, mediators as a whole tend to shroud themselves in a scrim of privacy. There is a feeling among mediators that what they do is magic.[12]

After struggling to convince a marketplace of the utility, indeed social benefit, of its skills, mediators are loathe to burden themselves with any further credentialing, which for the long-standing and busy mediator appears as just bureaucratic meddling. The successful mediator mantra is: ''If it ain't broke, don't fix it.'' Mediators are not the force behind the International Mediation Institute (IMI) pushing this initiative.

Recently, corporations who do business internationally began to grumble about the lack of a universal database for qualified mediators and about the lack of published feedback on mediators they may wish to use. At the same time, one in-house counsel who had been a dedicated user of mediation services, and a former board member of CPR, took early retirement and went on a mission to create a public, universal registry of certified and assessed mediators. His mission coincided with similar initiatives researched and planned by several non-profit bodies in the international arena: the Netherlands Mediation Institute in the Netherlands, the Singapore Mediation Centre/Singapore International Arbitration Centre, and the AAA/ICDR.[13] These independently conceived initiatives converged, and three organizations now sponsor The Hague-based IMI, a public-interest foundation, which aspires to turn mediation into a true profession on a global scale.

[12] *See* John W. Cooley, *"Mediation Magic: Its Use and Abuse,"* 29 *Loyola U. Chi. L.J.* 1 (1997). Although a serious discussion of mediator techniques, the metaphor is intended. Former U.S. magistrate, now professor, Cooley presents his paper dressed in top hat and black cape.

[13] The International Centre for Dispute Resolution (ICDR), the international division of the AAA, was established in 1996.

The core remit of the IMI is to establish a set of globally applicable, transparent standards for mediators that will raise professional practice standards and enable those who use the services of a mediator to establish the professional competence of that mediator with a high degree of confidence. IMI believes that such a voluntary, self-regulating system will also help head off all-but-inevitable, and likely unenlightened, government interest in regulating mediators. The IMI does not intend to provide any mediation services, and will not compete with nor replace any mediation provider or existing certifier.

Should commercial mediators be invited to apply for competency certification granted and administered by an international institute? Following an international, online, consultation, IMI posted draft standards, criteria, and proposed rules for public comment through March 2008 and found the response, while sometimes critically focused on small pieces of the overall design, generally positive.

The initiative for certifying mediators does not come from mediators, who have never had a penchant for putting credentialing hurdles in their path, but from corporate users of mediation. The IMI is chaired by Wolf von Kumberg, Assistant General Counsel of Northrop Grumman Corporation. Michael Leathes (one of the authors of this article), a former corporate general counsel and a CPR board member until 2006, is executive director.

IMI appointed an Independent Standards Commission of some 40 thought leaders from around the world, representing all the relevant constituencies, to define the structure and content of the certification scheme. The commission is chaired by Professor Tommy Koh, Singapore's ambassador-at-large and professor of law at the National University of Singapore. Michael McIlwrath, senior litigation counsel at General Electric Oil & Gas, is a vice chair of the IMI Independent Standards Commission. Judith Meyer (one of the authors of this article), an American mediator, is the other vice chair.

The IMI has undertaken a task that no one has successfully completed in the three decades in which mediation has moved from a new-age, wild-idea to an accepted, institutionally embraced alternative to litigation. Thirty years ago, mediation was routinely misspelled as ''meditation'' or, reconjectured as ''arbitration.'' Mediators were mostly in the business of educating potential clients—law firms and corporations—in the use of this new protocol.

Riding a wave of opportunity and interest, U.S. universities such as Pepperdine and Harvard, began offering mediator training. Private training groups next emerged, indeed proliferated, offering basic, intermediate, and advanced mediator training. Most of the training came with a disclaimer: we can give you mediation training, but we cannot offer you mediation employment. Mediators who found success in the marketplace began to coalesce and self-identify, forming in the 1980s the Society for Professionals

in Dispute Resolution (now the Association of Conflict Resolvers (ACR)), and in the 1990s the ADR section of the ABA, the IAM, and the ACCTM. Federal and state courts, and private national and international providers such as CPR, the AAA/ICDR, FINRA, JAMS, as well as innumerable local providers, created and now offer panels of mediators. The judicially created panels tend to require some form of training before acceptance—some a four-hour course attendance and others, such as Florida, a 40-hour training before holding yourself out as a ''Certified Mediator.'' Similar patterns began to emerge in Canada, the United Kingdom, the Netherlands, Australia, and New Zealand.

But, all that having happened, can mediators say that they belong to a professional community? Wilensky's thoughts on the transition from occupation to profession are insightful:

> [T]here is a typical process by which the established professions have arrived: [practitioners] begin doing the work full time and stake out a jurisdiction; the early masters of the technique or adherents of the movement become concerned about standards of training and practice and set up a training school, which, if not lodged in universities at the outset, makes academic connection within two or three decades; the teachers and activists then achieve success in promoting more effective organization, first local, then national—through either the transformation of an existing occupational association or the creation of a new one. Toward the end, legal protection of the monopoly of skill appears; at the end, a formal code of ethics is adopted . . . there are some major barriers to professionalization: organizational contexts which threaten autonomy and the service ideal, and bases of knowledge which threaten exclusive jurisdiction.[14]

In mediation's case, perhaps because its civil and commercial practitioners are overwhelmingly lawyers and retired judges, the code of ethics came before a ''monopoly of skills'' or professionalization. While the field is

[14] Although codes of ethics came early—perhaps because of the proximity of mediation to law and the fact that many commercial mediators are lawyers— there is no universal code of ethics governing mediators. The UMA provides a utilitarian code of ethics. AAA/ICDR, JAMS, and almost every provider organization has a stated code of ethics for mediators. Many states and court systems have adopted codes of ethics governing mediation. The default code of ethics, adopted in 1994 and revised in 2005, is a joint creation of the AAA, the ABA/ADR Section, and the Society for Professionals in Dispute Resolution (SPIDR), now ACR. In February 2008, the ABA/ADR section published its *Final Report on Improving the Quality of Mediation*. While the report did not address mediator competency as such, it summarized views of U.S. focus groups on the selection of mediators.

sufficiently mature in those areas where there is an entrenched practice or a de facto monopoly, mediators are highly resistant to standardization or definition of what constitutes sufficient skill. In addition to feeling that mediation is an art form, admitting of infinite variety of approach, there is the fear that any attempt to rationalize will negatively impact the happiest, most comfortably ensconced, and best remunerated practitioners in the field.

IMI's initiative is bold, and it is broad. It deeply offends existing constituencies and associations of mediators with mature practices. In part, the resistance it has come up against from the mediator community is based on simple fear: what if I do not meet the proposed standards, and, who will be judging me? In part, it comes from insecurity: if this opens the field with its transparency proposals, will I lose business? In part, it comes from a degree of (perhaps justified, perhaps not) arrogance: I created this field and my success; who are you to redefine it?

IMI's draft scheme, now being studied by the Independent Standards Commission, envisages two competency certifications—a professional mediator certification and an inter-cultural competency certification. The two certifications are not intended to be mutually exclusive. Mediators would be initially qualified by providing a feedback digest prepared by a mentor and filing a plan for continuing professional development. Then, if the mediator passes rigorous post-qualification testing in role plays conducted by actors under professional assessment, and passes a post-test interview with the assessors,[15] he or she would be listed as IMI certified.

To become interculturally certified, the IMI certified-mediator would be required to pass additional role plays involving inter-cultural issues and another post-test interview with the assessors. IMI also proposes a code of ethical conduct to serve as a default code in the absence of a recognized, existing code adhered to by the mediator. In addition to mediator competency standards, IMI proposes a mediator competency assessment system that invites feedback from users. And, under consideration is an ''experienced-qualified'' credential, one where those who are recognized for their skills—for example, by being members of acknowledged panels—may be considered certified by filing a summary, prepared by the mentor in accordance with guidelines issued by IMI, of feedback from users.

The gap that the IMI initiative seeks to fill is a gap created by some of the following conditions:

- Mediation practice is fragmented nationally and locally.

[15] The authors are unaware of any credentialing body, other than the Netherlands Mediation Institute, that certifies competency based upon role plays performed by trained actors and subjected to independent assessment.

- No single organization focused on mediation has a global reach.
- Most ADR organizations are providers in a highly competitive market.
- Many ADR organizations are arbitration focused.
- Most ADR bodies have insufficient funding to launch an international initiative.
- Mediation providers are inadequately organized internationally.
- In the United States, previous attempts to certify mediators have stalled.[16]
- A user-driven initiative has never been attempted.

Certainly, an ambition to establish global mediator competency standards is not for the faint-hearted, and the IMI convenes an array of provider, trainer, corporate, and mediator representatives as members of its Independent Standards Commission. A mediator who meets the detailed requirements of the IMI may hold himself out as an IMI certified mediator, entitled to use the IMI title and logo and to post his or her profile, including his or her feedback digest, on the open IMI Web site where it will be searchable by any intending users, anywhere, free of charge. It is currently proposed that continuing professional development will be required. This is similar to continuing legal education for lawyers, and an assurance that a committed mediator will acquire state-of-the-art knowledge, leading to best practices and cutting-edge skills.

A mediation ethics code will be launched to which IMI mediators will adhere, unless they opt to be bound by another recognized code of their choice having similar standards. Presently, mediator ethics are governed by a potpourri of state statutes and provider rules. Feedback forms will be available to users who will be asked to complete them. The feedback will be summarized by the mediator's chosen mentor, and posted on the IMI Web site biography of the mediator. Under IMI guidelines currently being prepared for consideration by the Independent Standards Commission, negative feedback will not be included unless a consistent pattern is shown.

Without doubt, the feedback proposal of the IMI will be highly controversial, as feedback is intended to inform third parties about style and competency, as well as an indicator of suitability of that particular mediator for that particular dispute. Mediators work behind a scrim of privacy. They

[16] The ACR and the ABA produced a set of recommendations in 2004 for a voluntary mediator certification program. The recommendations included presentation of a ''portfolio'' of years of experience and training; successful completion of a written knowledge assessment; periodic recertification; potential decertification for violation of ethical and professional standards; and appeals of decisions at various stages in the certifying process. The mediator certification program was designed to be purely voluntary. The IMI profile is also wholly voluntary.

rarely advertise their style of preference—facilitative, evaluative, transformative—partly because good mediators use a fluid range of styles in the course of a single mediation and partly because mediators are not used to and are uncomfortable with self-description—yet users are increasingly asking mediators before hire what style they use.

AAA mediator Web site profiles now include a mediator's self-assessment of his or her style. Competency is a more highly charged issue. There is no universal agreement on what constitutes competence in a mediator, and mediators rightly fear that a failed mediation may result in a disgruntled party report. The harder a mediation, for whatever reason, the greater is the likelihood of non-settlement. Undoubtedly, the IMI internal assessment of feedback will take into account the nuanced complexities of feedback from a user in a mediation that does not resolve the dispute.

The critique of the IMI proposal has come solely from mediators. Some of their more cogently expressed concerns are along these lines:

- Mediation cannot be defined as a standardized product, and competency standards cannot be codified, especially across all jurisdictions and in all circumstances.
- Mediators have many competencies, only a few of which can be only imperfectly measured.
- The protocol is burdensomely cumbersome and overly bureaucratic.
- There is no direct relationship between the setting of entry barriers through certification and the quality of the resulting practice.
- There are allegations that there are hidden, self-interested, and unwelcome, motivations of the AAA, the Singapore Mediation Centre and the Netherlands Mediation Institute in sponsoring the IMI foundation.[17]
- Will this create a monopoly on credentialing, and, if so, is that a good or bad thing?[18]

There has been, to date, no international push to publish lists of qualified mediators meeting rigorous standards put into play by a foundation operating globally. That this foundation is driven by users makes it

[17] Mediators are trained to dig for hidden interests and are entirely skeptical about assumed altruistic intentions.

[18] Credentialing, by definition, is exclusionary. It would likely not invite the dabblers, those who occasionally mediate as a diversion from whatever else they do full time. The uncredentialed may not hold themselves out as certified mediators. Non–board-certified doctors are not given surgical staff privileges at the best hospitals. The underlying, unspoken issue is: is this a socially good thing, or, more to the essence, *is* mediation a profession?

impossible to ignore. The proposed standards are the subject of heated debate in the mature community of mediators. The standards are universally applauded by the mediation-using companies and their advisors, who, unsurprisingly, seek more information and greater transparency in selecting mediators.

The users seek increased accessibility to mediation but are stymied by the local, idiosyncratic, and cryptic information they must parse to find the right mediator. For decades, a vocal few have suggested we have an operating ethos and a way of assuring the delivery of quality services, but our inherent diversity and unwillingness to evolve into a defined and definable profession dissuaded us from the work involved. Mediators' clients—the companies mediators look to for business—have taken on the task. They are saying they need to be able to define and assess us: to have a better understanding of who we are, what we do, how we do it, and why we are good at it. Mediators may not like their inner sanctum invaded by the people paying their fees, but they need pay attention if they want a voice in their own future.

The IMI initiative is a work in progress. Its final form has not yet jelled. The certainty of its progression is undeniable. Please stay tuned, and express your view. This is moving—and quickly.

Using Mediation Techniques to Improve M&A Outcomes

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This article has evolved from an initial discussion at the International Bar Association (IBA) Annual Conference in Singapore in October 2007 where I spoke about my rather mixed experience of using a third party to assist in the negotiation of major deals. For the Fordham Conference I have been able to take this a little further and concentrate on some aspects to which I was only able to allude briefly in Singapore.

I must make clear, however, that these are my personal musings and do not reflect the opinions of past employers or colleagues or current or past clients.

There is frequent complaint that mergers and acquisitions (M&A) often fails to deliver the promised value to shareholders and may at times even be value destroying. This article seeks to explore whether the use of mediators or perhaps mediation techniques could improve the outcome in some cases and specifically may reduce the number of ''bad'' deals that go through. By a ''bad'' deal I mean one that really should never have been allowed to proceed, as it had no reasonable chance of producing the anticipated returns.

