Contemporary Issues in International Arbitration and Mediation

The Fordham Papers 2007

Arthur W. Rovine
Editor

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Introduction

Arthur W. Rovine
Director, Fordham Law School Conference on International Arbitration

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The Fordham University School of Law in New York City has a long tradition of hosting annual conferences addressing questions of international and foreign law. The conference on international anti-trust law is some 30 years old, and the conference on international intellectual property law is 11 years old. Papers are published from both of these conferences. By contrast, the Fordham Law School Conference on International Arbitration, of which I am the Director, is only three years old. We had our first conference at the end of May 2006 and the second conference in June 2007. As of the date of this writing (April 2008), plans have been completed for the third conference in June 2008.

The papers in this volume are from the 2007 conference, with the exception of the papers in Part III, all of which are from the 2006 conference. We intend to have a conference on international arbitration and mediation each year at Fordham Law School and to have the papers from each conference published in an annual volume. The conferences themselves may be forgotten, even by the participants, but the published papers that emerge from the conferences should constitute the true and lasting contribution.

Yet certain events at the conference itself may stand out as memorable. I was particularly pleased at the June 2007 Fordham conference to say a few words and to have Antonio Parra, Secretary General of the International Council for Commercial Arbitration (ICCA) and former Deputy Secretary General of the International Centre for Settlement of Investment Disputes (ICSID), say a few words about Aron Broches. Broches inspired what are perhaps the key initial developments in the growth of bilateral and multilateral investment treaties, which, among many other things, permit what we now call investor-State arbitration. These developments were the drafting, signing, and entry into force of the 1965 Washington Convention on the Settlement of Investment Disputes and the establishment of ICSID. Parra provides further detail on Broches in his essay in Part I. Suffice it to say here that Broches was the key drafter of the ICSID Convention and the central figure in the creation of ICSID. Broches was also a 1942 graduate of the Fordham Law School. The latter fact is not well known, but should be,

and certainly at the Fordham Law School, which has every right to be proud of Aron Broches.

The Fordham conference and papers, as the title to this volume indicates, focus on contemporary issues in international arbitration and mediation. The field changes rapidly, both in international commercial and investor-State arbitration. Even without full-scale publication of and access to awards, there are now a sufficient number of published and accessible awards to make it essential, even if more time consuming and difficult, for participants in, and students of, the field to keep up to date with awards and with judicial decisions involving international arbitration. And of course, more awards are now published and on line than ever before, due to the greater number of awards neccesitated by the growth in international trade and investment, and the resultant accompanying numbers of contract clauses and treaties requiring arbitration in case of dispute. There is also now a greater pressure from private organizations and individuals to publish and a lesser resistance to publication. The general trend to transparency in decision making is the key here, particularly in investor-State arbitration, and has made possible a great body of literature on the subject, including the papers by Parra, Reed and Bray, Stern, Legum, and Brower and Ottolenghi in Part I of this volume, the article by Shany in Part II, and the article by Jarvin in Part III. Like so many of the articles in this field, none of these papers could have been written without publication or other access to the decisions of arbitration panels in investor-State disputes.

Publication of awards is currently having its greatest impact on investor-State arbitration. While there are necessarily far fewer arbitral awards in this area than in international commercial arbitration, a great percentage of the investor-State awards do eventually come to public attention. Where governments are involved, as they necessarily are in investor-State cases, host State taxpayers have an obvious interest in knowing how much his or her government may be paying to an investor, why, and what wrong-doing has been alleged and possibly determined by the arbitral tribunal. A given case may also involve matters of important public policy and questions of legislative concern. Host States also wish to know the jurisprudence in cases involving other governments and how that jurisprudence is developing. So do investors, most of whom have an obvious interest in the publication of awards. They want to know what the cases say about host State actions and regulations that may affect their investments. All this, in turn, has had an important effect on accessibility of awards and the development of the law.

The use of prior awards as persuasive sources for decision making in investor-State cases is far heavier than in traditional international commercial arbitration. While the number of investor-State awards is relatively small, perhaps that fact as well as accessibility of awards makes it difficult for arbitrators, and not worth their while, to ignore what other arbitrators have decided in similar cases. If nothing else, arbitrators do not wish to be seen as

not knowing what other possibly relevant awards say. The utility of prior awards in investor-State cases has also reduced, to some extent, reliance on customary international law. A kind of common law of investment protection is in the process of development, and in that process arbitrators are scrutinizing prior cases with great care and rendering decisions in some measure on the basis of those cases, or else distinguishing them.

Arbitral tribunals treat these prior cases as common law judges might—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. Today, for example, if the question is what constitutes a regulatory taking of property under international law, the awards rendered at the Iran-United States Claims Tribunal, ICSID, North American Free Trade Agreement (NAFTA), and under some 2,500 bilateral investment treaties are likely to receive more attention from arbitral decision makers and scholars than are the strictures of customary international law. At the same time, the International Law Commission's Articles on State Responsibility provide the most useful current statement of customary international law, which remains essential where the current cases provide insufficient answers to the questions posed.

While reliance on prior cases in international commercial arbitration is not as substantial, neither is the need. The great majority of commercial cases involve private contract disputes, and, more frequently than not, the central question is whether or not there has been a contract breach, and, if so, how the damages are calculated. While there are significant legal issues in calculating damages, arbitrators often feel uncomfortable with those issues, and for that reason, one might think there would be more reliance on, or at least examination of, prior cases with respect to damages. But the result seems to have been the reverse. A panel of arbitrators or a sole arbitrator in international commercial cases might complete a great many awards without having deemed it necessary to examine critical legal issues. This is less likely to happen in investor-State cases.

Yet even in international commercial arbitration, one sees a growing number of citations to previous cases, both in the awards themselves and in scholarly articles and books. One of the significant sources of support for this is the *ICCA Yearbook Commercial Arbitration*, under the general editorship of Albert Jan van den Berg, which publishes each year, with headnotes, a great number of arbitral awards, particularly International Chamber of Commerce (ICC) awards. The ICC practice is to publish these awards only three years after their issuance (leaving time for possible court proceedings concerning enforcement or set-asides), and the arbitrators' names and facts identifying the parties are deleted. But once published, the texts provide invaluable guidance for arbitrators in other international commercial arbitration cases and in the development of international arbitral law, both procedural and substantive.

In terms of the many practical considerations relevant to the arbitral management of cases, there is no satisfactory alternative to long experience. Prior cases can take an arbitrator just so far in deciding how to run a case that is quite likely to be different, at least procedurally, from the cases he or she has managed before. Thus, the Derains and Gill papers in Part II rely not on cited cases, but on the authors' own very substantial experience in arbitrating disputes.

Judicial decisions in national court systems involving international arbitration are obviously an important source of relevant law and are perhaps correctly perceived as precedents in some jurisdictions, such as the United States. We see this in the papers by Barceló and Benedictsson in Part II, as well as the papers by Lew, Mosk, and Davidson in Part III, and Carter, Brennan, and Hwang, Chung and Cheng in Part IV.

In view of the foregoing considerations, one of the goals of the Fordham conference and the publication of the Fordham papers is and will be to assist in keeping arbitrators, arbitration advocates, scholars, and students aware of the latest issues and developments in the field. While an annual conference on international arbitration, normally with only four panels and some 16 presenters and writers of papers, cannot be expected to make a comprehensive presentation of all contemporary issues and developments, the numbers and the high-level participants ensure, in my view, that a significant contribution is made.

It is insufficient, of course, simply to keep up to date with the latest developments and cases, as important as that is. It is essential to appreciate the patterns, to know how the law is changing and developing, to understand the reasons for the awards, the fact patterns that underlay them, and the directions the awards and the law may take. Some writers will make recommendations as to what, in their view, the law should be. Here too, even four panels and the papers that emerge, may make a significant contribution.

At the same time, the 2007 conference included presenters who wrote papers on mediation. There appears to be a trend indicating that, as international arbitration proceedings begin to resemble litigation in some respects, particularly as to discovery, length of proceedings, and expense, mediation will expand in terms of the numbers of mediations conducted, locations, and significance. The arbitration rules pamphlets always grow thicker, never thinner. There are always more rules, never fewer. It is all done in the name of fairness, and the resulting proceedings are indeed fairer. But the process may become as slow and expensive as litigation, resulting in the development of international mediation. Part V on mediation covers ethics, training, and growth (articles by Scanlon, Smith, and Davidson, respectively), mediation function (Carroll, Lang, and Tarrazon), and some mediation geography (Yang). Mediation does not present a rich array of reported cases, but that certainly does not signify

there is not much to be said about the area. Mediation is an essential part of the Fordham conference and papers.

* * *

We hope that the Fordham annual volumes on contemporary issues in international arbitration and mediation, with papers by leading authorities in these fields, and as published by Martinus Nijhoff, will contribute to the understanding and work of international arbitrators, mediators, advocates, scholars, and students, in both international commercial and investor-State arbitration and mediation. These are fascinating and significant areas of dispute resolution, and our hope is that the readers of these volumes will learn from them, and in turn will themselves contribute to further advances in these fields.

Contributors

Arthur W. Rovine has been serving as an arbitrator in international cases under NAFTA, ICSID (International Centre for the Settlement of Investment Disputes), and ICDR (International Centre for Dispute Resolution of the American Arbitration Association) 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 Law School, the Editor of the Fordham annual volume on international arbitration and mediation, and an Adjunct Professor of Law at Fordham Law School

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 has also had 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), and has been a member of the Council on Foreign Relations since 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 United States Agent to the Iran-United States Claims Tribunal in The Hague from 1981 to 1983. In that capacity, and working with the Iranian Agent, tribunal members, and the Dutch government, he helped establish the tribunal adapt the UNCITRAL Rules for the tribunal, and helped develop all 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 International Court of Justice 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.

Mr. Rovine has written widely and made many presentations on international arbitration and international law.

* * *

John J. Barceló III is the William Nelson Cromwell Professor of International and Comparative Law and the Reich Director of the Berger International Legal Studies Program at Cornell Law School in Ithaca, New York. He has been a member of the Cornell Law School faculty for almost 40 years. He holds a J.D. from Tulane Law School and an S.J.D. (research doctorate in law) from Harvard Law School. He was a Fulbright scholar in 1966-1967 at the University of Bonn, Germany. He is co-author of a leading arbitration casebook: *International Commercial Arbitration–A Transnational Perspective* (3d ed. 2006) (with T. Varady and A. von Mehren). He has authored or edited other books and many articles on arbitration, international trade, and international litigation, including *A Global Law of Jurisdiction and Judgments—Lessons From The Hague* (2002) (with K. Clermont) and *Lawyers' Practice and Ideals: A Comparative View* (1999) (with R. Cramton). He is also co-editor (with H. Corbet) and contributing author of a forthcoming volume on *Rethinking the World Trading System*. He is the founder and continuing director of the Cornell-Paris I Summer Institute of International and Comparative Law held annually in Paris during July, where he teaches international commercial arbitration. At Cornell, in addition to international commercial arbitration, he teaches WTO law, EU law, and international business transactions. From 1981 to 1983 he was a consultant on international trade law to the U.S. Department of Commerce. He has experience as an arbitrator and has taught or lectured at leading universities throughout Western and Eastern Europe, and in Asia, including in China, France, Germany, Hungary, Italy, Spain, and the United Kingdom. He is proficient in German and French, and has a basic ability in Spanish.

Jonas Benedictsson is head of the Disputes Group in the Stockholm office and a member of the Steering Committee of Baker & McKenzie's European Disputes Practice Group. He has tried cases in all major courts in Sweden, including the six courts of appeal and the Supreme Court. He has also acted as counsel and advocate in numerous domestic and international arbitrations, and is frequently appointed as arbitrator in commercial disputes, both domestic and international.

Mr. Benedictsson has been lead counsel and advocate in more than 60 international arbitration cases under various institutional bodies such as the ICC, the Zurich Chamber of Commerce, the Geneva Chamber of Commerce, the Hong Kong International Arbitration Center, and the Stockholm Chamber of Commerce. He has acted as lead counsel and advocate in *ad hoc* arbitrations in Sweden, Denmark, Finland, Germany, Switzerland, and Austria. He has also acted as co-counsel in a number of arbitration cases in various other parts of the world. In his capacity as counsel and advocate he has acted in and rendered advice on arbitral disputes arising out of or concerning matters pertaining to more than 20 different countries, including Kazakhstan, Azerbaijan, Turkmenistan, the Ukraine, Russia, PRC, Turkey, Canada, United States, and Italy.

Mr. Benedictsson is the contributing author for Sweden in Sweet & Maxwell's publication, *The Tracing of Assets*. He has been the editor of numerous in-house publications such as *Arbitration in Sweden, International Commercial Arbitration Directory,* and *Litigation in Europe*. He was the contributing editor for Sweden to the periodical international arbitration Web publication *Arbitration by International Law Offices* in cooperation with the International Bar Association and contributing author to the Juris Publishing book *International Arbitration Checklist* and to the *Stockholm Arbitration Report* issued by the Arbitration Institute of the Stockholm Chamber of Commerce.

Mr. Benedictsson is a frequent speaker at various seminars around the world on litigation and arbitration matters.

Daina Bray is an associate in the Dispute Resolution Group of Freshfields Bruckhaus Deringer LLP and is based in the firm's New York office. She has assisted in the representation of clients in international arbitrations under the ICC, ICSID, and LCIA rules, and with regard to issues of public international law and foreign investment. Prior to joining Freshfields in 2006, Daina worked in the Litigation Department of White & Case LLP in New York, concentrating on the litigation and arbitration of international commercial law matters. She has also been involved in the representation of *pro bono* clients in immigration, asylum, and constitutional matters.

Daina received her JD in 2004 from Stanford Law School and graduated with distinction and highest honors from the University of North Carolina at Chapel Hill in 1998. While at Stanford, Daina received the Carl

Mason Franklin Prize in International Law and served as the Senior Publishing Editor of the *Stanford Journal of International Law*.

Lorraine M. Brennan is Senior Vice President of The International Institute for Conflict Prevention and Resolution (CPR Institute). She had been a partner in the New York office of Kilpatrick Stockton, LLP, a full-service international law firm based in Atlanta, Georgia. She specialized there in international arbitration and dispute resolution and was the Director of the firm's International Arbitration Group. Prior to her tenure at Kilpatrick, Ms. Brennan served as Director of Arbitration and ADR, North America, ICC International Court of Arbitration, wherein she acted as the American advisor to the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris, France, advising North American attorneys and companies on all phases of ICC arbitration, including: negotiation of arbitration clauses, requests for arbitration, procedural issues and enforcement of arbitration awards. She frequently appears as a speaker/panelist at international arbitration and dispute resolution conferences and seminars and is one of eight U.S. members of the NAFTA 2022 Advisory Committee on Private Commercial Disputes. From 1997-1999, Ms. Brennan served as the Director of Arbitration and Intellectual Property and Legal Counsel at the USCIB, the U.S. affiliate of the ICC. In her role as Director of Intellectual Property, she assisted in formulating and implementing U.S. policy with respect to intellectual property issues and advised U.S. companies on the latest developments in the intellectual property rights field. She is an adjunct Professor of Law at Cornell Law School in Ithaca, New York (Spring and Fall 2005 and Fall 2006 and 2007), teaching International Business Transactions, and an adjunct Professor of Law at Georgetown University Law Center (Spring 2006 and Spring 2007), teaching International Business Transactions and Dispute Resolution and International Commercial Arbitration (Spring 2008). She was a Visiting Professor at Shantou University in Shantou, China in May 2006 and July 2007, and May 2008, teaching an intensive International Business Transactions course.

Before joining the USCIB in 1997, Ms. Brennan served as Senior Law Clerk to the Honorable Irving Ben Cooper in the United States District Court for the Southern District of New York and was a litigation associate at Milbank Tweed Hadley and McCloy in New York City, where part of her practice involved international arbitration. She also worked as a litigation associate at Choate Hall and Stewart in Boston.

Ms. Brennan received her Bachelor of Arts degree in French Literature from Cornell University and a Juris Doctor from Suffolk University Law School. She is a 1997 graduate of the Fletcher School of Law and Diplomacy, where she received a Masters of Arts in Law and Diplomacy (MALD) with a concentration in international economic law. She is also the recipient of a Diplôme d'Études Supérieures from the Institut Universitaire

des Hautes Études Internationales in Geneva, Switzerland. Her bar admissions include the Massachusetts State Bar, the New York Bar, the Southern and Eastern Districts of New York and the District of Massachusetts Bar. She is fluent in French and proficient in Spanish.

Ms. Brennan is a Member of the Executive Board of the American Branch of the International Law Association, Chair of the Women's Interest Network and Co-Chair of the Commercial Dispute Resolution Committee of the Section of International Law of the ABA as well as a member of the Diversity Task Force of that Section, a former Co-Chair of the International Litigation Committee of the ABA Litigation Section, a member of the American Society of International Law, a member of both the International Commercial Disputes Committee of the Association of the Bar of the City of New York and the Alternative Dispute Resolution Committee, a member of the Advisory Board of the Institute for Transnational Arbitration, the International Bar Association, and a fellow of the American Bar Foundation and the Center for International Legal Studies. She was a co-chair of the ILA International Law Weekend (2004, 2006) and was a member of the ILEX Steering Committee. She is the author of ''High Court Declines to Address Arbitrator Bias Standard,'' *New York Law Journal,* October 1, 2007; the co-author of ''Negotiating the Maze of IP Protection,'' *National Law Journal,* April 9, 2007; ''The Ten Most Frequently Asked Questions about ICC Arbitration,'' 19(1) *International Litigation Quarterly* 30-31; and co-author of ''The Practice of Law in the EEC by New York Litigators after 1992,'' 4(2) *International Law Practicum.* 38 (Autumn 1991), The International Law and Practice Section of the New York Bar Association.

Judge Charles N. Brower's 45-year career in the law has combined extensive practice at the bar with distinguished public service, both national and international, concentrating during more than 25 years in the fields of public international law and international dispute resolution.

Following eight years with the global law firm White & Case LLP in New York City (1961-1969), acting both as a commercial trial and appellate attorney and as criminal defense counsel in prominent cases, Judge Brower served for four years (1969-1973) in the United States Department of State in Washington, DC, where as Acting Legal Adviser he was the chief lawyer of the Department and principal international lawyer for the U.S. government. Thereafter, he rejoined White & Case LLP, co-founding its Washington, DC office, where his practice, originally concentrated in the litigation of administrative and public law cases, came to be comprised almost exclusively of substantial international arbitrations.

He has served continuously since 1983 as a Judge of the Iran-United States Claims Tribunal in The Hague, The Netherlands, where he sat full-time from 1984 to 1988. That service was interrupted for some months in 1987 by White House service as Deputy Special Counsellor to President Reagan. While continuing to serve in The Hague on a part-time basis, Judge

Brower resumed partnership in White & Case LLP from 1988 until 2001, when he resumed full-time service as a judge of the Iran-United States Claims Tribunal and also joined 20 Essex Street Chambers in London.

Judge Brower currently also serves as Judge *Ad Hoc* of the Inter-American Court of Human Rights, as a member of the Register of Experts of the United Nations Compensation Commission in Geneva (UNCC), and as a member of the Panels of Conciliators and Arbitrators of the International Centre for Settlement of Investment Disputes (ICSID) (a member of the World Bank Group). He has represented various governments in proceedings before the International Court of Justice (World Court) and is a member of the panels of arbitrators of a number of arbitral institutions around the world. As counsel or arbitrator he has handled cases principally under the rules of the ICC, UNCITRAL, the LCIA, the AAA, the UNCC, ICSID and SCC. These cases have involved a wide variety of commercial disputes as well as issues of public international law, particularly involving the oil and gas sector, major infrastructural projects, expropriations, and other investment disputes, including ones arising under both bilateral and multilateral investment treaties (such as NAFTA and the Energy Charter).

Eileen Carroll, a pioneering lawyer who was a founder of CEDR, has been engaged in a broad range of disputes and is one of a few mediators with experience in co-mediation, particularly relevant in major projects. As deputy Chief Executive of CEDR she has also been involved in designing and brokering the resolution of highly complex multiparty disputes, working with senior members of judiciary and politicians on high-profile projects.

Eileen's career started in the international business of chemicals and industrial consultancy work. She moved to law, and in over 20 years of practice worked with multinational corporations and a number of high-profile clients. Her clients have included multinational and FTSE 100 companies. She has served an international client base in the United States, continental Europe, the Far East, India, and a number of other jurisdictions. Eileen has also founded the Follett Group of leading international women mediators. She is a member of various panels including the advisory panel of the Conflict Analysis Research Centre (CARC) at the University of Kent, the Council of Distinguished Advisors of the Straus Institute for Dispute Resolution at Pepperdine University, California, and the CPR mediator panel in New York.

Eileen is the author of many articles on ADR and has spoken on numerous platforms in Europe and North America. She is the co-author of *International Mediation—The Art of Business Diplomacy* (2d ed. 2006); she was a contributor to Butterworths' *Mediators on Mediation* (2005).

Eileen has been invited to speak at many international events, including Harvard Business School, OECD, and the World Bank.

During her career, Eileen has received many distinctions including: being the first European to receive the New York-based CPR Institute of Dispute Resolution Award for excellence in alternative dispute resolution, 1997. She was a finalist for the European Women of Achievement Award, 2005. She was awarded the Entrepreneurial Award from European Union of Women 2005 in recognition of outstanding contribution to pan-European understanding and progress that provides inspiration to others.