By way of example, consider the case of a family company being sold to a multinational. The multinational has a small establishment in that country, and the acquisition of this local company is intended to provide the critical mass necessary to support further development. The sellers are second generation and inherited in middle age, by which time they had established their own businesses in other sectors and so had had limited expertise or interest in running the target company whose sales were slumping as a result. There was considerable distrust among the sellers, and they were not all prepared to meet together in one room.

The multinational had carried out some due diligence and had uncovered nothing but bad news. They had been hampered in completing their work, as some of the key papers were in the hands of the tax authorities and others were under review by State prosecutors. Standing on the sidelines in the cold light of day, one's first reaction is, of course, that the multinational should run as fast as possible in the other direction. But was that what happened? Of course not!

We have all been there: it is two in the morning, management has been working on the deal for months, outside counsel has produced files full of reports, finance is already including projections in the budget, and the draft contracts are in their umpteenth iteration; you turn to your client as yet another unhelpful fact emerges, and noting that it does not look very good, enquire if the client really wishes to continue.

The client pauses for perhaps a nanosecond before responding that ''the fundamentals are still there,'' and with the various discounts, warranties, and other safeguards so brilliantly negotiated, it is still worth it. It is like a kind of ''sales fever'' where everyone ignores the fact that no matter how much that orange nylon dress is reduced, it will still never be wearable.

So, why would the multinational go ahead? In part, I think it is that the deal takes on a life of its own:

- The negotiating manager may fear loss of face or even career damage if he or she ''fails'' to deliver the deal;
- Having been given responsibility the negotiating manager may be reluctant to appear weak or to lack seniority by asking for advice or help;
- The macho culture works against timeouts or even deferment to the next day with negotiations now traditionally going on into the early hours—negotiation by exhaustion!; and
- So much work and expense has already been devoted to the project, it has become in effect, inevitable.

Could the use of mediation techniques lead to a different outcome? Generally, discussions about the use of mediation in deal making have revolved around using mediators to break a negotiation impasse, to facilitate discussion of ancillary matters such as staff benefits, or to resolve disputes along the way where a complex deal involves the implementation of interrelated contracts over a period of time.

Rather than readdress the pros and cons of such use, I would like to examine other ways in which mediation skills could contribute positively to the M&A process. The process can be divided into the following stages:

- identification of target;
- instruction of counsel;
- indicative offer;
- due diligence;
- negotiation; and
- implementation.

In recent years, an enormous amount of effort has gone into improving and refining techniques for due diligence and implementation. While

obviously there is always room for improvement, due diligence is generally very professionally handled with appropriate risk assessment, checklists, and interviews to support the document review. Likewise, we expect to see implementation supported by cross-party committees, town hall meetings with staff and employee hot lines.

Increasingly, management consultants have also been used. My own experience with management consultants has been fairly limited, so perhaps I am being unfair, but to me, they seem to be creatures of the CEO, constantly bolstering his or her ego and producing charts that may serve some purpose as checklists and to monitor progress. But in their interaction with staff and individual departments, it seems to me that they are pushing box ticking and ''one size fits all'' rather than actually listening to the employees themselves and seeking to address the roots of the concerns. As well as inevitably putting people's backs up, this is also a missed opportunity.

A mediator, in particular one with a business background, would encourage people to address their concerns and the needs of the business. He or she would try to create solutions from within to which staff would naturally feel more supportive and that would be much more likely to be situation specific. A mediator would encourage realistic options rather than alternatives drawn from a management book as to the correct handling of certain circumstances, since no one knows a business better that those working in it. Deep down, the staff will also know what hard decisions have to be taken but may lack an appropriate forum in which to articulate them.

A mediator might well be able to manage concerns and expectations, which at the moment I do not think are even rising to the surface. There may be genuine concerns about job security, and, in general, fears may come forward, usually through staff representatives. But in many more cases, an individual may seek alternative employment without even raising his concerns with his or her superiors, especially in cases where the question is of unmet expectations.

The merger may have been ''sold'' to staff and to the media as a tremendous opportunity; the merged enterprise may sound exciting and full of promise, and some individuals may start to imagine a role for themselves that in reality will never come about. The resultant disappointment, even if it is only one of time scale, may be even more disruptive than the painful but shorter-term issue of redundancies.

Mediation methodology encourages realism and cooperation from the start. For those of you who have been at what we might call a ''normal'' mediation, when you start exploring options, you are encouraging people not to think ''my option, his option,'' but to look at a blank piece of paper and think, ''What could be done? What's the possible?'' And surely, with an M&A, that is exciting. I think that encouraging people to work together in considering what is possible is more positive and forward looking and respects rather than undermines the expertise that already exists within the

enterprise. As a result even unpleasant decisions may become more palatable, as they will be understood in the light of other options.

There are cost benefits in using appropriately qualified mediators. Management consultants are very expensive, so surely there is a major business opportunity for go-ahead law firms to enter into relationships with mediators to offer this type of service. Accountants started offering business consultancy years ago. As lawyers, do we not also have something to offer?

Good implementation is all very well, however, but it will still not turn turkey into filet mignon. Clearly if we are to remove turkey from the menu we must start earlier in the process. Lawyers do not usually become involved in the M&A process until a target has been selected. But if a broader consultancy approach were developed, I believe there would be value in offering a mediator—or perhaps more properly a facilitator with mediation training—to work with management to develop a range of goals for a strategic alliance or restructuring against which targets could be judged.

The exercise would provide managers with a forum for discussion that may not always be possible within a traditional board setting, especially where there is an inner circle or a dominant personality.

Often when people raise objections and barriers down the line, it is in the form of an objection that seems to them a better public face for a different concern that is more fundamental but that they have not had an opportunity to articulate. Because the barriers they erect is in fact a mask, it can prove very difficult to negotiate around, if that underlying issue is not understood. Facilitated debate at the outset may avoid this type of obstruction.

Cost is always an issue, but this process is not likely to be very expensive, as even the most complex situations are likely to require only two to three days of preparation, and of course mediators' fees are generally lower than those of lawyers!

Even if this is a modest cost, we should assume that, in most cases, as lawyers we will still not become involved until after the target is selected. Thus, how we take our instructions becomes very important.

Many of the attendees at the Fordham Conference come from litigation backgrounds. When you are asked to settle litigation, you expect to have detailed discussions with your clients. You would expect to address questions such as those that follow:

- Why are you going to settle?
- What might be the other party's interests in settlement?
- What other options do you have?
- What are the ''must have'' elements of any settlement?

When you do an M&A deal just as much money may be involved, and, if it goes wrong, the long-term implications may be even greater. But M&A

instructions rarely seem to go much beyond: ''What's the target?'' and ''What's the price?'' Now this may be a bit harsh, but there is clearly a big difference in the approach to taking instructions in these different circumstances.

In the course of actually undertaking the work and in general discussion with the client, you may pick up some of the motivators, but these may be misleading and are no substitute for taking detailed instructions. I have heard the same deal described by different senior managers within the same company as

- necessary to secure manufacture of a key product;
- essential to achieve critical mass in a particular country;
- a great opportunity to enter a new market; and
- critical to ensure the continued employment of the business development department that needs to be seen as having done a major deal.

Someone with mediator training might well take instructions in a style much closer to the approach familiar to you in litigation.

- Why are you doing this deal?
- Why might the other party, your target, be interested in joining with you as opposed to someone else?
- What other options do you have to achieve your goals?
- What are the essential elements to make this workable?; and finally
- What is the indicative price?

Now why does this matter? If the deal were abandoned, having gone through this exercise, we would have a clear basis for rejection. We had a pre-list of why we were doing the deal; we could see how close we came to achieving the deal;. there would be no loss of face. In effect, we have permission to walk away if it does not meet the preset criteria. The decision may be made at an earlier stage. And the idea of walking away then becomes part of a normal process. We are changing the parameters.

If the deal proceeds, then, clearly, you have the comfort that you have explored other options. You have full management buy-in. You have pragmatic and reasoned terms within the deal's structure because you have thought about it in advance. You have a solid basis to move forward. Would this eliminate the purchase of turkeys? Probably not, but I do believe this sort of structured approach would considerably reduce their frequency.

How mediation skills can be incorporated into good negotiation practice has been widely covered in numerous books and conferences. However I will conclude by describing a deal in which the traditional mediator's approach led to the swift and relatively inexpensive conclusion of a complex and very sensitive acquisition.

The target had a complex ownership structure, a controversial and technically demanding product, and a web of largely underdeveloped international alliances. The sellers were very elderly and emotionally engaged with the success of the product. Their lawyer was inexperienced and working without the support of his firm while the purchaser was a multinational with the support of both in-house counsel and a prominent multinational law firm. There was much sensitivity about how the company should be run going forward and the future promotion of the key product. It should have been a difficult deal. But in fact it all went extraordinarily smoothly. Why?

I think the most significant factor was the approach of the chief negotiator for the purchaser. He was a good match in age and cultural experience to the sellers and had a great deal of industry experience. He put himself in the shoes of the sellers and always invited them to explain their concerns—even the ones that did not seem business relevant. He did not cut them short, but rather used empathy and active listening to ensure that they were able to fully explain themselves and felt heard. He explained his company's views and then initiated a general discussion to explore how the parties might move forward.

The whole atmosphere was one of cooperation, courtesy, and respect. Meetings were kept fairly short and focused and ended with each participant clearly understanding what they had to do before the next meeting. Timings were agreed and realistic. There was no posturing, and he was open in saying when he did not have an answer, or wanted to take advice, and from whom he was taking that advice. All the time, he was building trust and, by his actions, giving the other party ''permission'' to break off and talk among themselves or seek advice. No one was pressured to hurry or make decisions. Where further information was needed, it was often sought jointly. Other staff and the professional advisors followed his lead.

His approach undoubtedly saved both parties considerable time and money, ensured a smooth transition, and, most importantly, both sides achieved a deal that met their needs and that they felt they had entered after proper consideration. All involved commented on how pleasant an experience it had been and their surprise that so many apparently intractable problems had been so ''easily'' resolved.

In conclusion, I believe the current M&A culture is inefficient and severely flawed. Lawyers can do more to support their clients in M&A. We do far more deals than our clients will ever do. In litigation, our clients expect us to contribute that experience to solving their problem. Surely in M&A they are looking for something beyond mere technical competence as well.

I believe mediation techniques can add value to all stages of the M&A process and that we should be looking to incorporate some of these into our practice, most especially at the earlier stages of the process where the impact can be greatest.

European Directive on Commercial Mediation: What It Provides and What It Doesn't

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On May 21, 2008, the European Parliament enacted a directive to encourage the use of mediation in civil and commercial matters, and to make uniform throughout the European Union the legal status of certain attributes of that practice. The directive[1] culminated a ten-year process that occasioned each member State within the European community to consider the role of mediation in commercial affairs and to take a position on the minimum requirements of the use of commercial mediation throughout the region.

The directive represents an intentional effort, on a pan-European scale, to achieve a degree of homogeny and predictability in the treatment of mediated resolutions of commercial disputes. Such a singular event deserves study, encouragement, and support.

CONTEXT OF THE DIRECTIVE

As the practice of commercial alternative dispute resolution (ADR) has grown around the world, certain aspects of its legal and commercial recognition have followed—some quickly, as in the United Kingdom, and others slowly. Standardized legal status has been elusive. In the United States alone, some jurisdictions have adopted the Uniform Mediation Act (UMA)[2] and others have not; some states have approved ethical regulations requiring attorneys to advise clients of ADR and others have not, and so on.

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[1] The text of the directive is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.

[2] The Uniform Mediation Act was promulgated by the National Commission on Uniform State Laws in 2003. The text of theUMA, commentary on its provisions, and

In Europe, the absence of uniform treatment of rudimentary ADR processes has been regarded by some observers as an inconvenience and by others as a serious hindrance to commercial growth in the region. The process of regional homogenization began with a call, in 1998, for the European Commission to issue a Green Paper on the use of mediation in civil and commercial matters.

The European Commission's 2002 Green Paper[3] set forth some observations on the desirability of pan-European ADR practices in a wide range of civil disputes (including family law, commercial disputes, and consumer complaints), and prompted more than 160 responses.[4] Despite this showing of interest, the European Parliament remained unconvinced that a centrally promulgated set of shared requirements was needed in order to stimulate economic efficiencies in the management and resolution of commercial disputes in the region.

In 2005, Member of European Parliament Arlene McCarthy promulgated a questionnaire on the proposed ADR directive that had the effect of convincing some skeptics that uniform treatment of ADR was in fact needed, at least in the commercial sector. The energy driving the movement was then recharged, and the directive was eventually approved in 2008.

POLITICAL PHILOSOPHY OF THE EUROPEAN PARLIAMENT

Europe is not a sovereign State, and the European Parliament is not a strictly legislative body in the way Americans conceive the term. Rather, the sovereign States who are members of the European Union have agreed to grant to a European Parliament the power to issue ''directives,'' which are statements of political or governmental objectives that each of the sovereign States constituting the Union must thereafter achieve by enacting laws that are consistent with those objectives. That is to say, in the case of the ADR directive, the members of the European Union must, within 30 months of passage of the directive, enact their own laws whose provisions are consistent with the stated provisions in the directive; but each State is free to do so pursuant to laws of its own making.

The directive is therefore not a harmonious law applicable throughout Europe, but rather a statement of political principles that are to be enacted by the several States so as to be consistent throughout Europe.

a list of state legislatures that have considered, adopted or rejected the UMA is available at http://www.nccusl.org/Update/ActSearchResults.aspx.

[3] The text of the Green Paper is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0196:EN:HTML.

[4] *See* summary at http://ec.europa.eu/civiljustice/adr/adr_ec_en.pdf.

Two philosophical principles inform this process, and their effects may be seen in the substance of the directive itself. These are ''subsidiarity'' and ''proportionality.'' The basis of these principles is set forth in a 2001 White Paper titled ''European Governance'':[5]

> Proportionality and Subsidiarity: From the conception of policy to its implementation, the choice of the level at which action is taken (from EU to local) and the selection of the instruments used must be in proportion to the objectives pursued. This means that before launching an initiative, it is essential to check systematically (a) if public action is really necessary, (b) if the European level is the most appropriate one, and (c) if the measures chosen are proportionate to those objectives.[6]

''Subsidiarity'' teaches that no act should take place by any level of government that could equally effectively take place by a smaller one or a more local one. Thus, in the ADR directive, the government in Brussels is agreeing upon broad outcomes, but then instructing each of its constituent governments to do the actual enacting of legislation.

''Proportionality'' instructs that a government should reach only so far as is absolutely necessary in order to accomplish a particular goal and no further. Adherence to this principle is evident in (for example) the provisions of the directive that limit its scope to cross-border commercial disputes. Because the initial issue was homogenization of pan-European commercial transactions, it follows then that transactions within a particular member State were not properly within the domain of pan-European concerns and should not be included in the directive.

PROVISIONS OF THE DIRECTIVE

Scope

The United Kingdom and Ireland have voluntarily agreed to be bound by the directive, and Denmark has exempted itself. As a result, all states within the European Union except Denmark are bound.

As previously noted, the directive applies only to cross-border disputes and only to civil and commercial matters. That means that matters that arise internally, between two French companies or between two German

[5] COM(2001), July 25, 2001, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf.

[6] *Id.* at 10-11.

companies, are unaffected by the directive. The directive also excludes disputes sounding in family law and community law.

The directive does not apply to administrative actions; to matters in which the state itself may be liable; and to any efforts by courts to settle matters that are before it.

Finally, the directive does not apply ''to rights and obligations on which the parties are not free to decide themselves.'' The import of this exclusion in a commercial context is unclear, since there are many commercial contracts with respect to which one could argue that one party or the other was ''not free to decide themselves.'' Prospective McDonald's franchisees, for example, are presented with a contract that they may either accept or reject; McDonald's does not negotiate the provisions of its agreements with each franchisee. Thus, the application of this proviso to numerous commercial transactions that are presumably within the intent of the directive drafters will need to be developed; it will be interesting to watch what the various national legislatures do with the language.

Mediation Quality

The directive calls on the states to ''encourage voluntary codes of conduct by mediators and by organizations providing mediation services.'' This is substantially short of a requirement that mediators must be licensed. Instead, the states ''shall encourage codes of ethics and shall encourage training of mediators to ensure effectiveness, impartiality, and competence in relation to the parties.''

Status of Agreements Achieved Through Mediation and of Agreements to Mediate

The directive requires states to provide for enforcement of agreements that result from mediation. This is particularly useful in a region of many languages and laws, almost all of whose civil justice systems are enshrined in a civil code. Each civil code will now grant judges the power to recognize settlement agreements obtained through mediation to be enforceable contracts.

However, the directive does not address whether an agreement to mediate—including, for example, an agreement that mediation must take place as a condition precedent to arbitration—is enforceable.

Confidentiality

Article 7 of the directive addresses the confidentiality of mediation processes and provides that ''mediators and those administering mediation shall not be compelled to give evidence in civil and commercial judicial proceedings or in arbitration'' except in limited circumstances.

CRITIQUE

The directive achieves its main goal: it recognizes and establishes uniform judicial treatment of cross-border commercial dispute resolution throughout the European market. This is a signal achievement—one that has frankly eluded the United States, whose various jurisdictions have failed to embrace the UMA and instead have adopted a hodgepodge of mainly court-initiated principles addressing the issues that the directive considers.

The restriction of the directive to cross-border commercial transactions is a disappointment. As noted above, the concept of ''proportionality'' would dictate that, if homogenization of practices among the member States is the goal of the directive, then homogenization of practices within a single member State is unnecessary to attain it. Similar respect for the sovereignty of member governments informs American notions of federalism. Yet, as a matter of practicality, it would require no more effort to allow businesses to realize the economic benefits of commercial mediation in their dealings with domestic business partners than in their dealings with cross-border business partners. One hopes that, if and when such economies are actually experienced, business managers will apply the lessons of cross-border conflict management to domestic situations on their own initiative.

The directive's concern about the quality of the mediation service seems disproportionate. It calls upon member States to encourage ''voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.'' It also encourages ''the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.''[7]

The challenge to the growth of commercial mediation in Europe, however, is not that it is practiced poorly or that mediation centers have not adopted effective codes of conduct. The problem is that commercial mediation itself is not practiced. Commercial enterprises in Europe have a

[7] Directive, *supra* note 1, at art. 4.

comparatively poor understanding of the mediation process as a management tool and are unaware of the benefits that accrue from its systematic use.[8]

Similarly, most European courts outside the United Kingdom[9] do not appreciate the nature of the process and the effect that court-annexed mediation can have on the efficiency of dispute resolution in their jurisdictions. The directive does not address this central challenge of education, advocacy, and end-user training, but rather addresses the ethical regulation and quality standards of a profession for which there is, sadly, very little current demand.[10]

By far the most egregious flaw in the directive is its treatment of the confidentiality of statements made, and information produced, in the course of a mediation. Article 7 of the directive provides as follows:

Confidentiality of mediation

> 1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
>
> (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

[8] *See generally Response of the International Institute for Conflict Prevention and Resolution ("CPR Institute") to Questions Posed by Arlene McCarthy, WEP, Concerning the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters* (2005), *available at* http://cpradr.org/Portals/0/EU%20Parliament%20Questionnaire%20Response.pdf.

[9] The 1998 changes to the Civil Procedure Rules that took the name ''Woolf Reforms'' had the intended effect of encouraging the mediation and settlement of civil and commercial cases in the United Kingdom within months of its enactment. *See* http://www.cedr.com/index.php?location=/news/archive/20000407.htm&param=releases.

[10] The European Commission's seeming fixation upon the quality of (practically non-existent) mediation services is illustrated in the fact that a proposed code of conduct for mediators (*see* http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm) was posted in 2004, four years before the directive itself was enacted.

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

The effect of this provision is that any statement, offer, demand, or concession made by a party during mediated settlement discussions can be repeated, reproduced, compelled, broadcast, or entered into evidence by anybody—*except* the mediator. Commentators tried to make clear to the drafters of the directive that the mediator is not the problem—the parties themselves are. The heart of the concern is that no well-counseled party will enter into serious negotiations of compromise if one's adversary can take any statement made during negotiations and use it in open court, in arbitration, in regulatory proceedings, or in the press. A consortium of pan-European businesses[11] suggested the following with regard to the directive's confidentiality provision:

- It should act as both a privilege and a bar on admissibility. That is, statements, documents, and other information conveyed in a mediation should not merely be non-admissible as evidence, but protected from discovery as confidential.
- It should apply to all participants in the mediation process—parties, counsel, administrators, and others—not merely to mediators. The privilege should not only reside in all such persons, but also apply to them, meaning that each person should have the power to prevent disclosure by any other person.
- It should not be limited to subsequent court proceedings, but rather should apply to any proceeding of any type whatsoever in connection with the dispute that was the subject of the dispute that was the subject of the mediation.
- It should follow, in its wordings of any exceptions, provisions promulgated by globally recognized bodies such as United Nations Commission on International Trade Law (UNCITRAL).

[11] *Response of the International Institute for Conflict Prevention and Resolution ("CPR Institute") to Questions Posed by Arlene McCarthy, MEP, Concerning the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters* (2005) 5-6 (2005), *available at* http://cpradr.org/Portals/0/EU%20Parliament%20Questionnaire%20Response.pdf.

The decision by the drafters not to accept the core of these recommendations can only be attributed to a disagreement with the logic of their being suggested. It remains to be seen whether this has the effect of hindering efficient negotiations in mediation or whether a patchwork of disharmonious evidentiary treatments will result. This flaw threatens the entire objective of the directive.

CLOSING OBSERVATIONS

The directive's very existence is a major event. The consideration of this directive by the member States was thorough and deliberative. By virtue of its promulgation, and as witnessed by its passage, the ministers of justice of each of the European Union's constituent members studied a topic that most of them had never previously addressed as a legitimate component of public policy. The entire ten-year process of framing, and eventually enacting, the EU directive speaks to the first plenary opportunity that Europe had to look at this process. In that sense, it is warmly welcome.

Commercial Mediation in China: Challenge of Shifting Paradigms

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The rise of China as a trade partner to the United States, and the legal and commercial ramifications of this phenomenon, have been widely observed and commented upon. This article relates some experiences that the International Institute for Conflict Prevention and Resolution (''CPR Institute'') has had with respect to encouraging commercial mediation in China, and suggests some lessons learned from those experiences. It concludes that Western concepts of mediated negotiation may have fundamental cultural limitations that require participants in the process to be open to shifting their understanding of the mediation process itself and of dispute resolution generally.

CPR INSTITUTE'S EXPERIENCES IN CHINA

In 2003, the CPR Institute was approached by the China Council for Promotion of International Trade (CCPIT).[1] CCPIT was interested in creating some sort of a resource by which disputes between American and Chinese businesses might be resolved on terms that would be cognizable and trusted by both Chinese and American principals. That prospect was

[1] Established in May 1952, the CCPIT comprises enterprises and organizations representing the economic and trade sectors in China. It is the most important and the largest institution for the promotion of foreign trade in China. The aims of the CCPIT are to operate and promote foreign trade, to use foreign investment, to introduce advanced foreign technologies, to conduct activities of Sino-foreign economic and technological cooperation in various forms, and to promote the development of economic and trade relations between China and other countries and regions around the world. The Conciliation Center of the CCPIT is a standing organization dedicated to helping disputants resolve disputes arising out of commercial and maritime transactions by means that don't involve litigation and arbitration. The center has established 43 sub-centers, forming a nationwide conciliation network. *See generally* http://english.ccpit.org.

very enticing to the CPR and to its corporate membership. The CPR obtained some multiyear financing for that effort from some of these corporations, and went on ahead.

Negotiations took about a year, which by Chinese standards is not at all long.[2] An agreement was reached, a mediation center was established, and rules for the mediation of commercial disputes between American and Chinese businesses were promulgated.[3]

In the course of these efforts, the CPR visited and framed working relationships with the United States-China Business Council; the American Chamber of Commerce in Beijing, numerous American companies investing in Hong Kong, Guanzhou, Beijing, and Shanghai; CCPIT officials, civil judges, and the China International Economic and Trade Arbitration Commission (CIETAC) arbitrators in Nanjing and Beijing; esteemed Chinese and American professors, and many other leaders. It developed what the Chinese call *guanxi*.[4]

In 2005, the CPR conducted a three-day mediator training in the Beijing headquarters of the CCPIT for a select group composed half of very prominent American and British lawyers who practiced in Beijing and Hong Kong, and half of CIETAC arbitrators, CCPIT conciliators, and Chinese judges and professors.

The first indication that something might be amiss came during the first day of this training. By lunch it was clear that the Chinese participants were unhappy. That afternoon, the trainers broke the agenda and asked for a discussion of why the Chinese trainees were dissatisfied. One very prominent Chinese judge explained as follows:

> I am a judge in the Supreme Court. I have been a judge for thirty-five years. I have conciliated 10,000 cases. And you're trying to tell me how to do an opening statement? There is no need for an opening statement by the judge. Our civil procedure law provides that I am

[2] ''As the first premier of the People's Republic of China in the 1950s, Zhou Enlai is supposed to have said, when asked about the impact of the French Revolution, ''It's too early to tell.'' *See* http://en.wikipedia.org/wiki/Historiography_of_the_French_Revolution. This anecdote is variously told of Mao, Zhou, and others, and is presumably apocryphal.

[3] These rules may be found in *Business Disputes in China* 21-36 (Michael Moser ed., 2007). The rules, the explanation of the U.S.-China Business Mediation Center, and other information on the CPR effort in China may be found at http://www.ChinaMediation.org.

[4] ''It's a term that literally means 'relationships' but that in this [business] context translates far better as 'connections.''' Scott D. Seligman, *Chinese Business Etiquette: A Guide to Protocol, Manners, and Culture in the People's Republic of China* 180 (1999).

obligated to offer my services as a conciliator in any case before me. I always do. The CIETAC Arbitration Rules provide that the arbitrator is obligated to offer his services as a conciliator, and they always do.

And what I do is to say, ''I'm going to now conciliate this case. Stop lying, all of you stop lying. Tell me what really happened.'' And they tell me what really happened, because I am a very respected judge. Then I go back to my office. I look up the law to find out what the right answer is. Then I come back and I say, ''According to the law, you owe him 10,000 RMB. Now, you will either pay him the 10,000 RMB or we will go back to the trial. And if we go back to the trial, then in front of your children and in front of your mother and in front of your business partners I will point to you and say, 'You owe him 10,000 RMB.'''

He concluded, ''They all settle.''

The CPR trainer said, ''I'm not surprised.''

The judge added, ''And also they settle on the right terms.'' And in that final response, the beginnings of the Chinese paradigm of conflict resolution was introduced.

CONTRASTING PARADIGMS: FISHER AND CONFUCIUS

The dispute resolution paradigm that Western conflict managers and mediators have been taught is classically stated in the influential book *Getting to Yes* by Roger Fisher and William Ury.[5] The paradigm emphasizes identification of disputing parties' interests rather than their negotiating positions.[6] The measurement of success of a negotiated resolution is then the extent to which those interests are satisfied, rather than the extent to which one negotiator ''beats'' the other.[7] In the course of interest-based negotiation, it is sometimes possible to create new and unexpected value, improving the parties' relationship in ways impossible to achieve through crude compromise or, worse, adjudication.[8]

Underlying this paradigm are fundamental values, paramount among them the primacy of individual interests and the virtue of self-determination. Other attributes of a ''complete'' resolution in this paradigm include

[5] Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (2d ed. with Bruce Patton, 1991).

[6] *Id.* at 40-55.