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arbitrator in over 100 proceedings, including numerous international arbitrations under the rules of all of the major provider organizations. He also has considerable experience as a mediator of international commercial disputes. A former Chair of the Committee on Arbitration of the New York City Bar, and a Board Member of the College of Commercial Arbitrators, Mr. Davidson led the committee that drafted JAMS International Arbitration Rules. He sits on the ICC's Task Force on Reducing Time and Cost in International Arbitration and the CEDR Commission on Settlement in International Arbitration. He is listed in various *Who's Who* publications including the *International Who's Who of Commercial Arbitrators,* and in various Marquis *Who's Who* publications, including *Who's Who in the World*, *in America*, and *in American Law*. He has been listed as a New York ''Super Lawyer'' for Alternative Dispute Resolution since 2006. The author of many articles, Mr. Davidson lectures frequently at universities and before Bar groups on international legal topics.

Yves Derains, former Secretary General of the ICC International Court of Arbitration and Director of the Legal Department of the ICC, is member of the Paris Bar and partner of the law office Derains & Associes. He is specialized in international arbitration and is acting both as arbitrator and counsel of parties in arbitration proceedings.

Mr. Derains is the Chairman of the Comité Français de l'Arbitrage and has been the Chairman of the Working Party on the Revision of the ICC Rules of Arbitration in 1998. He is co-chairman of the ICC Task Force on the reduction of costs and time in international arbitration. He is a member of the French Committee on Private International Law since 1979 and a member of the International Council for Commercial Arbitration since 1978. He is Vice President of ICC Institute of World Business Law, a member of the French Section of the International Council for Commercial Arbitration (ICCA), and a member of various other organizations specialized in international arbitration and international business law.

Judith Gill has been a partner of Allen & Overy LLP since 1992 and is head of the firm's International Arbitration Group. She graduated in Jurisprudence from Worcester College, Oxford University, and in 1985 qualified with Allen & Overy as a solicitor. In 1990, she obtained a Diploma in International Commercial Arbitration, with distinction, from Queen Mary College, University of London, and in 1998 qualified as a Solicitor Advocate (Higher Courts—Civil).

Judith specializes in international commercial arbitration, with extensive experience in both institutional and *ad hoc* arbitration including proceedings under LCIA, ICC, ICSID, AAA, and UNCITRAL Rules, as well as many others. She is regularly appointed as an arbitrator and frequently appears as lead advocate in arbitration proceedings. Judith's arbitration practice covers a broad range of subjects including insurance, joint ventures, distributorships, projects, and many other commercial dealings

including acting both for and against government entities. Judith is Chair of the Enforcement of Awards Sub-Committee of the International Bar Association. She is a Director of the LCIA and a member of the LCIA Court. Judith is also a member of the ICC UK Arbitration Group. She is joint author of the last three editions of the leading textbook *Russell on Arbitration* and has published widely on arbitration issues. Judith is also a fellow of the Chartered Institute of Arbitrators and the Institute of Advanced Legal Studies.

Michael Hwang SC was educated at undergraduate and post-graduate levels at Oxford University. He was called to the Singapore Bar in 1968, when he joined Allen & Gledhill, now Singapore's largest law firm. He became a partner in 1972 and retired from the firm at the end of 2002 after serving as Head of its Litigation and Arbitration Department for ten years.

He served as a Judicial Commissioner (Acting High Court Judge) of the Supreme Court from 1991-1992, and was one of the first 12 Senior Counsel of the Supreme Court of Singapore in 1997.

Michael now practices as a Barrister, primarily servicing lawyers as Independent Counsel and Arbitrator. He has received specialist training in both domestic and international arbitration (as well as mediation), and has lectured and written extensively on international arbitration and mediation. He is active in domestic and international disputes (under ICC, CIETAC, UNCITRAL, LCIA, ICSID, AAA, BANI, and SIAC Rules) as counsel and arbitrator as well as mediator. His arbitrations and mediations have involved disputes in Argentina, Bangladesh, China, Egypt, Guam, Indonesia, India, Japan, Korea, Malaysia, Mauritania, Macau, Pakistan, Singapore, Sri Lanka, the Philippines, the Seychelles, Taiwan, Thailand, Tanzania, Turkey, UK, USA, and Vietnam.

In 2005, *The International Who's Who of International Commercial Arbitrators* ranked him as Singapore's leading lawyer for commercial arbitration expertise. In 2006, *Global Arbitration Review* ranked him as No 1 on a list of Asia's 25 leading arbitrators. In 2007, *The Best of the Best 2007* (by Legal Media Group) included him in its list of the top 32 commercial arbitration practitioners in the world based on answers to over 4,000 questionnaires sent to senior practitioners or in-house counsel in over 60 jurisdictions.

Michael is a Vice Chairman of the International Court of Arbitration of the International Chamber of Commerce, a Vice President of the International Council for Commercial Arbitration, a Court Member of the London Court of International Arbitration, and a Council Member of the International Council of Arbitration for Sport. He was formerly a United Nations Compensation Commissioner and a Vice Chair of the International Bar Association's Arbitration Committee.

He also serves as Singapore's Non-Resident Ambassador to Switzerland and is an Adjunct Professor at the National University of Singapore. In 2005, Michael was appointed the Deputy Chief Justice of the Dubai International

Financial Centre. In 2008, Michael assumed office as the President of the Law Society of Singapore.

Sigvard Jarvin has been involved in more than 215 international arbitrations as counsel and arbitrator.

His arbitration experience involves various fields of industry and commerce, including large and complex disputes relating to oil, gas, nuclear and geothermal energy, the performance of industrial plants, reinsurance, construction, telecommunications, and sale of armaments.

He was General Counsel of the ICC International Court of Arbitration in Paris (1982-1987). Sigvard is a member of the Bars of Paris and Sweden, and speaks English, French, German, and Swedish.

Sigvard has published articles and case notes in leading periodicals, including *Arbitration International, Journal du Droit International, Revue de l'Arbitrage*, and *Recht der Internationalen Wirtschaft*. He is cited yearly as one of the best arbitration lawyers in France in Chambers Global and other guides.

Jon Lang is an independent commercial mediator. In May 2005, after almost 20 years in private practice, the last six as a partner in the disputes group of White & Case in London, Jon set up his own mediation practice.

Jon has acted regularly as a mediator for a number of years and is recommended by both the Chambers and Partners and Legal 500 guides to the legal profession.

Jon is CEDR accredited and mediates in a broad range of sectors. He is usually appointed directly by solicitors but also accepts appointments through service providers such as CEDR, the ADR Group, WIPO (World Intellectual Property Organisation), and the Sports Dispute Resolution Panel. He is also appointed by trade bodies, insurers, in-house counsel, and finance directors.

Jon has acted as an ''expert'' in mediation and regularly teaches on mediation training programs. He is a panel member of the United Kingdom's Court of Appeal mediation scheme, Vice Chair of the Mediation Committee of the International Bar Association, and a member of CPR's Panel of Distinguished Neutrals. Jon is the author of the book, *A Practical Guide to Mediation in Intellectual Property, Technology & Related Disputes* (2006).

Barton Legum, Counsel in the Paris office of Debevoise & Plimpton LLP, is a member of the firm's Litigation Department. His practice focuses on international arbitration and litigation. He has argued cases before numerous international arbitration tribunals, the International Court of Justice, and state and federal trial and appeals courts in the United States. Recently, he has served as counsel for governments and companies in arbitrations under investment treaties and a joint venture agreement; represented a U.S. company in an informal inquiry by a law enforcement agency into allegations of bribery by a European subsidiary; and provided advice on a range of international litigation matters.

From 2000 to 2004, Mr. Legum served as Chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, United States Department of State. In that capacity, he acted as lead counsel for the U.S. government in defending over $2 billion in claims submitted to arbitration under the investment chapter of the North American Free Trade Agreement. The United States won every case decided under Mr. Legum's tenure.

Mr. Legum is a member of the Council and the Administration Committee of the American Bar Association's Section of International Law. He is the Section's Programs Officer and Chair of the Programs Committee. He served as Chair of the Section's Disputes Division from 2004-2006 and as Co-Chair of the Section's International Litigation Committee from 1999 to 2003.

Mr. Legum is the editor of *International Litigation Strategies and Practice* (2005), a book published by the American Bar Association. He often writes on international dispute resolution topics. His recent publications include ''Defining Investment and Investor: Who Is Entitled to Claim?,'' 22 *Arbitration International* (2006); ''The Contribution of Investment Treaty Arbitration to International Commercial Arbitration,'' 60 *Dispute Resolution Journal* 70 (2005); ''Lessons Learned from the NAFTA: The New Generation of US Investment Treaty Arbitration Provisions,'' 19 *ICSID Rev.—Foreign Investment Law Journal* 344 (2004); ''Trends and Challenges in Investor-State Arbitration,'' 19 *Arbitration International* 143 (2003); and ''The Innovation of Investor-State Arbitration under NAFTA,'' 43 *Harvard Journal of International Law* 531 (2002). Mr. Legum is a frequent speaker at conferences on international arbitration and litigation.

Julian Lew is regularly appointed as an arbitrator, co-arbitrator, sole arbitrator, and chairman of tribunals in various kinds of arbitrations. These arbitrations include proceedings under the ICC, LCIA, ICSID, AAA, Stockholm Institute, and UNCITRAL Rules. Numerous arbitrations have arisen under BITs, the Energy Charter Treaty, and other international conventions. The subject matter of these arbitrations is wide-ranging and includes: international investment disputes; contracts for exploration and mining of natural resources; energy generation, supply, and development arrangements; international commercial transactions affecting distribution and agency contracts, joint ventures, and shareholder agreements; anti-trust, pharmaceutical, telecommunications, and other intellectual property licensing arrangements; mergers and acquisitions, buy-outs, and earn-outs; construction, engineering, and infrastructure projects; international trade and project finance. Many of these cases have involved sovereign states, state entities, major multinational companies, and other entities involved in international business transactions. Mr. Lew has also advised and represented parties in international arbitrations in London and many other countries around the world.

Mr. Lew is also Professor and Head of the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London. He has written extensively and lectured on all aspects of international commercial arbitration including most recently: *Comparative International Commercial Arbitration* (2003) (with two co-authors) and *Applicable Law in International Commercial Arbitration* (1978). He is fluent in English and French.

Justice Richard M. Mosk graduated Stanford University and Harvard Law School. He served as a member of the staff of the President's Commission on the Assassination of President Kennedy (Warren Commission) and as a law clerk to the California Supreme Court. He became a litigating partner of a large Los Angeles law firm and served as a special Federal Deputy Public Defender. He has argued cases in the California Supreme Court and United States Supreme Court. He served as a member of the Christopher Commission investigating the Los Angeles Police Department. He served twice as a judge on the Iran-United States Claims Tribunal and was a member of a number of international arbitration panels. He was also a consultant to a government claimant before the United Nations Compensation Commission. He was chairman of the Motion Picture Association Classification and Rating Administration. Justice Mosk was appointed the the California Court of Appeal and has been reelected twice. He has lectured at many law schools in the United States and abroad and has given a course at The Hague Academy of International Law. He has published many articles in law journals and other periodicals.

Michael Ottolenghi is currently law clerk to the Hon. Charles N. Brower at the Iran-United States Claims Tribunal in The Hague. He assists Judge Brower and the other American arbitrators with preparations for hearings and deliberations at the tribunal, which is currently addressing disputes between the governments of Iran and the United States involving both private and public international law. He also works on matters concerning relations between the tribunal and the Dutch government.

In addition to his work for the tribunal, he serves as Administrative Secretary to two ICC arbitrations chaired by Judge Brower and assists Judge Brower in certain ICSID and other investor-State arbitrations.

Following his time at the tribunal, he is scheduled to return to White & Case LLP as an associate in the International Arbitration and Litigation Groups in New York.

Antonio R. Parra is a Consultant with the Legal Vice Presidency of the World Bank. He is also Secretary General of the International Council for Commercial Arbitration and Visiting Professor, Faculty of Laws, University College London. From 1999 to 2005, he served as the first Deputy Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) and from 1990 to 1999 he was Legal Adviser, ICSID. His earlier positions include Senior Counsel, ICSID; Senior Counsel, World Bank;

Counsel, World Bank; and Assistant Legal Counsel, OPEC Fund for International Development. At the World Bank and ICSID, Mr. Parra was a member of the staff teams that worked on the establishment of the Multilateral Investment Guarantee Agency and the preparation of the World Bank Guidelines on the Treatment of Foreign Direct Investment. He was Managing Editor of the *ICSID Review—Foreign Investment Law Journal* from 1987 to 2003 and Editor-in-Chief from 2004 to 2007. He is an Editorial Board member of *The Law and Practice of International Courts and Tribunals* and a Consultative Member of the Investment Treaty Forum at the British Institute of International and Comparative Law.

Lucy Reed is the senior partner in Freshfields Bruckhaus Deringer's Dispute Resolution Group in the New York office. A specialist in international commercial arbitration and particularly in investment treaty disputes, she advises private and public clients and serves as arbitrator in arbitrations under the AAA, ICC, ICSID, LCIA, UNCITRAL, and other rules. Lucy is an arbitrator on the Eritrea-Ethiopia Claims Commission and served as a co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (the Holocaust tribunal). She is co-author of the *Guide to ICSID Arbitration* and *The Freshfields Guide to Arbitration and ADR* (both published by Kluwer), and she is a frequent writer and speaker on international arbitration. Lucy is one of five attorneys nationwide to be named a tier one international arbitration practitioner by Chambers USA (2006).

Lucy gave private international law lectures at The Hague Academy of International Law in 2001 and, on the public international law front, serves as President of the American Society of International Law. She was the first general counsel of the Korean Peninsula Energy Development Organization and, while with the U.S. State Department, the U.S. agent to the Iran-United States Claims Tribunal and the deputy assistant legal adviser for international claims and investment disputes. She received her BA *magna cum laude* from Brown University in 1974 and her JD from the University of Chicago Law School in 1977, where she was a member of the Law Review.

Kathleen M. Scanlon is Special Counsel at Heller Ehrman LLP in NY, NY. She works in the firm's International Arbitration and ADR practice area and is a member of the Complex Litigation and Insurance Recovery Practice Groups. She is a former Senior Vice President of the International Institute for Conflict Prevention and Resolution (CPR) and former director of the CPR Public Policy Projects. Ms. Scanlon is also an Adjunct Associate Law Professor at Fordham Law School and teaches courses in ADR Ethics and International Arbitration.

Ms. Scanlon received her A.B. in Economics from Brown University in 1981; she received her J.D. from Fordham University School of Law in 1986 where she served as the Associate Editor for the *Fordham Law Review*. After graduating from law school, Ms. Scanlon clerked one year for the Honorable Louis L. Stanton in the U.S. District Court, Southern District of

New York. Ms. Scanlon currently serves on the Panel of Mediators for the Southern District of New York.

Ms. Scanlon is very active in writing articles and publications relating to international arbitration and alternative dispute resolution. Recent publications include: *Drafter's Deskbook for Dispute Resolution Clauses*, New York, CPR Institute; ''Planning for Commercial Dispute Resolution in Mainland China,'' (with Joseph T. McLaughlin and Catherine X. Pan), 16(1) *American Review of International Arbitration* (2005''; ''Back to *Buckeye*: Clarifying an Arbitrator's Jurisdiction,'' 24(9) *Alternatives* (Oct. 2006); ''An Untapped Dispute Resolution Option,'' 32(4) *China Business Review* (July 8, 2005); ''A Master's Checklist for Drafting International Agreement that Use Alternative Dispute Resolution,'' 22(9)*Alternatives* (Oct. 2004); ''A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate 'Path','' 17(379) *Ohio State Journal on Dispute Resolution* (2002).

Yuval Shany is the Hersch Lauterpacht Chair in International Law at the Law Faculty of the Hebrew University of Jerusalem. He also serves currently as the academic director of the Minerva Center for Human Rights at the Hebrew University, a Director in the Project on International Courts and Tribunals (PICT), and a member of the steering committee of the DOMAC project (assessing the impact of international courts on domestic criminal procedures in mass atrocity cases).

Mr. Shany has degrees in law from the Hebrew University (LL.B., 1995 *cum laude*), New York University (LL.M., 1997) and the University of London (Ph.D., 2001), and he has published a large number of books and articles on international courts and arbitration tribunals, including, *inter alia*, on the competing jurisdictions of international courts, the jurisdictional relations between national and international courts, recognition and enforcement of foreign arbitral awards, the margin of appreciation doctrine, reconciling competing investment claims, consolidation of arbitration proceedings, and judicial ethics. In addition, Mr. Shany has published extensively on other international law issues such as international human rights and international humanitarian law.

Professor Shany has taught in a number of law schools in Israel and has been in recent years a research fellow in Harvard and Amsterdam University and a visiting professor at the Georgetown University Law Center. He is scheduled to teach international law courses in the upcoming academic years in Michigan University Law School, Columbia University Law School, and the Faculty of Law of the University of Sydney.

Fern M. Smith is a retired U.S. District Judge, where she served for almost 17 years. During that time, she spent four years as Director of the Federal Judicial Center, in Washington, DC, which is the primary teaching and research arm of the U.S. Federal Courts. While there, she was one of the primary editors of the *Manual on Complex Litigation 4th.* Judge Smith has spent extensive time working with foreign judiciaries to assist them in

establishing or strengthening their case management and ADR programs, and has a strong interest in international arbitration and mediation. Since retiring from office, Judge Smith has been a full-time arbitrator and mediator, associated with JAMS The Resource Center, where she specializes in various types of complex commercial litigation, including Intellectual Property and Pharmaceutical cases; she also consults as a neutral evaluator.

Brigitte Stern is Professor of International Law at the University of Paris I, Panthéon-Sorbonne, and for eight years was Professor at the Graduate Institute of International Studies in Geneva. She has been invited as a visiting Professor at many universities.

She is also an expert on international organizations and governments. She was a member of the legal team of the Bosnian government in the Genocide case against Yugoslavia before the International Court of Justice and works as a counsel in several arbitrations; as well, she is an international arbitrator (ICSID, ICC, UNCITRAL, NAFTA, Energy Charter Treaty). For seven years, until October 2005, she was the President of the French Commission for the Elimination of Landmines and is presently a judge of the United Nations Administrative Tribunal (UNAT).

She has published many books, among others, Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973, Brigitte Stern, *20 ans de jurisprudence de la Cour internationale de Justice. 1975-1995* (1998), ''La succession d'Etats,'' Lecture at the Hague Academy of International Law, 262 *RCADI* (2000), as well as articles in the *AFDI*, *RGDIP*, *AJIL*, and other journals. She is the co-editor of a series on WTO case law, from which four titles have been published: Brigitte Stern and Hélène Ruiz Fabri eds., *La jurisprudence de l'OMC/The Case Law of the WTO; 1996-1997* (2004); 1998-I (2005); *1998-II* (2006); 1999-I (2006).

Mercedes Tarrazón is the founder of Dispute Management, SL, a Barcelona-based law firm specialized in international business advice and dispute resolution. As a lawyer, a significant percentage of her practice involves counseling clients on various matters involving Europe and Latin America.

She is the member for Spain at the ICC International Court of Arbitration, Vice President of the Inter-American Commercial Arbitration Commission, and a member of the Boards of Management of the Chartered Institute of Arbitrators and of the Spanish Club of Arbitration.

An experienced arbitrator and accredited mediator much involved in Spanish and Latin American domestic and international arbitration and mediation, Mercedes is thoroughly committed to the development and strengthening of ADR: she is one of the experts members of the working group that assisted the European Commission's Directorate General for Justice and Home Affairs in preparing a European Code of Conduct for Mediators; she is also a member of the CPR European Advisory Committee

and founding member of the *Groupement Européen de Magistrats pour la Médiation.*

As Consul of Barcelona's *Consolat de Mar* (ADR Center), in 2000, Mercedes provided Spain with the first set of institutional business mediation rules.

Norris Yang, former Chairman of the Hong Kong Mediation Council (a Division of the Hong Kong International Arbitration Centre) practices international commercial law with Messrs. Boughton Peterson Yang Anderson in Hong Kong. He obtained his B.Sc. from the University of Toronto and his LLB from the University of Windsor. He is admitted as a Solicitor of Hong Kong, Singapore, England, and Wales, as well as a Barrister and Solicitor of New South Wales, Australia and Ontario, Canada (where he was first admitted in 1980). He is an Attesting Officer appointed by the Ministry of Justice of the People's Republic of China. He is an Accredited Mediator (HKIAC) and a member of the Global/International Panel of Distinguished Neutrals of the CPR Institute (International Institute for Conflict Prevention & Resolution).

Mr. Yang is the Executive Director of ADR Chambers (HK) Limited, which provides negotiation and dispute resolution services to governments, industries, professionals, and lay clients. He has trained and lectured to thousands of government officials, professionals, and students on arbitration and mediation in China, Hong Kong, and North America. Mr. Yang is very active in promoting ADR in Hong Kong and sits on numerous government and professional committees dealing with ADR and mediation.

With his fluency in English and three Chinese dialects (Mandarin/Putonghua, Cantonese, Shanghainese), Mr. Yang effectively assists clients bridge their cultural and linguistic characteristics to arrive at a more congenial negotiated solution.