[7] *Id.*

[8] *Id.* at 56-80.

an element of vindication or moral affirmation (sometimes through apology); restitution for the harm done to the claimant; forgiveness extended by the claimant; and a plan for prevention of a recurrence of the conduct causing the harm.[9]

But conciliation in Chinese culture is founded on the concept of interpersonal and social harmony, not the vindication and pursuit of individual interests. The sources of this model may be found in a quick (and necessarily amateur[10]) review of Chinese moral teaching, particularly the influence of Confucius.

A primary virtue taught by Confucius is *jen*: goodness, respect, benevolence.[11] It is expressed not through contemplation, study, or prayer, but rather through an individual's conduct with others. Confucius taught: ''The gentleman has morality as his basic stuff and by observing the rites puts it into practice, by being modest gives it expression, and by being trustworthy in word brings it to completion.''[12] Thus, the manner in which the individual handles his relationships with others is the chief expression of his wisdom, benevolence, and kindness. The relationship of son to father, or elder to younger brother, are to be harmonious; and if they are, then that harmony will expand to other more distant relationships such as that among other families in the neighborhood, or even between the subject and the emperor.

The broad social implication of properly balanced individual conduct is expressly made by Confucius: ''It is rare for a man whose character is such that he is a good son and obedient as a young man to have the inclination to transgress against his superiors; it is unheard of for one who has no such inclination to be inclined to start a rebellion.''[13]

The most profound expression of this harmony is a respect for ritual or etiquette in the way one treats others: *li*.[14] In the observance of *li*, one sets an example for conduct that, if modeled by others, would yield a perfectly harmonious society. ''To aim always at harmony without regulating it by the rites simply because one knows only about harmony will not, in fact,

[9] *See, e.g.*, Karl A. Slaikeu, *When Push Comes to Shove* 35-38 (1996).

[10] While I enter this profound topic with the trepidation of the amateur, I note that were I to be silent until I became expert I would never speak. While it is undoubtedly true that ''Hell is full of musical amateurs'' (George Bernard Shaw, *Man and Superman*, Act I), it is also true that ''[a]n expert is one who knows more and more about less and less.'' Nicholas Murray Butler, *reprinted in Bartlett's Familiar Quotations* 585 (Justin Kaplan ed., 16th ed. 1992). One goes forward as best one may.

[11] Denise Lardner Carmody & John Tully Carmody, *In the Path of the Masters,* 72 (1994).

[12] *Confucius: The Analects,* V.18, at 134 (D.C. Lau trans., 1979).

[13] *Id.* at 59.

[14] Boyé Lafayette De Menthe, *The Chinese Have a Word For It,* 242-44 (2000).

work.''[15] The ''perfect man''—that is, one whose manner and conduct embody the moral integrity of these teachings—has *lian*.[16] For the ''common people,'' who may not have the insight consciously to choose a harmonious life of *li*, the example of those who do—those whose lives embody *lian*—will serve to steer them towards the harmonious life with greater effect than compulsion would. ''If a man is correct in his own person, then there will be obedience without orders being given; but if he is not correct in his own person, there will not be obedience even though orders are given.''[17]

Compulsion and punishment, or *fa*, is a contrasting virtue.[18] It has its place, too, particularly in the art of government. But in characteristic Chinese fashion, these concepts are not viewed as stark alternatives and certainly not as opposites. The concept of *kuei* teaches that there is a duality in all things in nature and that overcoming seeming contradictions is an inevitable challenge to any individual; thus, by extension,

> [S]eemingly insoluble contradictions, in either business or political matters, do not always mean the two parties cannot reach an agreement; that if both sides work conscientiously toward a compromise the results often end up being a stronger union than if there were no differences to begin with.

Not surprisingly, one of the first guidelines for dealing with contradictions in one's personal life or in public endeavors is to exercise patience, to apply gentle persuasion or pressure here and there, but let the opposing forces evolve at their own speed —a characteristic of Chinese behavior that is recognized worldwide.[19]

And once again, Confucius directs the ruler to a path to harmonize both *li* and *fa* in his dealings with the common people: ''Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves.''[20]

[15] *Confucius: The Analects,* I.12, *supra* note 12, at 61.
[16] De Menthe, *supra* note 14, at 245-46.
[17] *Confucius: The Analects,* XIII.6, *supra* note 12, at 119.
[18] A helpful overview of the concepts of *li* and *fa*, and their role in forming modern Chinese mediation practices, is offered in Tanya Kozak, ''International Commercial Arbitration/Mediation in CIETAC,'' a*vailable at* http://cfcj-fcjc.org/clearinghouse/drpapers/kozak.htm.
[19] De Menthe, *supra* note 14, at 220-21.
[20] C*onfucius: The Analects,* II.3, *supra* note 12, at 63.

The fundamental virtue that these precepts and traditions prescribe is harmony—of the individual within the family, of the family within the community, of the community within the empire, and of the empire among nations. This is the underlying principle and the informing paradigm of modern Chinese commercial mediation.[21]

The State-sponsored Conciliation Centers of the CCPIT, in a volume observing the 20th anniversary of their establishment, proudly cited the statement of President Hu Jintao, ''We maintain that the people of all countries should join hands to strive to build a harmonious world of lasting peace and common prosperity. . . . A harmonious socialist society should be a society of . . . harmony between man and nature.''[22] The same book also prominently reprinted a communiqué of the sixth plenary session of the 16th China People's Congress (CPC) Central Committee stating a goal of ''improving judicial system and mechanism to enhance judicial safeguarding of social harmony.''[23]

These goals are immediately evident in Chinese institutions addressing the management of business disputes. Both the civil judicial code and the State-sponsored commercial arbitration code permit the judge or arbitrator to act as informal conciliator and work to resolve disputes informally.[24] The CCPIT Conciliation Centers continually emphasize harmony, not vindication of individual interests, as the goal of the conciliation process.[25]

The paradigm in America is illustrated by the parable of the oranges, where disputing parties' interests are both met when they agree to share a shipment of fruit upon discovering that one wanted only the rind and the other only the pulp. The paradigm in China might be illustrated in an escalating dispute between two neighbors that, one afternoon, prompts the village mandarin to visit one of the feuding neighbors. The mandarin will show respect and demand respect, then instruct the disputant what the terms of the resolution are to be. The disputant is to perform these terms,

[21] For that reason, ''ADR in China is not considered 'alternative,' but mainstream.'' Urs Martin Læuchli, ''Negotiations and Other ADR with the Chinese,'' *available at* http://www.læuchli-adr.com/article.htm.

[22] *20th Anniversary of CCPIT/CCOIC Mediation Center 1987-2007,* at third unnumbered page (CCPIT 2007).

[23] *Id.*

[24] James M. Zimmerman, *China Law Deskbook* 835-37 (ABA ed., 2d ed. 2005).

[25] *See, e.g., 20th Anniversary of CCPIT/CCOIC Mediation Center 1987-2007* 145-61 (CCPIT 2007) (quoting expressions of mission by CCPIT mediators in terms such as ''to establish a relationship of concord and harmony;'' ''to promote strongly the spirits of harmony;'' ''to promote business harmony;'' ''to develop the qualities of human nature so as to resolve contradictions, and pursue harmony which benefits society;'' ''to build a harmonious society;'' ''a method for harmonizing society;'' ''to mediate the contradiction, to resolve the disputes, to promote the harmony;'' and so on).

and the dispute is then to be brought to a close with no further question. This is because, in the larger scheme, nobody cares about his dispute, or his rights, or his need for vindication. He had the responsibility to maintain harmony in his community, and he is to refrain from any further fractious behavior that disrupts it for his personal reasons.[26]

These Chinese cultural (or, as I prefer to think of them, spiritual) predispositions express themselves in unexpected ways. Prompted by the singular spectacle of the opening ceremonies of the 2008 Olympics in Beijing, a *New York Times* columnist wrote the following:

> If you show an American an image of a fish tank, the American will usually describe the biggest fish in the tank and what it is doing. If you ask a Chinese person to describe a fish tank, the Chinese will usually describe the context in which the fish swim. . . . When the psychologist Richard Nisbett showed Americans individual pictures of a chicken, a cow and hay and asked the subjects to pick out the two that go together, the American would usually pick out the chicken and the cow. They're both animals. Most Asian [*sic*] people, on the other hand, would pick out the cow and the hay, since cows depend on the hay. Americans are more likely to see categories. Asians [*sic*] are more likely to see relationships.[27]

[26] *See, e.g.*, Nabil N. Antaki, ''Cultural Diversity and ADR Practices in the World,'' in *ADR In Business: Practice and Issues across Countries and Cultures* 283 (J.C. Goldsmith, Arnold Ingen-Housz & Gerald H. Pointon, eds., 2006). (''As the Chinese social model is a traditional one, disputes are most often resolved by an older member of the family or a respected figure of the neighborhood.'') The author also notes that, by tacitly incorporating Confucian principles in its modern civil legal code, ''the two sources of obligations which are most widespread [elsewhere] in the world, *i.e.* religion and positive law, are replaced here by an uncodified moral code based on interpersonal relations, which is secular, informal and interiorized by those who know it. In this spirit, a person who fulfils himself or herself and succeeds in his or her personal life fulfils his or her family, social and political role at the same time.'' *Id.*

[27] David Brooks, ''Harmony and the Dream,'' *New York Times,* Aug. 12, 2008, at A21. This column provoked a response by Jerome A. Cohen—who is professor of Chinese law at New York University and really *is* an expert on China—worth quoting at length:

> David Brooks's thoughtful reach exceeds his grasp. He succumbs to the old, discredited clichés about ''Asia'' and ''the West.'' Japan and China cannot be lumped together at one end of the individualist-collectivist spectrum. The Japanese are far more group- or community-minded than the Chinese. . . . Confucius preached a . . . belief in putting the common good before individual satisfactions. [He was] responding not to some innate Chinese cultural preference for collective welfare but to fiercely individualistic traits in China's complex society. By resurrecting and adapting Confucius and now

The paradigm is not ''What do the individual parties want to gain; let's see if both of them can gain or lose an equal amount.'' The paradigm instead is ''What might we do to render harmony to a disharmonious event?''

ANTICIPATED CHALLENGES IN AN UNPREDICTABLE WORLD

This outline is not an indictment of Chinese mediation practice, but rather an explanation for how and why it is different from Western practice, and how fruitless it would be to aim to ''teach the Chinese the right way to do it.'' Indeed, it could be argued that, compared to the way Americans go about managing commercial (or, worse, tort) disputes, the Chinese approach is a far more efficient, effective, and socially responsible way of looking at life.

But it is not GE's way, and it is not Honeywell's way, and indeed I doubt if it is the way of the clients of many American attorneys. And, indeed, one may ask whether it really is ''harmony'' when one party is being told by the judge/mediator, ''If you do not do X, I will shame you.'' On a grand social scale, is such a practice really harmony, or merely a collectivist appearance of harmony, as opposed to the authentic product of individual conduct? On the other hand, is this not the underlying assumption of the American concept of a BATNA[28] —that one should accept any negotiated outcome that is preferable to the likely compelled outcome? Which of these practices is more informed by *fa*?

The Chinese approach to arbitration—and in particular the practice of an arbitrator's meeting with the parties *ex parte* in the role of conciliator and subsequently, if unsuccessful in settling the case, resuming the final and binding arbitration—is also unfamiliar and unsettling to many Western participants.[29] I was once both entertained and dismayed by a ''war story''

> stressing ''harmony'' (at least in principle), China's current leaders have sought to unleash but channel that abiding individualism in ways that have thus far produced astonishing economic results.

New York Times, Aug. 14, 2008, *available at* http://www.nytimes.com/2008/08/15/opinion/l15brooks.html?_r=1&scp=1&sq=Jerome%20Cohen&st=cse&oref=slogin.

[28] ''BATNA—your Best Alternative to a Negotiated Agreement—is the standard against which any proposed agreement should be measured.'' Fisher & Ury, *supra* note 5, at 100.

[29] ''While certain authors advance that the combination of conciliation with arbitration is an ideal form of dispute resolution, the practice has been described as 'entirely inappropriate,' 'disastrous,' 'bizarre,' and even 'perverse.''' Joseph Reynaud, ''Playing Chinese Chess? Fairness and Reform in CIETAC Arbitration Procedure,'' Jan. 2006, at 14, a*vailable at* http://lsa.mcgill.ca/aplam/ChineseArticles/FAIRNESS%20AND%20REFORM%20IN.pdf.

involving a major American company whose counsel discovered, in the course of a CIETAC arbitration, that the Chinese arbitrator was lunching with counsel for the opposite side on a regular basis during the hearing. When confronted, the arbitrator explained that he would of course lunch with the other counsel, because that counsel was the arbitrator's cousin. The arbitrator could not understand why the American counsel was upset with this arrangement: ''I thought that was why you chose me,'' he explained, ''because I have *guanxi* with the other side. You do want this to be resolved, don't you?''

There is no clear resolution of these issues. One thing, though, is indisputable: if a Western commercial conflict manager prepares for negotiation with a company in China by saying, ''What's my BATNA?'' and ''What's their underlying interest,'' he is going to have a problem—a real ''square peg, round hole'' problem.

Some caveats should also be kept in mind when considering the ''grand view'' of the future of U.S.-Chinese commercial dispute resolution:

- There is a sharp generational distinction in the modern Chinese business and legal community. There was a big difference between the way the older people were responding to the CPR training and the way the younger people were responding. Young Chinese are not as responsive to the party, or to Chinese custom, as their elders, and their ambition is palpable and Western focused.
- China's economic growth has been guided by a central political entity that guides the country and controls the conduct not only of its markets but of its people. Thus, neither China's market behavior nor its information flow is a function of supply-and-demand intersections, but rather of central decision making in which the conduct of individual entities is designed to serve a broader politico-social objective. This has a particularly demonstrable effect on negotiation, where the discretion and authority of the Chinese negotiator may be severely limited in deference to communal ''upper management.'' Such is the requirement of communal senior decision making that gross inefficiencies develop: many Chinese negotiators would rather pay a million RMB because they were ordered to by a judge, than 10,00 RMB in discretionary settlement through conciliation, simply so that they will not later be second guessed for conveying company assets at their own initiative.
- Over the next very near term, questions of the sustainability of Chinese economic growth are going to become much more prominent, as the challenges of limitations of natural resources become more pressing, having a direct impact on such social rudiments as food production and the supply of water, as well as finding ways to deliver fossil-fuel energy without fatally despoiling the country. In a

related concern, the gross inequality of the distribution of the wealth that is being created in China will increasingly challenge the political stability of this trading partner. Chinese legal and commercial decision making is taking place under pressures of which we Americans may not always be cognizant.