List of Abbreviations and Acronyms

AAA	American Arbitration Association
ABA	American Bar Association
ACR	Association for Conflict Resolution
ADR	alternative dispute resolution[1]
AFM	Academy of Family Mediators
ALI	American Law Institute
BIT	bilateral investment treaty
CAFTA-DR	Central America-Dominican Republic-United States Free Trade Agreement
CCOIC	China Chamber of International Commerce
CCPIT	Conciliation Center of the China Council for Promotion and International Trade
CEDR	Centre for Effective Dispute Resolution
CIARB	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CNIAM	Chamber of National and International Arbitration of Milan
CPR	Center for Public Resources
CREnet	Conflict Resolution Education Network
CSCE	Commission on Cooperation and Security in Europe
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EU	European Union

[1] In some instances, ''amicable'' is substituted for ''alternative.''

FAA	Federal Arbitration Act
FIPA	Foreign Investment Protection Agreement
FTAC	Foreign Trade Arbitration Commission
HKIAC	Hong Kong International Arbitration Centre
HKMC	Hong Kong Mediation Council
IAA	Singapore International Arbitration Act
IBA	International Bar Association
ICJ	International Court of Justice
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
ILO	International Labor Organization
JAMS	Judicial Arbitration and Mediation Services
LCIA	London Court of International Arbitration
MEDAL	International Mediation Services Alliance
NAFTA	North American Free Trade Agreement
NAI	Netherlands Arbitration Institute
OECD	Organisation for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
PRI	political risk insurance
SIAC	Singapore International Arbitration Centre
SPIDR	Society for Professionals in Dispute Resolution
TRIMs	Agreement on Trade-Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
USCIB	U.S. Council for International Business,
VIAC	Vienna International Arbitral Centre
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Part I

Investor-State Arbitration

Applicable Law in Investor-State Arbitration

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INTRODUCTION

Investor-State arbitration has seen tremendous growth in the last decade. Most of the cases are administered by the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID) under its constituent Convention[1] or Additional Facility Rules.[2] Established in 1966, ICSID registered cases at the rate of one or two new cases a year in its first 30 years. The rate of growth then quickened greatly, to about one new case a month in the period 1997 to 2002. That rate of growth more than doubled in 2003, and ICSID has since been registering 25 to 30 new cases annually. Altogether, ICSID has registered 231 arbitration cases, of which 111 are pending.[3]

Underlying these developments have been great expansions of world investment flows and an accompanying proliferation of bilateral and multilateral investment treaties since about 1990. There are now an estimated 2,500 bilateral investment treaties (BITs) involving some 170 countries.[4] Most of these treaties provide for the ICSID arbitral settlement

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (the ICSID Convention). The ICSID Convention and the regulations and rules adopted pursuant to it are reprinted in *ICSID Convention, Regulations and Rules*, Doc. ICSID/15 (Apr. 2006) and are also available on the ICSID Web site, http://www.worldbank.org/icsid.

[2] *The Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, as amended effective Apr. 10, 2006* (the Additional Facility Rules) are reprinted in ICSID Additional Facility Rules, Doc. ICSID/11 (Apr. 2006) and posted on the ICSID Web site, http://www.worldbank.org/icsid.

[3] *See Lists of Pending and Concluded Cases,* http://www.worldbank.org/icsid/cases/cases.htm.

[4] *See United Nations Conference on Trade and Development, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking,* UNCTAD/ITE/IIA/2006/5, at xv (2007).

of covered investor-State disputes. Many also, or instead, refer in this context to other forms of arbitration, such as arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[5] Similar provisions may be found in such multilateral treaties as the North American Free Trade Agreement (NAFTA)[6] and the Energy Charter Treaty (ECT).[7] The overwhelming majority of the many new investor-State arbitrations have been initiated on the basis of such treaty arrangements. Thus, 100 of the 111 cases now pending at ICSID were brought to the Centre under BITs, the NAFTA, or the ECT.

It is pleasant to recall, at this conference hosted by Fordham University Law School, that ICSID and the ICSID Convention, which have been so central to these developments, were the creation of a Fordham graduate, Aron Broches. As General Counsel of the World Bank, he proposed the ICSID initiative to the Bank's management and boards; he was the main drafter and negotiator of the ICSID Convention; and he became the first Secretary-General of ICSID.

Broches received his LL.B. from Fordham in 1942. He then joined the staff of the Washington Embassy of his home country, the Netherlands. In 1944, he served as Secretary of the Netherlands Delegation at the Conference at Bretton Woods that led to the establishment of the World Bank and International Monetary Fund. He joined the Bank's Legal Department in 1946, becoming its Director ten years later and General Counsel after another three years. At the Bank, he played a prominent role in laying the legal foundations for the Bank's operations. Approaches that he helped to pioneer for such issues as the governing law of Bank loan agreements have since served the Bank well and have been adopted by other development finance institutions. Also innovative were the approaches that Broches devised for the ICSID Convention in regard to the law applicable to the merits of the dispute.[8]

This paper discusses this aspect of arbitration under the ICSID Convention, hoping to show how well Broches's approaches have stood the test of time and shown themselves adaptable to the great changes we have seen in investor-State arbitration.

[5] United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules,* adopted Apr. 28, 1976, U.N. Doc. A/3/17 (1976).

[6] North American Free Trade Agreement, Dec. 8-14, 1992, 32 I.L.M. 289 (1993).

[7] Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 (1995).

[8] The varied interests and achievements of Aron Broches are well reflected in the invaluable collection of his writings: A. Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law*, with a foreword by S. Schwebel (1995).

ARTICLE 42(1) OF THE ICSID CONVENTION

The principal provisions of the Convention on applicable law are in Article 42(1). It consists of two sentences. The first gives the parties full autonomy in regard to the selection of the law applicable to the merits of their dispute. It directs an arbitral tribunal constituted under the Convention to decide the dispute ''in accordance with such rules of law as may be agreed by the parties.'' The formula ''rules of law'' rather than ''the law'' applicable to the merits has since also been adopted for such other instruments as the UNCITRAL Model Law on International Commercial Arbitration.[9] The formula makes it clear that the parties may agree not only that their tribunal will apply a domestic law or international law, but also, among other possibilities, combinations of domestic and international law rules. There is no requirement that the parties' agreement on applicable law be express. As was said during the drafting of the Convention, a tribunal may also be bound by ''an implicit agreement which could be deduced from the facts and circumstances of the relationship between the parties.''[10]

In the absence of party agreement on applicable law, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law, for example, provide that the arbitral tribunal should apply the law or rules of law determined by the conflict of laws rules the tribunal considers applicable.[11] The second sentence of Article 42(1) of the ICSID Convention requires an ICSID arbitral tribunal, in the absence of party agreement on applicable law, to apply the law of the ''State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'' As regards the applicable domestic law, this provision may in practical terms differ little from its UNCITRAL counterparts. In the case of a typical foreign investment—a natural resources concession contract, for instance—normal conflict of laws analysis will usually point to the application of the substantive law of the host State of the investment. The reference, in the second sentence of Article 42(1), to the conflict of laws rules of the host State, makes possible the application of the substantive law of another

[9] *See* United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration,* adopted June 21, 1985, U.N. Doc. A/40/17, at art. 28(1) (1985).

[10] ICSID, 2 *Documents Concerning the Origin and Formulation of the Convention* 570 (1968) [hereinafter *History of the Convention*]. For an implicit agreement to be found, however, its substance must be clear. The point is discussed in *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, Award of Feb. 17, 2000, 5 *ICSID Rep.* 153, 170 (2002).

[11] *See* UNCITRAL Arbitration Rules, *supra* note 5, at art. 33(1); *UNCITRAL Model Law on International Commercial Arbitration, supra* note 9, at art. 28(1).

country when that would be appropriate—as might, for example, be the case when the investment takes the form of a commercial loan.

The main distinguishing feature of the provision of the second sentence of Article 42(1) lies in its reference to international law. As the provision says, the tribunal is, in the absence of party agreement on the matter, bound to apply the pertinent domestic law ''and such rules of international law as may be applicable.'' The drafters of the ICSID Convention envisaged, among other possibilities, that, in the event of a gap in the applicable domestic law, arbitrators might, under this provision, turn to international law to fill the gap.[12] More importantly, the provision was seen as authorizing the arbitrators, in their application of international law, to set aside the applicable domestic law when it, or an action taken under it, violated international law.[13] The first *ad hoc* committees established under the annulment provisions of Article 52 of the Convention, and several subsequent arbitral tribunals, endorsed the view that international law had, under the provision, these supplemental and corrective functions in relation to host State law. Some of the decisions seemed to suggest that these were the only roles of international law under the provision: the tribunal could apply international law only to the extent necessary to fill gaps in host State law or to correct inconsistencies between it and international law. The view was encapsulated in the statement, in the 1986 decision of the *ad hoc* committee in *Amco Asia Corp. v. Indonesia*, that the provision of the second sentence of Article 42(1) ''authorizes an ICSID tribunal to apply rules of international law only to fill up *lacunae* in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.''[14] However, it is important to remember that almost all of these earlier cases concerned what are now commonly called contract claims; none was brought under an investment treaty in respect of alleged violations of the substantive protections of the treaty.

[12] *See History of the Convention, supra* note 10, at 803.

[13] *See id.* at 570, 580, 984-85. As demonstrated by Emmanuel Gaillard and Yas Banifatemi, the drafters of the Convention did not rule out other roles for international law under the provision. Emmanuel Gaillard & Yas Banifatemi, ''The Meaning of 'and' in Article 42(1), Second Sentence of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process,'' 18 *ICSID Rev.—Foreign Inv. L.J.* 375, 383-88 (2003).

[14] Amco Asia Corp. v. Republic of Indonesia, *Ad Hoc* Committee Decision of May 16, 1986, 1 *ICSID Rep.* 509, 515 (1993). *See also* Kloeckner Industrie-Anlagen GmbH v. United Republic of Cameroon, *Ad Hoc* Committee Decision of May 3, 1985, 2 *ICSID Rep.* 95, 122 (1994); Amco Asia Corp. v. Republic of Indonesia, Award of May 31, 1990, 1 *ICSID Rep.* 569, 580 (1993); Liberian Eastern Timber Corp. v. Republic of Liberia, Award of Mar. 31, 1986, 2 *ICSID Rep.* 343, 358-59 (1994).

Nowadays, almost all of the ICSID Convention cases that are being initiated concern such treaty claims. The tribunals have, in these newer cases, all applied to the merits of the disputes the provisions of the underlying treaties, as well as general international law rules. They have at the same time generally also acknowledged the relevance, in varying degrees, of the law of the host State concerned. This broadly similar outcome has been reached in different ways under Article 42(1) of the ICSID Convention. This may be seen from an examination of the 20 published awards on the merits thus far rendered in ICSID Convention arbitrations initiated pursuant to investment treaties.[15] In all of these, as it happens, the underlying investment treaty was a BIT.