- More fundamentally, a substantial increase in wealth that is not accompanied by socially and commercially accountable institutions is hugely problematic. Corporate governance, market competition, transparent securities exchanges, and political and industrial enterprises that are accountable to their owners, their regulators, their employees, their customers, and their communities are forces that act as both a stimulus and a ''brake'' on the raw production of wealth, and their absence in China raises real questions whether China really is, as so many predict, the great 21st century power. Mere wealth creation, without social accountability, is not the way the rest of the developing world has been evolving and may be a brief episode rather than a lasting way of life.

But those are macroeconomic or big-trend kind of perceptions that may not be susceptible to proof. And there are no easy answers to ensuring that American investors in China, and Chinese investors in America, have shared legal and business expectations. A final anecdote to illustrate this quandary will, I hope, close this article on a suitable note.

Recently I spent time with my colleagues at CCPIT to negotiate, on behalf of the CPR Institute, an extension of the agreement between the two institutions. I sought some assurances that the CCPIT would fulfill certain duties of promotion, education, and inter-cultural exchange, which were part of the original undertaking but had not been performed to the CPR's satisfaction during the initial term. For the first time in our relationship, I expressly shared with my counterpart the factual basis of the CPR's dissatisfaction (waiting, however, until his superior was not in the room in order not to cause a loss of face for either of us).

I was told, ''One does not catch fish in clear water.''

For a year and a half I did not understand what that meant, and I suspected that I was being abused as a gullible American. But it eventually made sense to me. In the course of dealing with people—and with all of nature—one will always encounter uncertainty. One needs to recognize and embrace that uncertainty or mystery, because that is how the world works. Some work is fit only for those who are willing to act decisively even though their knowledge is imperfect.

Now, that attitude is in sharp contrast to what American-trained litigators are taught—detail, clarity, leaving nothing to chance. It is quite frustrating for a Western-trained negotiator to ask each side, ''What do you want?'' and get long pauses, lack of clarity, analogies and mystery. But, from

the point of view of the Chinese, Western negotiators—even Western mediators, who pride themselves in the acuity of their observations—see too much of the *fa* in disputes and not enough of the *li*.

My children's world will increasingly be a Chinese world. American values may be on the wane, and China's influence may be on the rise. That is an issue that my daughter is going to have to confront in her lifetime. But certainly, she is going to have to live with uncertainty, with an inability to make probability calculations that are useful, in a world where the decision-making process I have taught her may be increasingly inapplicable. She is going to have to fish in muddy water, and I have told her so.

These are challenges for which I am not prepared to propose a solution. The purpose of these remarks is to sensitize conflict managers to the likelihood that, if you know what you are doing when you are addressing commercial dispute resolution in China, you are probably wrong.

Mediation Trends in Australia—Déjà Vu and Innovation

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In Australia a notorious underworld figure, recently acquitted of the murder of an underworld hit man, conducts a service advertised as Arbitration and Mediation Services. When asked about his style of mediation he was quoted in the newspaper:

> We can't divulge our methods, otherwise everyone else will be doing it but we get the result - put it that way. We never use violence. It is always done amicably.

Emerging from being considered an arcane art with connections to the after-life or yoga, mediation became the flavor of the decade in Australia in the 1990s. It was championed by the former chief justice of New South Wales, Sir Laurence Street, by Bond University, by various mediation-oriented organizations, and by the legal profession.[1] By 2000, half of the community had decided they were mediators. We had mediators dealing with the biggest commercial disputes and mediators dealing with leaves that fell over fences into the neighbor's yard and dogs that barked too much. We had mediators who were highly qualified and had undergone substantial training, and backyard mediators who had no training of any kind whatsoever; at the other extreme, we had retired High Court judges acting as mediators. One such judge recently resolved a price-fixing cartel dispute involving an agreed penalty of many millions of dollars and saving a six-month trial. Disputes concerning native title to land and mining activities on such land have been the subject of many successful mediations.

Of course we even had underworld mediators—perhaps the most effective and experienced group of all. It was a totally unregulated emerging profession.

[1] B. French, ''Dispute Resolution in Australia—The Movement from Litigation to Mediation, 18 *ADR J.* 213 (2000).

This great diversity resulted in an infinite number of mediation styles. Whereas psychologists, social workers, psychiatrists, and counselors in the area of family discord may favor a transformative style of mediation; those involved in resolving family disputes in the shadow of the court were more likely to be involved in facilitative mediation; and those of us involved in mediating commercial disputes in the shadow of a long trial, tended towards the evaluative end of the spectrum.[2]

ACCREDITATION

This diversity in mediation practice led to a federal government-sponsored initiative to introduce a scheme for the voluntary accreditation of mediators. That scheme began on January 1, 2008. To become and remain an accredited mediator, one must have passed an assessment after 38 hours of training by an accredited body; accreditation is maintained by engaging in 25 hours of mediation in a two-year period and in the same period attending 20 hours of continuing professional development.[3] While the scheme is voluntary, it enables the end user to determine whether a mediator has at least some minimal training and accreditation.

SOME CONCERNS

In Australia, as I suspect in all of the free world, legislators remain under pressure to cut the costs of conflict resolution. Not only are costs high for the litigants, but the courts are frequently overburdened. The response of the legislators and, in some instances, the courts, has been to put pressure on parties to settle. This has led not only to a great many cases settling that would not otherwise settle, but also to much earlier settlement of cases that would have settled at the door of the court. Mandatory mediation clauses have become almost routine in new legislation.[4] In most states of Australia,

[2] *See* J. Wade, ''Current Trends and the Models in Dispute Resolution: A Helicopter View'' an as yet unpublished paper delivered at the third Australian Conference of Tenanc y Tribunals and Associated Bodies in 1997 and updated by the author in March 2008.

[3] This is a simplified summary of the accreditation provisions. For more detail, see http://www.wadra.law.ecu.edu.au/pdf/Final%20%20Approval%20Standards_200907.pdf.

[4] Indeed the National ADR Advisory Committee to the Australian government has published a guide for government policy makers and legal draftsmen to assist them in achieving appropriate standards and consistency in the legislative framework for alternative dispute resolution (ADR). *See* http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Legislating

litigants are now required to participate in compulsory conferences before commencing any action for personal injuries. These conferences as often as not involve a mediator. At the conclusion of an unsuccessful conference, the parties must each make a final offer that will have cost consequences if the matter proceeds to a trial. This puts enormous pressure on the parties to settle.

There is an old adage in the world of business that of the three objectives of improving a business by increasing the speed of delivery, reducing the cost of production, and improving the quality of service, it is possible to improve two out of the three, but rarely all three.[5] Forcing reluctant parties into mediation may well cheapen the cost of justice and improve the speed of delivery but that does not necessarily improve or even equate to the quality of service that might be rendered by a court.

I have a concern that the familiarity of the legal profession with mediation processes in certain areas is breeding contempt. I refer to the mediation style known by the acronym ''*simsnilc*'' where there is a single issue, monetarized, shuttle, no intake, lawyer controlled mediation. The single issue arises out of an accident, be it occupier's liability, motor vehicle negligence, medical malpractice, or industrial accident. The single issue is how much money will be paid. The mediator does not meet the plaintiff prior to the commencement of the mediation. Lawyers are involved for each party. The mediator simply shuttles between two rooms with offers, and eventually a figure acceptable to both parties is agreed upon. The whole process is lawyer controlled. Sometimes the plaintiff gets no opportunity to speak. Do clients like it? No. Do insurers like it? Yes. They are repeat players.

They like it because it is straightforward, quick, and gets a result. There is no emotional involvement. It is just a case of efficiently managing a file. Speaking from experience, in my opinion, an injured plaintiff will settle for less than the reasonable value of his injuries as would be determined by a court. They are psychologically tuned to settle. There is nothing wrong with this. Indeed mediation is about achieving a result one can live with. However, the client plaintiffs are frequently not happy with the process because it leaves them with a feeling of being devalued and treated as a commodity or number. In particular, they feel that they have not had their say or been properly heard. There has been no catharsis.

_for_alternative_dispute_resolution:_A_guide_for_government_policy-makers_and_legal_drafters.

[5] J. Doyle, ''Dispute Resolution: Is Civil Litigation Part of the Solution or Part of the Problem? 26 *Arb. & Mediator* 5, at 10 (2007).

INTAKE CONFERENCES

It does not have to be this way, and I would suggest that there would be greater user satisfaction if there was a more satisfactory intake process. Only three things matter in negotiation—preparation, preparation, and preparation.[6] The need for preparation applies not only to the parties and their representatives. It also applies to the mediator. The pressure on lawyers to facilitate the resolution of matters quickly and cheaply can result in very poor quality preparation. There can be many reasons for this:

- The lawyer may be unwilling to spend a client's money to collect and organize data in the hope that the matter might settle at the mediation;
- ''We'll go along and see what happens anyway'';
- There may be a lack of confidence in the preparation of the other party, so there is no point in spending money;
- If a dispute does not settle at the early mediation, the client may resent the costs of the early preparation. On the other hand, if the dispute does resolve at the mediation, the client may still resent the high costs that have been incurred by the need for thorough preparation;
- Parties always face the dilemma of whether they should negotiate early with a somewhat incomplete set of facts or negotiate later after they have spent a lot of time and money putting all the facts together.

Well-organized intake can minimize what has been called ''data chaos'' at the mediation.[7] This observation particularly applies to self-represented litigants. Intake is not a task to be performed by a personal assistant, secretary, or law clerk in a firm. It is a task that justifies time and effort by the mediator. I invariably hold an intake conference with the lawyers to determine that the matter is on track and that relevant people will attend but more importantly I hold an intake conference with each client. May I illustrate from my own practice with three categories of case.

In the last few years I have mediated more than 200 cases of medical malpractice, all originating from the one doctor in the one hospital, as well as 85 cases of sexual abuse by one perpetrator carried out over a long period of time in two private schools. In the medical malpractice actions, a civil action had not been commenced. The abuse cases were however mediated where proceedings had commenced and issues in relation to time limita-

[6] Wade, *supra* note 2.
[7] *Id.*

tions were pending. In the medical malpractice cases, the defendant was the government. In the sexual abuse cases, the defendant was the school and its insurer.

The first step involved a meeting with the lawyers to determine how we would proceed, and the first big breakthrough occurred when, after a lot of negotiation, we were able to agree on acceptable expert medical witnesses. This was not easy, particularly in the field of psychiatry. Some doctors were considered lenient, and others too hard, but eventually we agreed on a group of three or four that were considered mainstream. A cooperative approach rather than an adversarial approach was then taken to those witnesses. They received material from both parties. This included school reports in the case of the abuse victims, which showed the academic potential of the students before the abuse. In the case of the victims of the doctor, the defendant had access to earlier medical records to consider the prognosis without the negligent intervention.

The result of this cooperative approach was that we had one expert in respect of a particular plaintiff and thus avoided issues created by dueling experts.

Once expert reports had been obtained, with the approval and encouragement of the defendants, I conducted an intake conference with each plaintiff individually. Whether the lawyers attended was a matter for them. The venue and seating for the intake conference was as it would be for the mediation. I outlined who would attend the mediation, where they would be sitting, and what their role would be. I outlined the mediation process, its benefits, and most importantly answered any questions in an attempt to allay their very great fear of being retraumatized by the process. I gave them an opportunity in this conference to touch briefly on the abuse if they wanted to do so. (The sexual abuse victims generally did not do so, whereas the medical malpractice victims did). I was also able to ascertain how I should conduct the mediation for each individual (i.e., were they resilient or fragile); were they likely to actively engage in the mediation or leave it to their legal team; were they going to be aggressive; was there a threat to personal safety of anybody; were my legal colleagues likely to be on the receiving end of a fist if they pointed out to a man who had not achieved the success he thought he deserved in life that his pre-abuse school reports showed he was never going to be an Einstein.

I urged them to prepare for the mediation by considering their alternatives to a negotiated settlement, the stresses on themselves and their families if the matter did not settle, the time during which their lives would be disrupted, whether they would like the school, church or State to proffer an apology or whether that would be counterproductive; and in particular I encouraged them to prepare for what they wanted to say at the mediation. In the intake conference with the church, the school, or the State, as the case may be, we had agreed that an apology should be offered quite

separately from the financial part of the mediation. In relation to the sexual abuse cases, we agreed that different people would be involved in the apology and in a different room.

May I refer also to a number of nuisance actions in which I have been involved where a large number of residents were complaining of odors, emanating, in one case, from a garbage tip, and, in the other, from an abattoir. Each case resulted from bad long-term planning, and, in each case, residential development had encroached on the existing noxious use. In each case, I attended a meeting at the site of the offending emission with the managers and then attended a meeting in the homes of the residents in the early evening at a time when they complained that the odor was at its worst. The result of such meetings is that, when it came to the day of the mediation, the participants knew that I had experienced the odor for a short time and could relate to what they were saying.

I do not suggest this is rocket science, but I was dealing in the abuse and medical malpractice cases with people who had been hurt both physically and psychologically. Their trust had been betrayed by those they believed were trustworthy. In the nuisance cases, I was dealing with a constituency who felt that their idyllic, park residential lifestyle was being ruined and the value of their homes destroyed. The intake conference had this effect on the claimants:

1. They knew precisely what to expect on the day of the mediation; there were no surprises;
2. Their anxiety was reduced;
3. They had confidence in the process.
4. I hope that I as mediator had developed a rapport with them and that they trusted me and realized that I had some early knowledge of their concerns;
5. They knew that the barrister or solicitor opposing had a job to do and that they would not necessarily agree with everything they heard;
6. They knew that they were the most important person in the room; that I would be inviting them to speak; and that I had urged them to have their say to the extent that they felt comfortable with; and, if they were to speak, they had been given a chance to prepare;
7. They had a promise from me that they would be treated with the utmost courtesy, and they knew I would ensure that promise was honored.

I also benefited from this process:

1. I knew the claimant somewhat;

2. I had a fair idea of how the claimant would behave and therefore should be treated at the mediation;

3. I knew whether the mediation would be long or short and how difficult it would be to conduct;

4. I was in a position to coach the other parties' legal representatives how they might best behave in the mediation.

I conclude by saying that, in my opinion, the intake conference is a vital part of every mediation. By the end of such conferences, I generally have a fairly good idea as to whether the mediation will be successful.

RECENT DECISIONS IN AUSTRALIA

There are two relatively recent cases that have been significant in Australia. *Tapoohi v. Lewenberg*[8] is the first and only case in Australia considering the legal basis of mediator liability. It is interesting but of limited value being a judgment given in an interlocutory proceeding in which the mediator applied to strike out the statement of claim. The issue therefore was whether the plaintiff's allegations (which were very much in dispute), if believed, were without prospects of success.

The mediator was a senior commercial barrister with extensive experience as a mediator and arbitrator. He was not conducting the mediation pursuant to an order of a court which would have given him immunity from suit, and he was not conducting the mediation pursuant to a written mediation agreement as most mediators do in Australia.[9] Tapoohi and Lewenberg were sisters who had a bitter dispute over the estate of their mother. Lewenberg attended the mediation in person accompanied by her solicitors and barristers, and Tapoohi, who was overseas at the time, attended by telephone but was represented in the mediation room by barristers and solicitors. Terms of settlement were reached and an agreement was executed by Lewenberg in person and then faxed through to Tapoohi who signed it and faxed it back. The agreement provided for payment of a large sum of money in exchange for various properties. After the mediation, Tapoohi discovered that she was liable for a large amount of capital gains tax and, a year after the mediation, commenced proceedings against ten parties, including her sister and the companies holding the

[8] Tapoohi v. Lewenberg [2003] VSC 410 (Oct. 21, 2003). I am not aware of any other case in a common law jurisdiction.

[9] For a full discussion of the case, see Laurence Boulle, *Mediation Principles Process Practice* 518 (2d ed. 2005).

bequeathed properties. She sought to have the settlement agreement set aside on two bases:

1. The agreement was subject to an express oral term that the parties would seek taxation advice, after which they would negotiate the final terms of the agreement; and
2. The parties had not reached a concluded agreement on the matters subject to the settlement.

There were various other grounds raised, which are not relevant for present purposes. She later added a claim against her solicitors alleging that they had been instructed to obtain taxation advice before any final settlement and therefore failed to protect her interests. The solicitors sought contribution from the barrister and the mediator for breach of their respective contractual and tortious duties towards her.

The affidavit evidence, which for the purpose of the application had to be accepted, was to the effect that an agreement in principle was reached at about 8 p.m. at the end of a long day by which time two of the legal advisors had left the meeting. On several occasions throughout the day, Tapoohi's solicitor stressed the importance of the tax implications in any settlement.

At 8 p.m. when an agreement in principle had been reached, Tapoohi's legal advisors suggested that enough had been done for the day, but the mediator asked everybody to return to the joint meeting room to draft something for the parties to sign. He indicated that it was in the interests of the parties to sign something before they went home and said that that was the way he always did things. It was suggested that he spoke forcefully and gave a direction to this effect, which effectively gave the persons present no choice. In their affidavits, they said that otherwise they would have adjourned the mediation.

The mediator dictated the terms of settlement in detail with little active involvement from the lawyers. Tapoohi's solicitor said that he attempted to raise the question of taxation advice. When the issue arose as to consideration for the transfer of shares in a company, the mediator suggested a figure of $1 as nominal consideration, and that led to a further comment from the solicitor that tax advice would be needed before the consideration issue could be finalized. Minor changes were made to the draft settlement, but ultimately all parties signed the agreement. There was no term in the settlement agreement to the effect that it was subject to advice on taxation issues being received to the satisfaction of the parties.

On behalf of Tapoohi, in the court hearing it was argued that there was no binding agreement.

In the course of the application, the plaintiff alleged that the mediator owed both a contractual and tortious obligation to the parties to exercise an appropriate level of care and skill, and the court had no hesitation in accepting that submission but did not decide whether the standard of care

required was that of a senior barrister specializing in commercial litigation or a senior expert mediator. The judge dismissed the application for summary judgment saying that it was open to a trial court to find that there had been an:

> imposition of undue pressure upon resistant parties, at the end of a long and tiring mediation, to execute an unconditional final agreement settling their disputes where it was apparent that they . . . wanted to seek further advice . . . or where it was apparent that the agreement was not unconditional, or where the agreement was of such complexity that it required further consideration.[10]

Boulle[11] makes the point that the case shows the potential extent of a mediator's power and influence and that it is not surprising that the first decided case on mediator liability turned on the advisory function associated with evaluative mediation. He says that the case indicates that, as a matter of policy, mediators owed duties to their clients, and could be held accountable if they breached them, and that a mediator cannot too readily claim immunity from liability and has the onus of establishing that such immunity exists.

The case touches on[12] but does not otherwise deal with the formidable difficulties relating to causation in this area and proof of loss. What would have been the situation if the mediator had not acted in the overbearing manner alleged?

From the point of view of mediators in Australia, the case established four things:

1. Either mediate pursuant to the order of a court and gain a statutory protection; or
2. At least mediate pursuant to a formal signed agreement, which sets out precisely the legal obligations and position of the parties to the agreement; and
3. Be wary of being coercive; and
4. Do not draft the settlement agreement yourself.

The second case *Legal Services Commissioner v. Mullins,*[13] deals with the behavior of a barrister representing a party in mediation. The barrister was

[10] Tapoohi v. Lewenberg No. 2 [2003] VSC 410, ¶ 86 (Oct. 21, 2003).
[11] Boulle, *supra* note 9, at 523.
[12] Tapoohi v. Lewenberg No. 2 [2003] VSC 410, at ¶ 88 (Oct. 21, 2003).
[13] Legal Services Commissioner v. Mullins, http://www.lsc.qld.gov.au/documents/mullins.pdf.

found guilty of professional misconduct in connection with the conduct of a personal injuries claim. The facts are these. A claim was made by a seriously injured plaintiff on the basis of medical reports indicating that the plaintiff's life expectancy was reduced by 20 percent. He was 47 years old at the time. Evidence in reports given to the other party and intended to be used at the mediation was to the effect that damages should be calculated on the basis that he had 16 more years of working life before him. A few days before the mediation, the barrister conferred with the claimant, and one topic of discussion was the draft schedule of damages prepared by the barrister that was to be presented to the insurer. At that conference the claimant told his legal advisors that he had been advised by his doctor that he had cancer spots on his lungs and elsewhere throughout his body. The cancer was described as secondary cancer (the primary cancer had not been discovered); he was to receive chemotherapy treatment for cancer. These matters had only been discovered two weeks earlier, and there were no medical reports dealing with the cancer or the prognosis.

The barrister told his client that it was his preliminary advice that the cancer facts should be disclosed to the insurer before the mediation, the mediator should probably be advised, and the mediation would probably be adjourned. The client instructed the barrister he did not want to disclose the cancer facts unless he had to do so. Counsel then considered the matter carefully and wrote an opinion on the matter. Unfortunately, he was wrong.

The barrister did not advise the insurer or the insurer's legal team of the existence of the cancer. The barrister stated to opposing counsel that ''The claim for future care set out in the schedule is very reasonable and the claim for future economic loss is based upon the reports.''

Of course the barrister knew that the stated life expectancy critical to the claim for quantum was very probably no longer sound, but he did not advise opposing counsel of that fact. Instead, he invited opposing counsel to have regard to the reports that contained no reference to the recently discovered cancer.

Justice Byrne commented as follows:

> When this mediation was held Queensland barristers could not have approached the exercise on the basis that they were entering an honesty free zone. For one thing rules adopted by the Bar Association then included Rules—
>
> ''51. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise)
>
> ''52. A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon

as possible after the barrister becomes aware that the statement was false.''

Justice Byrne held that by continuing to call the various reports in aid as information supporting the claim after learning the cancer facts and recognizing their significance to the validity of the life expectancy assumption, the barrister intentionally deceived the opposing barrister and the insurer with the intention of influencing them to compromise the claim. He held that the fraudulent deception involved such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute and competency as to constitute professional misconduct. The tribunal imposed a penalty of $20,000 plus costs and a public reprimand.

The case is a reminder of the absolutely fundamental obligation not to mislead at any time. That applies to settlement negotiations and to statements made in mediations. Obviously the privilege that normally attaches to the mediation process will not inure to protect settlements dishonestly obtained by misleading information.

CONCLUSION

Mediation is now in the mainstream of dispute resolution methods in Australia. Ten years ago, in my state, the delays in having a case get to trial were approximately three years. Now, the courts are finding it difficult to fill their lists. This is due largely to the effects of mediation. However, in the same period, courts have more rigorously managed litigation making the system quicker and cheaper. Mediation offered quick, cheap, stress-free results. The courts have responded to the challenges presented by the old system of litigation by making their process cheaper and quicker but not stress free. It is my impression that fewer cases now settle at mediation than occurred five years ago, and I attribute that to the fact that litigants are presented with an earlier credible trial date. Nevertheless, there remains a concern within the legal profession that young barristers are gaining insufficient experience in the art of advocacy because of the popularity of mediation, and this may be a matter that needs to be addressed by the respective bar associations in the years ahead.

Final Step: Issues in Enforcing the Mediation Settlement Agreement

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This article concerns mediation in the international arena and how its utilization and efficacy can be fostered. The growth of mediation over the past 15 years has been exponential, a tribute to the success of the process. Settlement rates in mediation are said to be on the order of 85-90 percent and are achieved long before the traditional ''court house steps'' at a significant saving of cost and time for the parties. User satisfaction is high, as parties retain control and tailor their own solution in a more confidential, less confrontational setting that preserves relationships and results in a win/win instead of a win/lose.

Multiple drivers are at work to further the already resounding success of mediation as a tool for dispute resolution. There are now literally thousands of court-sponsored mediation programs around the country in the United States, and the EU Mediation Directive issued in 2008 is likely to foster the development of many such programs in Europe and otherwise encourage the growth of mediation on the European continent. Business lawyers are increasingly inserting step clauses into contracts, which require an attempt at mediation before an arbitration or litigation can be commenced. State ethical obligations requiring that attorneys advise their clients about the availability of resolution through alternative dispute resolution (ADR) are on the rise in the United States, a requirement that may gain acceptance elsewhere. Corporations are increasingly trying ADR as is exemplified by the signature by 4,000 corporations of the Center for Public Resources (CPR) pledge, which commits signatories to trying ADR before filing suit in a dispute with another signatory. Deal mediation and other innovative uses of expert facilitation are emerging. The long traditions of harmony and

* The discussion of the U.S. case law applying contract law principles to the enforcement of settlement agreements resulting from mediation is adapted from an article written by Edna Sussman entitled ''Enforcing Mediation Settlement Agreements in the United States and Implications for Mediator Confidentiality,'' which first appeared in the April 2006 issue of the *Newsletter of the Mediation Committee of the International Bar Association* (Vol. 2, No 1).

conciliation in the Far East will inevitably influence the resolution of disputes in our global economy and advance the use of mediation.

Perhaps most importantly, as litigants complain about how costly and slow litigation is and arbitration seems to have become, they seek a cheaper and faster dispute resolution process. Mediation offers a solution and is growing exponentially. The increased interest in mediation is reflected in the mediation case loads of the dispute resolution institutions. For example, the Centre for Effective Dispute Resolution (CEDR) found that the number of mediation matters it handled increased sevenfold from 1997 to 2004, an increase to 700 cases from 100 cases.[1]

LITIGATION OVER MEDIATION SETTLEMENT AGREEMENTS

It is said that settlements reached in mediation have a higher rate of compliance than court decisions. As the parties have themselves developed a resolution they feel is fair to them and that they are capable of performing, the likelihood of not fulfilling obligations of the settlement are reduced. For example, a structured settlement with payment terms within a party's ability to pay is much more likely to be paid and useful to the other party than a court money judgment that leaves the prevailing party with the unhappy task of moving forward with collection actions, as the loser simply cannot make the payment.

However, as the number of mediations increases, there is an inevitable increase in the litigation that arises out of mediation. Professor Coben conducted a review of cases involving mediation in the United States in an article published in 2006.[2] He found over 1,200 cases in which substantive issues related to mediation were litigated and resulted in a reported decision. Many of those cases dealt with the enforcement of a mediated settlement agreement (MSA).

While an MSA is the outcome of a voluntary agreement between the parties, there are many reasons that might cause a party to retreat from an agreement reached. These reasons might include the following:

- There is a change of heart after the mediation is over;
- The company has a new boss or new ownership;

[1] *CEDR Solve Mediation Statistics 2004*, *available at* http://www.cedr.co.uk/index.php?location=/library/articles/Statistics_2004.htm.

[2] James Coben & Peter Thompson, ''Disputing Irony: A Systematic Look at Litigation about Mediation,'' 11 *Harv. Negot. L. Rev.* 43 (2006). Hamline University School of Law maintains a datebase of U.S. court decisions relating to mediation. It is available at http://law.hamline.edu/adr/mediation-case-law-project.html.

- There actually was no agreement with respect to a material term, or there was a lack of agreement on the interpretation of a term;
- External factors intervene, such as currency fluctuations, that suddenly turn a good deal into a bad deal;
- For a variety of reasons, such as government action, business reverses, natural events, the agreement cannot be performed;
- There are public consequences; for example, there may be a great deal of negative publicity or public reaction that's not favorable.