THE BIT CASES

The BIT concerned, in five of the 20 cases, specifically provided that the BIT, general international law principles and host State law should be applied by tribunals constituted in investor-State proceedings under the

[15] These 20 published awards on the merits rendered in ICSID Convention investment treaty arbitrations as of June 19, 2007, are (in chronological order): Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka, Award of June 27, 1990, 4 *ICSID Rep.* 250 (1997); American Manufacturing and Trading Inc. v. Republic of Zaire, Award of Feb. 21, 1997, 5 *ICSID Rep.* 14 (2002); Fedax NV v. Republic of Venezuela, 5 *ICSID Rep.* 200 (2002); Maffezini v. Kingdom of Spain, Award of Nov. 13, 2000, 5 *ICSID Rep.* 419 (2002); Vivendi Universal v. Argentine Republic, Award of Nov. 21, 2000, 5 *ICSID Rep.* 299 (2002); Wena Hotels Ltd. v. Arab Republic of Egypt, Award of Dec. 8, 2000, 6 *ICSID Rep.* 89 (2004); Genin v. Republic of Estonia, Award of June 25, 2001, 6 *ICSID Rep.* 241 (2004); Olguin v. Republilc of Paraguay, Award of July 24, 2001, 6 *ICSID Rep.* 164 (2004); Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt, Award of Apr. 12, 2002, 7 *ICSID Rep.* 178 (2005); Generation Ukraine Inc. v. Ukraine, Award of Sept. 16, 2003, 10 *ICSID Rep.* 240 (2006); AIG Capital Partners Inc. v. Republic of Kazakhstan, Award of Oct. 7, 2003, 11 *ICSID Rep.* 7 (2007); MTD Equity Sdn. Bhd. v. Republic of Chile, Award of May 25, 2004, 12 *ICSID Rep.* 6 (2007); CMS Gas Transmission Co. v. Argentine Republic, Award of May 12, 2005, http://www.worldbank.org/icsid/cases/awards.htm; Noble Ventures v. Romania, Award of Oct. 12, 2005, http://www.investmentclaims.com/oal.htm/; Azurix Corp. v. Argentine Republic, Award of July 14, 2006, http://www.worldbank.org/icsid/cases/awards.htm; ADC Affiliate Ltd. v. Republic of Hungary, Award of Oct. 2, 2006, http://www.worldbank.org/icsid/awards.htm; Champion Trading Co. v. Arab Republic of Egypt, Award of Oct. 27, 2006, http://www.investmentclaims.com/oal.html/; Siemens AG v. Argentine Republic, Award of Feb. 6, 2007, http://www.investmentclaims.com/oal.htm/; PSEG Global Inc. v. Republic of Turkey, Award of Jan. 19, 2007, http://www.worldbank.org/icsid/cases/awards.htm; Enron v. Argentine Republic, Award of May 22, 2007, http://www.investmentclaims.com/oal.htm/.

BIT.[16] In these cases, there obviously was party agreement on applicable rules of law, in terms of the first sentence of Article 42(1) of the ICSID Convention, the agreement being formed by the investor's acceptance of the State's offer in the BIT to arbitrate on that basis. In one of these five cases, *Siemens AG v. Argentine Republic,* the tribunal in its award discussed the role of international law under the BIT provision on applicable law. The tribunal rejected the notion that international law was referred to in the provision merely ''as a corrective to municipal law or as a filler of *lacunae* in that law.''[17] It went on to point out that, as the case concerned alleged breaches on the part of Argentina of its treaty commitments, ''the Tribunal's inquiry is governed by the [ICSID] Convention, by the [BIT] and by applicable international law. Argentina's domestic law constitutes evidence of the measures taken by Argentina and of Argentina's conduct in relation to its commitments under the [BIT].''[18]

Unlike the BITs in *Siemens* and the four other cases, most BITs, including those involved in the remaining 15 cases under consideration, lack specific provisions on applicable law. However, as indicated earlier, in all of the cases the claims were made in respect of alleged violations by the respective host States of their obligations under the BITs. The investor-State arbitration provisions of the BITs obviously authorize this type of claim; they typically do so by stating that they cover disputes over the obligations of the State under the BIT or disputes relating to alleged breaches of rights created or conferred by the BIT in respect of investments. Inevitably it would seem the claims will fail to be decided in accordance with the provisions of the BIT and of international law as the BIT's governing law. At the same time, the BIT will normally also direct a tribunal to host State law on certain questions, for example on covered investments, referred to in many BITs as those made in accordance with the law of the host State. Considerations such as these could lead a tribunal charged with deciding a BIT claim to find party agreement, on the application of the BIT and international law supplemented by host State law, no less readily than in the cases where the BIT contains a specific provision to that effect.

This approach was followed by the tribunals in at least three of the further cases under consideration, most clearly in *ADC Affiliate Ltd. v. Republic of Hungary.* The investor-State arbitration provision of the BIT in that case applied to ''[a]ny dispute between a Contracting Party and the investor of another Contracting Party concerning expropriation of an

[16] These were the BITs in *Fedax NV v. Republic of Venezuela, Maffezini v. Kingdom of Spain, Vivendi Universal v. Argentine Republic, Olguin v. Republic of Paraguay,* and *Siemens AG v. Argentine Republic* (references *supra* note 15).

[17] Siemens AG v. Argentine Republic, *supra* note 15, at ¶ 77.

[18] *Id.* at ¶ 78.

investment.''[19] In its award, the tribunal held that by consenting to arbitration under the investor-State arbitration provision with respect to such a dispute, the disputing parties ''also consented to the applicability of the provisions of the [BIT] . . . that consent falls under the first sentence of Article 42(1) of the ICSID Convention. . . . The consent must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the [BIT].''[20] The tribunal added that a sole exception to this was in a provision of the BIT to the effect that compensation for any expropriation could be calculated in accordance with the law of the expropriating State. ''As the reference to domestic law is used for this one isolated subject matter only,'' the tribunal said, ''it must be presumed that all other matters are governed by the provisions of the [BIT] itself which in turn is governed by international law.''[21]

Other cases in which the tribunals appear to have taken such an approach include *MTD Equity Sdn. Bhd. v. Republic of Chile* and *Azurix Corp. v. Argentine Republic.* In the *MTD* case, the tribunal simply declared in its award that ''[t]his being a dispute under a BIT, the parties have agreed that the merits of the dispute will be decided in accordance with international law.''[22] The award in the *Azurix* case states that as the claims had been advanced under a BIT, ''the Tribunal's inquiry is governed by the ICSID Convention, by the BIT and by applicable international law,'' with the law of Argentina being ''an element of the inquiry,'' though no more than that ''because of the treaty nature of the claims under consideration.''[23]

In some of the cases, the tribunals have discerned agreements on applicable law from the pleadings made by the parties in the course of the arbitral proceeding. Thus, in *Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka,* the tribunal observed in its award that the parties had agreed in their respective pleadings to the application of the BIT as ''the primary source of the applicable legal rules'' and of

[19] ADC Affiliate Ltd. v. Republic of Hungary, *supra* note 15, at ¶ 290.
[20] *Id.*
[21] *Id.* at ¶ 292.
[22] MTD Equity Sdn. Bhd. v. Republic of Chile, *supra* note 15, at ¶ 86.
[23] Azurix Corp. v. Argentine Republic, *supra* note 15, at ¶ 67. Two other cases that could be included in this further group of cases are *Generation Ukraine Inc. v. Ukraine* and *Champion Trading Co. v. Arab Republic of Egypt.* In both cases, the awards referred to the international law nature of the claims and applied the respective BITs and international law. *See* Generation Ukraine Inc. v. Ukraine, *supra* note 15, at especially ¶ 8.12, and Champion Trading Co. v. Arab Republic of Egypt, *supra* note 15, at especially ¶¶ 39-40. *Cf.* Vivendi Universal v. Argentine Republic, *Ad Hoc* Committee Decision of July 3, 2002, 6 *ICSID Rep.* 340, 365 (2004) (''whether there has been a breach of the BIT'' is a question to ''be determined by reference to its own proper or applicable law . . . [i.e.,] by international law'').

''international or domestic legal relevant rules . . . as a supplementary source.''[24] Similarly, in reaching the conclusion in its award that it would ''apply both Argentine law and international law to the extent pertinent and relevant,'' the tribunal in *Enron Corp. v. Argentine Republic* recalled that the parties had in their pleadings both relied on ''rules of the Argentine legal system'' as well as the BIT, other treaties and customary international law.[25]

In several of the remaining BIT cases considered in this paper, the tribunals found no agreement of the parties as to applicable law. The provision of the second sentence of Article 42(1) of the ICSID Convention was instead invoked in these cases. Thus, for example, in *Genin v. Republic of Estonia,* the tribunal, after citing that provision of the ICSID Convention, referred in its award to the applicability of Estonian law and rules of international law set out in the BIT and ICSID Convention.[26] In *AIG Capital Partners Inc. v. Republic of Kazakhstan,* the tribunal held that the applicable law was that of the host State ''read with and controlled by the provisions contained in the BIT.''[27] The relationship between the applicable domestic law and international law under the provision of the second sentence of Article 42(1) of the ICSID Convention was further considered in the award in another of the remaining BIT cases, *CMS Gas Transmission Co. v. Argentine Republic*. In that award, the tribunal interpreted the provision as allowing the application of both domestic and international law, without one necessarily prevailing over the other.[28] Noting their close interaction and inseparability, the tribunal held that the relevant domestic legal provisions, the BIT, and customary international law were all to be applied to the extent justified.[29] The tribunal added that, under Argentine law, treaty rules prevailed over domestic law rules in the event of a conflict but that, in any event, the tribunal found no such ''collision'' in the instant case.[30]

[24] Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka, *supra* note 15, at ¶¶ 20, 24.

[25] Enron Corp. v. Argentine Republic, *supra* note 15, at ¶¶ 206, 207, 209. The tribunal did not, however, go so far as to state that it had inferred an agreement of the parties as to applicable law, referring also to the interpretation of the provision of the second sentence of the ICSID Convention Article 42(1) in the *ad hoc* committee decision in *Wena Hotels Ltd. v. Egypt*. *See id.* at ¶ 207 and text accompanying *infra* note 31. In another two of the arbitrations, *Noble Ventures v. Romania* and *PSEG Global Inc. v. Republic of Turkey* (references *supra* note 15), the parties evidently argued the cases on the basis of the BIT and international law, and the tribunals decided the disputes on that basis without discussion of choice of law under Article 42(1) of the ICSID Convention.

[26] Genin v. Republic of Estonia, *supra* note 15, at ¶ 350.

[27] AIG Capital Partners Inc. v. Republic of Kazakhstan, *supra* note 15, at ¶ 10.1.4.

[28] CMS Gas Transmission Co. v. Argentine Republic, *supra* note 15, at ¶ 116.

[29] *Id.* at ¶ 117.