When enforcement action must be taken on a settlement agreement, some of the primary goals of mediation are defeated—speed, economy, and the maintenance of relationships. The degree to which these goals are undermined can be impacted by the enforcement mechanisms available.

MECHANISMS FOR ENFORCEMENT

The basis on which MSAs should be enforced has been the subject of much debate, but no single mechanism for the enforcement of MSAs has emerged. There was a strong effort by those working on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation[3] to develop a uniform enforcement mechanism. However, notwithstanding the effort made, that goal was not achieved. Article 14 provides: ''If the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable, [the enacting state may insert a description of the method of enforcing the settlement agreement or refer to provisions governing such enforcement]'' The comments to Article 14 recognized that ''many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award.'' Notwithstanding, because of the differences between domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus, the UNCITRAL provision leaves the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

[3] UNCITRAL Model Law on International Commercial Conciliation (2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf.

The EU Mediation Directive[4] recognizes the importance of enforcement and states in paragraph 19 that ''mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties.'' However, while the EU Mediation Directive calls in Article 6 for member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the member State, as it may be ''made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state.''

The same result was reached by the drafters of the U.S. Uniform Mediation Act (UMA).[5] A concerted effort was made to develop a uniform enforcement mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the MSA, but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation, and no enforcement mechanism was ultimately included in the UMA.

This conclusion as to enforcement under the UMA highlights the issue raised as to any summary enforcement mechanism for mediation settlements. While mediation is seen as a benefit to the parties, there is concern that a summary enforcement mechanism would undercut mediation's value of voluntariness and self-determination. Accordingly, some commentators argue that care should be taken not to introduce an enforcement mechanism that eliminates the ability of the parties to raise such issues as coercion to defeat enforcement.

As a result of the procedural and theoretical issues surrounding the establishment of an overarching enforcement mechanism for MSA's, no such mechanism has been developed to govern international mediations.[6]

[4] Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.

[5] Uniform Mediation Act, adopted by the National Conference of Commissioners on Uniform State Laws in 2001, *available at* http://www.pon.harvard.edu/guests/uma/. A 2003 amendment to the UMA incorporated the UNCITRAL Model Law on International Commercial Conciliation Model Law into the UMA and provides that unless there is an agreement otherwise, the model law applies to any mediation that is ''international commercial mediation.''

[6] For a review of the scholarly discussions relating to enforcement of mediation settlement agreements, see Ellen E. Deason, ''Procedural Rules for Complimentary Systems of Litigation and Mediation- Worldwide,'' 80 *Notre Dame L. Rev.* 553 (2005).

We will review the three approaches employed in different jurisdictions to enforce an MSA: enforcement as a contract, enforcement as a judgment, or enforcement as an arbitral award. We will then consider whether an arbitration award issued by an arbitrator who is appointed after the MSA is achieved can be enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention or the Convention)[7] and offer some suggestions as to how such enforcement could be realized.

ENFORCEMENT AS A CONTRACT

In many jurisdictions, including the United States, England, and many other jurisdictions around the world, the principal method for enforcing an MSA is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract that it is trying to enforce.

In the United States, there is a very strong policy favoring the settlement of disputes by agreement by the parties, and the courts, in fact, almost invariably uphold the MSA. However, the MSA is a contract, and contract defenses are available to the parties and are litigated in the courts. We review some of the standard contract defenses as discussed in the U.S. courts.

Binding Contract

The question of whether the facts support mutual consent to all material terms as is necessary to form an enforceable contract is the area of potential attack that has been most successful in defeating efforts to enforce mediation agreements. It is also the claim most likely to arise in an international dispute context, as in such cases the parties are generally sophisticated, represented by counsel, and accordingly less likely to find applicable other commonly raised issues such as duress, lack of competence, and lack of authority.

Abbreviated settlement agreements or memoranda of understanding, often prepared at the mediation session as a shorthand recording of the terms agreed to, are frequently argued to be only agreements to make an

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38, implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

agreement and are not binding.[8] The courts recognize the difficulty of generating a final settlement document in complex cases at the mediation conference. Thus, the courts have enforced settlement agreements where all of the material terms had been the subject of mutual consent,[9] and the mere fact that a later more complete document is contemplated will not defeat enforcement.[10] The language used in the agreement can be critical in this determination. Where the parties made the settlement ''subject to'' a formal agreement, as contrasted with ''to be followed'' by a formal agreement implementing the terms agreed to, enforcement was denied.[11] Where the courts find that material terms in an agreement are not sufficiently definite to constitute a basis for finding mutual consent, they have, of course, refused to enforce a settlement agreement.[12] But the fact that a few ancillary issues remain to be resolved will not generally defeat enforcement of a settlement agreement.

Oral Agreements

Consistent with the standard contract law principle, which recognizes the validity of oral contracts (with the exception of contracts governed by the statute of frauds, which requires a writing in limited circumstances, for examplel contracts concerning transfers of land or where performance is not to be completed within one year), courts in the United States enforce a mediation settlement agreement in the absence of an executed written agreement if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound.[13]

An exception to the enforcement of oral settlement agreements achieved in mediation is found when governing law or applicable court

[8] Certainteed Corp. v. Celotex, No. Civ. A. 471, 2005 WL 217032, at *14 (Del.Ch. Jan. 24, 2005).

[9] Harkader v. Farrar Oil Co., No. 2004-CA-000114-MR, 2005 WL 1252379 (Ky. App. Oct. 12, 2005).

[10] Claridge House One Condo. Ass'n v. Beach Plum Props., 2006 WL 290439 (N.J. Super. A.D. Feb. 8, 2006); Chesney v. Hypertension Diagnostics, No. A05-2210, 2006 WL 2256590 (Minn. App. Aug. 8, 2006); Snyder-Falkinham v. Stockburger, 457 S.E.2d 36 (Va. 1995).

[11] Golding v. Floyd, 539 S.E.2d 735 (Va. 2001); Quinlan v. Ross Stores, 932 So. 2d 428 (Ct App. Fla. 1st Dist. 2006)

[12] M. Martin, No. 1:05CV00063, 1:05CV00462, 2005 WL 2994424 (M.D.N.C Nov. 7, 2005); Weddington Prods. Inc. v. Flick, 71 Cal Rptr. 2d 265 (Cal. App. 2d Dist. 1998); Lindsay v. Lewandowski, 139 Cal App. 4th 1618 (2006)

[13] White v. Fleet Bank of Maine, 875 A.2d 680 (Me. 680); Standard Steel, LLC v. Buckeye Energy, Inc., No. Civ. A. 04-538, 2005 WL 2403636 (W.D. Pa. Sept. 29, 2005); Harkader, *supra*, note 9; Ford v. Ford, 68 P.3d 1258 (Alaska 2003).

rules governing the mediation require a writing. The UMA is in the process of being passed by states across the United States and at the time of this writing has been adopted in ten states. The UMA exempts the written settlement agreements from the privilege that protects mediation communications but does not exempt oral settlement agreements thus making oral agreements inadmissible in court. This approach is consistent with the current trend in mediation policy and is likely to be passed in most, if not all, U.S. jurisdictions. Similarly, the EU Mediation Directive, speaks of enforcement only of a written agreement and thus requires a writing for enforcement.

Duress and Coercion

The courts adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced. Notwithstanding the fact that some of the facts alleged in the cases are quite egregious, only in rare cases have the courts believed the claims to be persuasive in establishing such duress or coercion as to defeat enforcement of an MSA. After reviewing the facts before them, the courts have enforced settlement agreements reached in mediation in the face of a party's testimony that he was not permitted to leave the room throughout a lengthy mediation and had been sapped of his free will;[14] a party's testimony that he was threatened with prosecution in bankruptcy court;[15] the testimony of a 65-year-old woman claiming duress at a mediation which started at 10 a.m. and was concluded at 1 a.m. the next morning, while she suffered from high blood pressure, intestinal pain, and headaches, and was told by both the mediator and her lawyer that if she went to trial, she would lose her house;[16] and a party's testimony that he was diabetic and his blood sugar went up, was in severe pain, was prevented from leaving the building when he wanted to terminate the negotiations, and his attorney would not let him leave without signing the agreement.[17]

Factors illustrative of excessive pressure have been stated to include (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on the untoward consequences of delay, (5) use of multiple persuaders by the dominant side against a servient party, (6) absence of third-party advisors to

[14] DeVille v. United States of Am., No. Civ. A. 04-538, 2005 WL 2403636 (W.D. Pa. Sept. 29, 2005).

[15] Chantey Music Publ'g Inc. v. Malaco, Inc., 915 So. 2d 1052 (Miss. 2005).

[16] Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

[17] Peacock v. Spivey, 629 S.E.2d 48 (Ct. App. Ga. 2006).

the servient party, and (7) statements that there is no time to consult financial advisors or attorneys.[18] Where the party seeking to back out is represented by counsel at the mediation and had an opportunity to reflect, an attack on the mediation settlement agreement based on duress and coercion will not succeed.[19]

An increasing number of cases are directed at contentions that the mediator himself or herself was the cause of duress and coercion. These cases are troubling and perhaps suggest a need for more training and oversight over mediator methodologies; however, the courts have for the most part rejected such attempts to defeat settlement agreements. Where a party contended that she was warned by the mediator of claims of insurance fraud against her, that the mediator bullied her, that she cried for an hour and no consideration was given to her distress, the agreement was enforced.[20] Statements by the mediator as to the substantial legal fees that would be incurred that were claimed to make the party feel financially threatened and under duress were held not to be a basis to set aside a settlement agreement.[21] Where the mediator was alleged to have said ''you have no case'' because the case belongs to the bankruptcy trustee, and the only way the plaintiff ''would ever see a dime'' would be if he ''agreed to the mediated settlement then and there,'' the court upheld enforcement of the settlement agreement stating that a mediator's statement as to the value of a claim, where the value is based on fact that can be verified, cannot be relied on by a counseled litigant whose counsel was present when the statement was made.[22]

However, the courts will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact on duress or coercion. Thus, where it was alleged that the mediator imposed extreme time pressure and told the party that the court would have the embryos in issue destroyed rather than give them to her, that the property value in issue was grossly disproportionate to the cost of litigating further, and that she would have a chance to protest any provisions of the agreement at a final hearing even if she signed the mediation settlement agreement, the court held that if the mediator in fact engaged in such conduct the agreement would not be enforceable and set it down for a hearing.[23]

[18] Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1142 (N.D. Cal. 1999).

[19] Advantage Props., Inc. v. Commerce Bank N.A., 242 F.3d 387 (10th Cir. 2000).

[20] Vela v. Hope Lumber & Supply Co., 966 P.2d 1196 (Okla. Civ. App. Div. 1 1998)

[21] Marriage of Banks, 887 S.W.2d 160 (Tex. App.—Texarkana 1994)

[22] Chitkara v. New York Tel. Co., 45 Fed. App'x 53 (2d Cir. 2002)

[23] Vitakes-Valchine v. Valchine, 793 So. 2d 1094 (Dist. Ct App. Fla. 2001)

The issue of duress and coercion can, of course, arise even in direct negotiation without a mediator facilitating the settlement. In the 2008 International Centre for Settlement of Investment Disputes (ICSID) decision in *Desert Line Projects v. Yemen*,[24] the tribunal set aside a settlement agreement reached between the parties on grounds of coercion and duress. Desert Line had contracted with Yemen to execute a major road-working project and had been lulled into continuing work by continuous assurances of payment. After a failure by Yemen to pay for a year and a half, Desert Line filed an arbitration demand, and an award in its favor was rendered. Following the award, settlement discussions commenced, and Desert Line agreed to accept half the amount awarded.

Desert Line commenced a second arbitration in which the tribunal set aside the settlement agreement and reinstated the original award, finding economic duress, based on actions during the negotiation period that included armed interference and preemptory advice that ''you better take this deal.'' The tribunal noted that ''economic duress is present in many settlements and cannot be a basis for setting aside an agreement. But the judicial decision must draw the line between economic compulsion exercised by the other party and the normal operation of economic forces.'' A similar distinction could be drawn into the mediation analysis.

Incompetence or Incapacity

The law presumes adult persons to be mentally competent and places the burden of proving incompetence on the person claiming it. In the face of this burden, claims of incompetence, even based on facts that sound quite striking, have not met with much success in court where they have been raised to defeat enforcement of a settlement agreement. The courts have rejected claims that a party was incompetent when suffering from side effects of medication that included severe depression, memory loss, brain fog, that she was crying during the mediation and continually stated that she was confused and did not understand,[25] and where a party claimed that she suffered physical pain during the mediation from a recent surgery, had taken higher than prescribed narcotic pain and anti-depressant medication, and developed a migraine headache that required her to administer a

[24] Desert Line Projects LLC v. The Republic of Yemen, ICSID 2008, *available at* http://ita.law.uvic.ca/documents/DesertLine.pdf.

[25] Domangue v. Domangue, No. 12-04-00029-CV, 2005 WL 1828553 (Tex. App.—Tyler Aug. 3, 2005).

medicinal injection during the mediation.[26] The court rejected a claim of mental incapacity where the party claimed to be disassociating and had no understanding of the nature and terms of the contract, finding that expert testimony was required to support such a claim.[27]

Lack of Authority

Claims by a party that it had not signed the settlement agreement and that the signature by its attorney was not authorized have also not been viewed with favor. A party's counsel is presumed to have authority when counsel is present at a mediation session intended to settle a lawsuit, a presumption that has to be overcome by affirmative proof that the attorney had no right to consent.[28] A settlement agreement signed by counsel can also be upheld on the basis that apparent authority existed where the opposing counsel had no reason to doubt that authority.[29] Even where the governing state statute required the party's own signature, the courts have upheld a settlement agreement in the absence of such a signature where the party's absence from the mediation was unexcused.[30] But where there was a question as to the grant of authority by the client to the attorney, which must be clear and unequivocal, the courts have required an evidentiary hearing.[31]

Fraud

The courts have applied the contract rules quite strictly and required a knowing and material misrepresentation with the intention of causing reliance on which a party justifiably relied even in the mediation context with its unique negotiating framework and relationships.[32] Absent a duty to disclose, mere failure to disclose a fact that might be material to the

[26] Mc Mahon v. Mc Mahon, No. E2004-03032-COA-R3-CV, 2005 WL 3287475 (Tenn. Ct. App. Dec. 5, 2005).