[30] *Id.* at ¶¶ 120-21. Two other cases that can be included in this last group of the BIT cases that have so far led to awards on the merits are *Wena Hotels Ltd. v. Arab*

The tribunal in the *CMS* case drew inspiration for this approach from the approach taken by the *ad hoc* committee in the annulment proceeding in *Wena Hotels Ltd. v. Arab Republic of Egypt.* In its decision, that *ad hoc* committee stated that the provision of the second sentence of Article 42(1) of the ICSID Convention ''allowed for both [domestic and international] legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.''[31] In upholding the challenged award's reliance on the BIT as the primary source of the applicable rules in that case, the *ad hoc* committee also emphasized the supremacy of treaty rules over domestic legislation under Egypt's own law.[32]

CONCLUSION

It could be said that in the ICSID Convention BIT cases, little seems to turn on whether the applicable rules of law are seen as being derived from the provision of the first or the provision of the second sentence of Article 42(1). Under either alternative, the result, broadly speaking, has been that the applicable rules of law have been those of the investment treaty and general international law, with host State law rules also having a role.[33]

A possible practical consequence of the distinction is suggested by the award in the *ADC Affiliate* case. As explained earlier, that award found an agreement on applicable law under the first sentence of Article 42(1) of the ICSID Convention. Like many other BITs, the BIT involved in the case offered non-ICSID as well as ICSID Convention arbitration options in its investor-State dispute-settlement provision. The tribunal drew support for its analysis from the fact that all of the offered forms of arbitration appeared to

Republic of Egypt and *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt.* In both of these cases, the tribunals found the provisions of the BIT supplemented by international and domestic law to be applicable on the basis of partial party agreements on applicable law and, for the rest, on the basis of the provision of the second sentence of Article 42(1) of the ICSID Convention. *See* Wena Hotels Ltd. v. Arab Republic of Egypt, *supra* note 15, at 111-12; Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt, *supra* note 15, at 191.

[31] Wena Hotels Ltd. v. Arab Republic of Egypt, *Ad Hoc* Committee Decision of Feb. 5, 2002, 6 *ICSID Rep.* 129, 138 (2004).

[32] *See id.* at ¶ 42.

[33] Thus, in the *MTD* case, the *ad hoc* committee could conclude that ''[w]hether the applicable law here derived from the first or second sentence of Article 42(1) does not matter . . . both [domestic and international] laws were relevant.'' MTD Equity Sdn. Bhd. v. Republic of Chile, *Ad hoc* committee decision of Mar. 21, 2007, http://www.investmentclaims.com/oal.html, at ¶ 72.

be similar in referring to party autonomy in the choice of law. Yet they had at least textually different ''subsidiary conflict of laws rules'' addressing choice of law in the absence of party agreement. ''The application of these subsidiary conflict rules,'' the tribunal observed, could ''give differing results, which in turn may affect the manner in which the [BIT] provisions, in particular the substantive ones, are to be interpreted and applied. It cannot be deemed to have been the intent of the States Parties to the BIT to have agreed to such a potential disparity.''[34]

There might also be fears that, under the interpretation of the *ad hoc* committee in the *Wena Hotels* case, arbitrators might have too much discretion or freedom to choose between the application of domestic or international law. But such fears would seem to be misplaced. The *ad hoc* committee made clear in its decision that the choice would in each case have to be justified, with each law applied in its own ambit. Contract claims, of course, normally belong to a domestic law ambit. In ICSID Convention arbitrations involving such claims, it may therefore be expected that, unless the parties have agreed otherwise, arbitral tribunals would generally continue to apply the applicable domestic law in the first instance, resorting to international law only as needed to supplement or correct the domestic law. There may be cited in this connection the 2003 award of the tribunal constituted under the ICSID Convention to decide the contract claims in *Autopista Concessionada de Venezuela CA v. Bolivarian Republic of Venezuela*. In that award, the tribunal stated that ''[w]hatever the extent of the role that international law plays under Article 42(1) (second sentence), this Tribunal believes that there is no reason in this case, especially considering that it is a contract and not a treaty arbitration, to go beyond the corrective and supplemental functions of international law.''[35]

[34] ADC Affiliate Ltd. v. Republic of Hungary, *supra* note 15, at ¶ 291. The non-ICSID arbitration options offered by the BIT in that case included arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC). Those rules provide that in the absence of party agreement on the rules of law to be applied to the merits of the dispute, the tribunal ''shall apply the rules of law which it determines to be appropriate.'' International Chamber of Commerce Rules of Arbitration in force as from January 1, 1998, ICC Publication 838, at art. 17(1) (2005). It was pointed out in the text accompanying *supra* note 5 that many BITs give covered investors a choice between resorting to arbitration under the UNCITRAL Arbitration Rules and arbitration under the ICSID Convention in the event of disputes with the host State. The ''subsidiary conflict rule'' of the UNCITRAL Arbitration Rules presents an even greater contrast with the provision of the second sentence of Article 42(1) of the ICSID Convention. As indicated in *supra* note 11 and the accompanying text, the former (Article 33(1) of the UNICTRAL Arbitration Rules) provides that, failing ''designation by the parties [of the law applicable to the substance of the dispute], the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.''

[35] Autopista Concessionada de Venezuela CA v. Bolivarian Republic of Venezuela, Award of Sept. 23, 2003, 10 *ICSID Rep.* 314, 336 (2006).

Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?

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OVERVIEW: INDIRECT EXPROPRIATION AND THE FAIR AND EQUITABLE TREATMENT STANDARD

Although we may be witnessing a revival of direct expropriation in parts of Latin America (by instances of what could be referred to as ''old-fashioned expropriation'' or ''expropriation *simpliciter*''),[1] such events are a departure from the recent trend under which States expropriate foreign investment by indirect or regulatory measures.[2] One can argue whether this reflects only the realities of modern complex economies or also a desire by savvy States to minimize their exposure to international liability and protect their reputations by avoiding outright confiscation of foreign investors' assets. (That argument is well beyond the scope of this modest paper.)

Virtually all bilateral investment treaties (BITs) provide protection from indirect or regulatory expropriation by prohibiting expropriation ''indirectly through measures tantamount to expropriation and nationalization.''[3]

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[1] *See, e.g.,* Alliant Emerging Markets, ''Alliant Index Shows Political Risk Up 5% in 2006: 'Old-Fashioned' Expropriation,'' *Alliant News*, Mar. 13, 2007, *available at* http://www.jltusa.net/AEM%20Press%20Release%2003%2013%2007.pdf.

[2] *See, e.g.,* W. Michael Reisman & Robert D. Sloane, ''Indirect Expropriation and Its Valuation in the BIT Generation, 74 *Brit. Y.B. Int'l L.* 115, 149 (2004) (''[S]tates today rarely expropriate foreign investments by formal decree.'').

[3] *Id.* at 118-19 (2004) (quoting United States-Russia BIT, art. III(I)); *see also* Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 100 (1995).

The BITs, however, do not (and could not) define objective standards, leaving it to international arbitral tribunals to wrestle with articulating standards for establishing liability for indirect expropriation. A finding of regulatory or indirect expropriation is bound to be difficult, as it will by definition be fact specific and entail subjective judgment and reasoning.

As illustrated below, some tribunals are holding that a government may only be liable for indirect expropriation if its actions result in a 100 percent loss of value in—and control of—the foreign investment. It seems that such unwillingness to hold States liable for expropriation by indirect measures has, in part, contributed to the growing prominence of the fair and equitable treatment standard contained in many BITs as a distinct basis of liability. As described by one observer, there is

> a broader trend of many investment tribunals to resist findings of expropriation, whether direct or indirect, save in the most extreme circumstances where state action has caused a ''neutralization'' of the investment such that its economic value has effectively been destroyed. . . . [T]he concept of fair and equitable treatment appears to have taken on a life of its own such that it now encompasses a broad range of mistreatment, or failure to accord due process, without requiring the high threshold of interference that is attendant upon any expropriation claim.[4]

The analysis is not always so distinct. The concept of ''fair and equitable treatment'' is no more precise than indirect expropriation. There can be substantial overlap between the methodologies employed by tribunals evaluating indirect expropriation claims and claims for violations of fair and equitable treatment. For example, as discussed below, when dealing with both categories of claims and with more or less explanation, tribunals have looked to the legitimate expectations of investors and have often, but not always, employed similar techniques for the calculation of damages.

This paper does not purport to analyze all the existing jurisprudence on the fair and equitable treatment standard,[5] but instead it focuses on

[4] Stephen Fietta, ''Expropriation and the 'Fair and Equitable' Standard: The Developing Role of Investors' ''Expectations' in International Investment Arbitration,'' 23 *J. Int'l Arb.* 375, 398 (2006).

[5] For a more detailed analysis of fair and equitable treatment clauses, see, for example, Fietta, *supra* note 4; T. Westcott, ''Recent Practice on Fair & Equitable Treatment,'' 8 *J. World Inv. & Trade* 409 (2007); Peter Muchlinski, '' 'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard,'' 55 *Int'l Comp. L.Q.* 527 (2006); Elizabeth Snodgrass, ''Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle,'' 21 *ICSID Rev.—Foreign Inv. L.J.* (2006); Rudolf Dolzer, ''Fair and Equitable Treatment: A Key Standard in Investment Treaties,'' 39 *Int'l Law.* 1 (2005); Christoph Schreuer, ''Fair and Equitable Treatment in Arbitral Practice,'' 6

seven recent investment treaty cases—*CMS, LG&E, Enron, Sempra, Azurix, Saluka,* and *PSEG*—where the claimants have alleged both indirect expropriation and violations of the fair and equitable treatment standard and have succeeded only with respect to the latter claim.[6] These cases therefore provide a framework for considering whether tribunals may be using fair and equitable treatment as a ''second cousin'' for findings of indirect expropriation or whether they are instead evaluating fair and equitable treatment according to an independent standard. Four of the seven cases discussed in this paper relate to actions taken by the Argentine government against companies in the energy sector in the course of its most recent economic crisis, and these cases may be particularly relevant for the remaining 20-plus ICSID cases pending against Argentina.[7]

This paper also briefly refers to decisions under political risk insurance (PRI) policies covering expropriation. In particular, given that PRI policies do not typically cover unfair and inequitable treatment (or other catch-all categories) by a host State towards an investor, it may be that insurers and tribunals assessing PRI claims have to focus more critically on claims of indirect expropriation than do BIT tribunals looking at the same investment dispute scenario. Although decisions related to PRI policies are rarely publicly available, the overlap between fair and equitable treatment, indirect expropriation, investment treaty arbitration, and political risk insurance arbitration is likely to come under increasing focus in coming years.

CMS V. ARGENTINA

In *CMS Gas Transmission Company v. Argentine Republic*, CMS Gas Transmission Company (CMS) brought claims under the Argentina-United States

J. World Inv. & Trade 357 (2005); Stephan W. Schill, ''Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law,'' *IILJ Working Paper* 2006/6 (Global Administrative Law Series), *available at* http://www.iilj.org.