[27] Alexander v. Naden, No. 55163-9-I, 2005 WL 3150323 (Wa. App. Div. 1st, Nov. 28, 2005).

[28] Inwood Int'l Co. v. Wal-Mart Stores, 243 F.3d 567 (Fed. Cir. 2000).

[29] Little v. Greyhound Lines, Inc. No. 04 Civ. 6735(RCC), 2005 WL 2429437 (S.D.N.Y. Sept. 30, 2005); Takuanyi v. Allstate Ins. Co., No. A05-887, 2006 WL 696329 (Ct. App. Minn. June 20, 2006).

[30] Georgos v. Jackson, 790 N.E.2d 448 (Ind. 2003).

[31] Fivecoat v. Publix Super Mkts., Inc., 928 So. 2d 402 (Ct. App. Fla 1st Dist. 2006).

[32] JMJ Inc. v. Whitmore's BBQ Rest., No. 85349, 2005 WL 1792817 (Ohio App. 8th Dist. July 28, 2005).

opposing party is not a basis for defeating a settlement agreement. Where a plaintiff thought the defendant's insurance limit was $100,000 rather $1.1 million, the court held that defendant was in an adversarial position and not in a position of special trust or confidence that would create a duty to disclose to plaintiff; however, an evidentiary hearing was required to determine if defendant had made an affirmative misrepresentation that could be a basis for defeating the settlement.[33]

In jurisdictions in which strict confidentiality of mediation communications applies, the courts have refused to accept any evidence of a claimed fraud based on what transpired at the mediation session, holding that such evidence is blocked by the confidentiality of the proceeding.[34] The Delaware Chancery Court suggested that if parties to a mediation know that they are basing their decision to settle on a representation of fact, they must extract that representation in a form that is not confidential, for example, as a representation in the settlement agreement itself.[35]

Mistake

While mistake is frequently raised as a defense to enforcement of a settlement agreement, it too is a ground that is rarely accepted by the court. The courts have rejected claims of mutual mistake and the more difficult claim of unilateral mistake where a party claimed that the amount to be paid was to be offset by an amount previously paid;[36] where a plaintiff had failed to read the agreement to understand its terms;[37] but remanded for a hearing where a claim of mutual mistake leading to a clerical error of $600,000 was asserted.[38]

As is apparent from this discussion, enforcement as a contract can lead to considerable additional expense and significantly prolong the dispute resolution process. It also raises serious questions as to the confidentiality of the mediation process: to what extent should confidentiality be preserved if the mediation proceedings are relevant to the issues raised on enforcement of the MSA in a court proceeding? The difficulties with enforcement as a contract require that review of the other options for enforcement be conducted.

[33] Brinkerhoff v.Campbell, 994 P.2d 911 (Wa. App. Div. 1st 2000).
[34] Princeton Ins. Co. v. Vergano, 883 A.2d 44 (Del. Ch. 2005).
[35] *Id.*
[36] Feldman v. Kritch, 824 So. 2d 274 (Fla. App. 4th Dist. 2002).
[37] Stewart v. Preston Pipeline, 36 Cal. Rptr. 3d 901 (Cal. App. 6th Dist. 2005).
[38] DR Lakes Inc. v. Brandsmart, U.S.A., 819 So. 2d 971, 974-75 (Fla. Dist. Ct. App. 2002).

Enforcement as a Judgment

If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. The EU Mediation Directive expressly contemplates such court action in providing that the directive ''shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of the written agreement be made enforceable . . . by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state where the request is made.''

Even if there is no court proceeding, in some jurisdictions, the courts are available to enter a judgment on the MSA. For example, in the United States, the Colorado International Dispute Resolution Act was enacted to further the policy of encouraging parties to international transactions to resolve disputes, when appropriate, through arbitration, mediation, or conciliation. To foster that goal the statute provides as follows:

> [i]f the parties involved in a dispute reach a full or partial agreement . . . If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.[39]

However, even if a judgment can be obtained, the difficulties of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This difficulty could be obviated if the MSA could be entered as an arbitral award and thus gain the benefit of the established enforcement mechanisms of the New York Convention.

Entry of an Arbitration Award Based on the Mediation Settlement Agreement

Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the Arbitration

[39] Colo. Rev. Stat. Ann. § 13-22-308.

Rules of Korean Commercial Arbitration Board, Article 18(3) provides as follows:

> If the conciliation succeeds in settling the dispute, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties; and the result of the conciliation shall be treated in the same manner as such award as to be given and rendered upon settlement by compromise under the provision of Article 53, and shall have the same effect as an award.

Similarly the Rules of the Mediation Institute of the Stockholm Chamber of Commerce, Article 12, Confirmation of a Settlement Agreement in an Arbitral Award, provides as follows:

> Upon reaching a settlement agreement the parties may, subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award.

Some states in the United States have made similar remedies available for international disputes. For example, the California Code of Civil Procedure, Title 9.3, Arbitration and Conciliation of International Commercial Disputes, Section 1297.401 states,

> If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.

While the enactment of such provisions would seem to be a useful avenue for MSA enforcement, such an appointment after the dispute is settled cannot be effected in many jurisdictions because, under local law, there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 clearly sets out this requirement in its definition of an arbitration agreement in Section 6(1):

> In Part 1 of the Act, an ''arbitration agreement'' means ''an agreement to submit to arbitration present or future disputes (whether they are contractual or not).''

As there is no ''present or future dispute,'' once the dispute is settled in mediation, there cannot be an arbitrator appointed to record the settlement

in an award. Any consent award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement.

It would be easy to avoid this problem by appointing the arbitrator before the mediation is commenced and having the mediation conducted as an ''arb-med'' either by the appointed arbitrator with a carefully worded document executed by the parties consenting to such a process[40] or by a separately appointed mediator. While this may be satisfactory to some, there are many cases in which the party is willing to go to mediation but prefers a court solution to an arbitration if the mediation does not result in resolution.

It would also be relatively easy to circumvent this problem by specifying that the law of a jurisdiction that permits the appointment of an arbitrator after the settlement is achieved governs the agreement, providing the arbitrator with authority to act. Such a provision should circumvent any attack on the award based on the appointment of the arbitrator.[41]

However, the question of whether such an award would be enforceable under the New York Convention remains. Can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, the arbitration award will frequently be of much lesser utility.

In analyzing this question, one must first recognize that that it is widely accepted that an arbitrator may enter an ''agreed award'' if the parties reach an agreement during the arbitration; such an award is generally just a reflection of the agreement of the parties and does not reflect the arbitrator's own analysis and conclusions as to the dispute. The UNCITRAL Model Law on International Commercial Arbitration adopted by the UNCITRAL in 1985 expressly sanctions such awards and their recognition:

[40] Whether a court would recognize such a consent to overcome issues of due process has not been determined in many jurisdictions. *See, e.g., Glencot Development and Design v. Ben Barrett & Son*, [2001] All ER (D) 384 (Feb) in which the High Court in 2001 dealt with an adjudicator who was appointed by the parties. The parties subsequently settled but one point proved to be outstanding. The adjudicator mediated without success and then rendered a decision over the objection of one party. The Court held that there was apparent bias and the decision could not stand because the adjudicator may have been privy to information gathered in *ex parte* discussions that influenced the result. The Court left open the question of whether the parties could contract to have the adjudicator mediate and then resume the adjudicator role.

[41] For example, the U.S. Supreme Court decision in *Volt Information Service v. Leland Stanford Junior University*, 489 U.S. 468 (1989), has been construed to mean that parties can agree to abide by state rules of arbitration even if at variance with Federal Arbitration Act rules and so should be able to contract for the appointment of an arbitrator after the MSA under the laws of a jurisdiction that permit it.

> [i]f during the arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral tribunal, record the settlement in the form of an Arbitral Award on agreed terms.''

Article 31 provides that ''such an award has the same status and effect as any other award on the merits of the case.'' Similar provisions giving full deference to ''agreed awards'' are found in the rules governing International Chamber of Commerce (ICC) and ICSID arbitration.

Moreover, there are jurisdictions that empower and, in some cases, require or encourage the arbitrator to try mediation first. The arbitration rules of Brazil, China, and Hong Kong specifically authorize the arbitrator to attempt mediation or conciliation in the course of the arbitration proceeding. The Brazilian Arbitration Law provides in Article 21(4) that ''the arbitrator or the arbitral tribunal shall, at the beginning of the procedure, try to conciliate the parties, applying, to the extent possible, Article 28 of this Law.''

> Article 28 provides as follows:
>
> if the parties settle the dispute by joint agreement, in the course of the arbitral proceedings, the arbitrator or the arbitral tribunal, at the parties' request, may make an arbitral award declaring such fact, containing the requirements provided for in Article 26 of this Law.

The Arbitration Law of the People's Republic of China, Article 51 states the following:

> Before giving an award, an arbitration tribunal may first attempt to conciliate. If the parties apply for conciliation voluntarily, the arbitration tribunal shall conciliate. If conciliation is unsuccessful, an award shall be made promptly. When a settlement agreement is reached by conciliation, the arbitration tribunal shall prepare the conciliation statement or the award on the basis of the results of the settlement agreement. A conciliation statement shall have the same legal force as that of an award.

The Hong Kong Arbitration Ordinance, Section 2B, provides that an arbitrator may act as a mediator and may meet separately with the parties, but if no settlement is reached he or she shall can disclose whatever he or she thinks is material to the arbitration; the ordinance further provides that no objection to the conduct of the arbitration by the umpire shall be taken solely on the ground that the arbitrator served previously as the conciliator.

Most would agree that such agreed awards rendered by an arbitrator appointed before the settlement of the dispute are governed by the New York Convention and enforceable under the Convention. Whether the same result obtains if the arbitrator is appointed after the settlement of the dispute as a result of mediation, such as can be achieved in Korea, California, and under the Stockholm rules, is less certain. The commentators that have analyzed this question have come to differing conclusions. Some have concluded that it is not enforceable.[42] Others have concluded that it is.[43] While yet others conclude that the result is not clear.[43]

The relevant New York Convention articles provide as follows:

- Article 1(1) ''This Convention shall apply to the recognition and enforcement of arbitral awards. . .arising out of differences between persons.''
- Article 2(1) ''Each contracting state shall recognize an agreement in writing under which the parties undertake to submit all or any differences which may have arisen . . . between them . . . concerning a subject capable of settlement by arbitration.''
- Article 5(2) can refuse recognition and enforcement ''where the subject matter of the difference'' is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought or would be ''contrary to the public policy of that country.''

The language of the New York Convention does not have the precise temporal element of such local arbitration rules as the English Arbitration Act, which requires a ''present or future'' dispute. The references to a ''difference'' do not specify when that ''difference'' had to exist in time in relation to the time of the appointment of the arbitrator.[45] An extensive discussion of the meaning of the Convention as it relates to the issuance of an arbitration award based on an MSA is just beginning. The disparity of the opinions rendered by scholars as to the meaning of the language of the

[42] Christopher Newmark & Richard Hill, ''Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?'' 16)(1) *Arb. Int'l* 8 (2000); James T. Peter, ''Med-Arb in International Arbitration,'' 8 *Am. Rev. Int'l Arb.* 83, 88 (1997).

[43] Harold I. Abramson, ''Mining Mediation Rules for representation Opportunities and Obstacles,'' 15 *Am. Rev. Int'l Arb.* 103 (2004).

[44] *See* Ellen E. Deason, ''Procedural Rules for Complimentary Systems of Litigation and Mediation—Worldwide,'' 80 *Notre Dame L. Rev.* 553, n.173 (2005).

[45] While some might argue that such an expansion would raise issues as to the use of an arbitration award to record unfacilitated direct negotiations that lead to resolution, a subject for another discussion, it would not be difficult to limit any interpretation of the Convention to cover only mediated resolutions.

Convention suggests that there is an ambiguity. It is time to delve into the issue and consider providing interpretive guidance to the courts, with due consideration of the many ancillary issues that must be considered in reaching a conclusion as to interpretation.[45]

UNCITRAL recommendations as to interpretations of the New York Convention are an available mechanism for clarifying the meaning to be given to the Convention's language.[47] A UNCITRAL recommendation as to the interpretation of the New York Convention could clarify the applicability of the Convention to international arbitration awards entered into with the consent of both parties as a result of a mediation.

CONCLUSION

With the 50th anniversary of the New York Convention in 2008, there has been a great deal of discussion and controversy over whether and how the Convention should be amended to cure problems that have arisen with respect to certain provisions of the Convention. The New York Convention is a powerful instrument of enormous value in promoting international trade. To maximize the utility of the New York Convention, those reviewing it should not only look backward but also forward in assessing how and whether it should be reshaped. Mediation has been demonstrated to be on the rise throughout the world and is an increasingly important mechanism in the menu of options for dispute resolution.

The New York Convention was drafted in the 1950s long before mediation's emergence. It can and should be reviewed on this 50th anniversary with an eye towards keeping it current and enhancing its relevance to the realities of today's dispute resolution world. Consideration should be given to recommending an interpretation under the Convention clarifying its applicability to an award issued by an arbitrator appointed after the resolution of a dispute in mediation that embodies that resolution.

[46] For a comprehensive discussion of enforcement of an MSA under the New York Convention, see Brette L. Steele, ''Enforcing International Commercial Mediation Agreements Arbitral Awards Under the New York Convention,'' 54 *UCLA L. Rev.* 1385 (2007).

[47] For example, UNCITRAL adopted a recommendation in July 2006 that Article II(2) be applied ''recognizing that the circumstances described therein are not exhaustive'' in recognition of the fact that the writing requirement in the New York Convention might be too limiting in light of the development of modern technology. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html.

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