[6] It bears emphasis that some tribunals have found State action to amount both to indirect expropriation and a breach of the fair and equitable treatment clause. *See, e.g.,* Siemens A.G. v. The Argentine Republic, Award, ICSID Case No. ARB/02/8 (Feb. 6, 2007); Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, Award, ICSID Case No. ARB/97/3 (Aug. 20, 2007). Other tribunals have concluded that the relevant State action did not amount to expropriation or unfair or inequitable treatment. *See, e.g.,* Parkerings-Compagniet AS v. Republic of Lithuania, Award, ICSID Case No. ARB/05/8 (Sept. 11, 2007) (the Norway-Lithuania BIT provided for ''equitable and reasonable'' treatment, but the tribunal concluded that this equates to ''fair and equitable treatment,'' ¶ 278); M.C.I Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, Award, ICSID Case No. ARB/03/6 (July 31, 2007).

[7] See list of pending cases at http://worldbank.org/icsid/cases/pending.htm.

BIT for indirect or creeping expropriation and for violation of the fair and equitable treatment standard arising out of measures taken by the Argentine government in response to the Argentine economic crisis that peaked in 2001-2002.[8] CMS alleged that Argentina's measures had negatively impacted its investment in an Argentine gas transportation company, Transportadora de Gas del Norte (TGN).

Although the *CMS* tribunal found that Argentina had not kept commitments made under its own legislation, regulations, and the license that it had granted to TGN, and that the value of CMS's investment in TGN had been drastically reduced as a result, the tribunal decided that Argentina had not expropriated CMS's investment.[9] According to the tribunal, ''[t]he essential question [for determining whether an indirect expropriation took place] is . . . to establish whether the enjoyment of the property has been effectively neutralized.''[10] The tribunal found that, despite the loss of value in CMS's investment, no such neutralization had taken place because CMS retained ''full ownership and control of the investment.''[11]

The tribunal did find a violation of the fair and equitable treatment standard, explaining that the legal guarantees given by Argentina had induced CMS's investment and that the government measures had ''entirely transform[ed] and alter[ed] the legal and business environment under which the investment was decided and made.''[12] In this respect, the tribunal observed that ''fair and equitable treatment is inseparable from stability and predictability.''[13] In reaching this conclusion, the *CMS* tribunal stated that the Preamble in the Argentina-United States BIT ''makes it clear . . . that one principal objective of the protection envisaged is that fair and equitable treatment is desirable 'to maintain a stable framework for investments and maximum effective use of economic resources.' ''[14]

To calculate CMS's damages, the tribunal used a fair market value standard, noting that while such a standard ''figures prominently in respect

[8] CMS Gas Transmission Co. v. Argentine Republic, Award, ICSID Case No. ARB/01/8 (May 12, 2005). Freshfields represents CMS in the ICSID proceedings.

[9] *Id.* at ¶¶ 252, 264.

[10] *Id.* at ¶ 262.

[11] *Id.* at ¶ 263.

[12] *Id.* at ¶¶ 275, 281.

[13] *Id.* at ¶ 276.

[14] *Id.* at ¶ 274. The tribunal also quoted the following key passage from *Tecmed v. Mexico* on the fair and equitable treatment standard: ''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.'' *Id.* at ¶ 279 (quoting Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Award, ICSID Case No. ARB(AF)/00/2, ¶ 154 (May 29, 2003)).

of expropriation,'' it may also be appropriate in the fair and equitable treatment context. In a (in our view) well-reasoned discussion, the *CMS* tribunal found that it was appropriate to use a fair market value calculation for CMS's damages because, among other reasons, CMS had offered to transfer its shares in TGN to Argentina upon payment of an eventual award. In the award, the tribunal afforded Argentina an option to purchase CMS's shares for a small amount.[15] The CMS decision relating to fair and equitable treatment and damages was recently upheld in the annulment phase.[16]

LG&E V. ARGENTINA

In *LG&E Energy Corp. v. Argentine Republic*,[17] LG&E Energy Corp. (LG&E) alleged violations of the indirect expropriation and fair and equitable treatment provisions of the Argentina-United States BIT arising out of measures taken by the Argentine government in response to the same economic crisis at issue in *CMS*. LG&E argued that such measures had reduced the value of its investments in three Argentine gas distribution companies. In its 2006 Decision on Liability, the tribunal denied LG&E's indirect expropriation claim, finding that the measures had not denied LG&E the right to enjoy its investments; the value of the asset base of the investments had rebounded; LG&E had not lost control over its shares in the investments; and the impact of the measures was not permanent.[18]

The *LG&E* tribunal went on to find that Argentina was liable for unfair and inequitable treatment of LG&E. Analyzing the ''stability of the legal and business framework'' and the ''investor's expectations when making its investment in reliance on the protections to be granted by the host State,'' the tribunal found that Argentina had abrogated certain guarantees to the gas distribution companies.[19]

In its July 2007 Award on Damages, the *LG&E* tribunal noted that questions as to the applicable standard and measure of compensation and the method to quantify damages are ''particularly thorny when it comes to defining the standard and measure of compensation applicable for treaty breaches other than expropriation. There are no express provisions in the

[15] CMS Gas Transmission Co. v. Argentine Republic, *supra* note 8, at ¶ 410.

[16] CMS Gas Transmission Co. v. Argentine Republic, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8 (Sept. 25, 2007).

[17] LG&E Energy Corp. v. Argentine Republic, Decision on Liability, ICSID Case No. ARB/021 (Oct. 3, 2006).

[18] *Id.* at ¶¶ 185-200.

[19] *Id.* at ¶¶ 119-139.

Treaty addressing these issues and pre-existing guidance in arbitral jurisprudence is very limited.''[20] The tribunal determined not to base damages on an expropriation-type fair market value analysis, in the particular circumstances of that case, and instead looked at the actual loss suffered by the investor as a result of Argentina's conduct, being the amount of dividends that could have been received but for the adoption of the measures.[21]

ENRON V. ARGENTINA

Another example of a tribunal finding liability for unfair and inequitable treatment but not for indirect expropriation is the May 22, 2007, decision in *Enron Corporation v. Argentine Republic*.[22] Enron Corporation (Enron) had asserted claims against Argentina under the Argentina-United States BIT arising out of Argentine government measures in response to the economic crisis, alleging that the government measures had resulted in a loss in the value of its investment in TGS, the other Argentine gas transportation company.

Enron alleged both direct and indirect expropriation.[23] The tribunal found that there could have been no direct expropriation, because no part of Enron's property rights had been transferred to the State, and that no indirect expropriation had occurred, because Argentina had not substantially deprived Enron of its investment in TGS. In particular, the tribunal noted that Argentina had not taken control of the investment, deprived the company of its property, or interfered in the day-to-day operations of the company.[24]

In making its determination of the fair and equitable treatment standard, the *Enron* tribunal noted that fair and equitable treatment requires that the host State provide a stable framework for the investment and protect the investors' expectations (namely, those expectations that were based on guarantees provided by the State and that the investor had relied upon when making the investment).[25]

Like the *CMS* tribunal, but unlike the *LG&E* tribunal, the *Enron* tribunal used a fair market value standard for determining the compensa-

[20] LG&E Energy Corp. v. Argentine Republic, Award, ICSID Case No. ARB/021, ¶¶ 29-30 (July 25, 2007).

[21] *Id.* at ¶¶ 45, 48, 58.

[22] Enron Corp. v. Argentine Republic, Award, ICSID Case No. ARB/01/3 (May 22, 2007).

[23] *Id.* at ¶¶ 235-236.

[24] *Id.* at ¶¶ 243-246.

[25] *Id.* at ¶¶ 260-268.

tion due to Enron for Argentina's breach of the fair and equitable treatment standard. The *Enron* tribunal explicitly acknowledged the potential for overlap between analyses of indirect expropriation and unfair and inequitable treatment:

> 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.[26]

SEMPRA V. ARGENTINA

Most recently, the ICSID tribunal in *Sempra Energy International v. Argentine Republic* concluded that the claimant had proven a breach of the fair and equitable treatment standard but not indirect expropriation.[27] The claim was also brought under the Argentina-United States BIT, based on the same measures underlying the claims in *CMS, LG&E,* and *Enron.* The *Sempra* tribunal noted that indirect expropriation required substantial deprivation, which could include the following actions:

> depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part.[28]

The *Sempra* tribunal accepted that many of the Argentine measures had ''a very adverse effect on the conduct of the business concerned'' but concluded that a ''finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been

[26] *Id.* ¶ 363.

[27] Sempra Energy International v. Argentine Republic, Award, ICSID Case No. ARB/02/16 (Sept. 28, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8.

[28] *Id.* at ¶ 284 (quoting Pope & Talbot Inc. v. Government of Canada, Interim Award of June 26, 2000, ¶ 100).

virtually annihilated.''[29] After finding that no indirect expropriation had occurred, the *Sempra* tribunal followed the approach of *CMS, LG&E,* and *Enron* in concluding that the fair and equitable treatment standard had been breached. The *Sempra* tribunal discussed the relationship between fair and equitable treatment and indirect expropriation as follows:

> [I]t would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, it ensures that even where there is no clear justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended. Whether this result is achieved by the application of one or several standards is a determination to be made in the light of the facts of each dispute. What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty.
>
> It must also be kept in mind that on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. In case of doubt, however, judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable treatment standard. This also explains why the compensation granted to redress the wrong done might not be too different on either side of the line.[30]

ENRON AND *SEMPRA* POLITICAL RISK INSURANCE CLAIMS FOR EXPROPRIATION

An interesting backdrop to the *Enron* and *Sempra* ICSID proceedings is provided by the parallel claims made by Sempra and Enron under PRI policies, based on essentially the same acts of the Argentine government that gave rise to the ICSID claims. As noted, the ICSID tribunals in *Enron* and *Sempra* held that there had been unfair and inequitable treatment but no expropriation under the Argentina-United States BIT. By contrast, Sempra's and Enron's PRI claims were both accepted on the basis of expropriation (although the *Sempra* PRI tribunal denied coverage on other

[29] *Id.* at ¶ 285.
[30] *Id.* at ¶¶ 300-301.

grounds). There apparently was no ''fair and equitable treatment'' clause in either PRI policy.

The decision of the *Sempra* arbitral tribunal relating to the PRI claim is not publicly available, but it became public knowledge when the decision was upheld by the Southern District of New York in related litigation.[31] Based on this Southern District of New York opinion, it appears that the *Sempra* PRI tribunal accepted that the Argentine government's actions constituted an ''expropriatory act'' under the PRI policy but went on to exclude recovery under, *inter alia*, a devaluation exclusion in the policy.[32] As the original award is not publicly available, the exact wording of the PRI coverage for expropriation is not known.

Enron was more successful in its claims under its PRI policy issued by the Overseas Private Investment Corporation (OPIC). OPIC agreed, in a publicly available decision, that Argentina had expropriated the fundamental rights of Ponderosa Assets, L.P., a subsidiary of Enron Corporation.[33] The OPIC policy incorporated standards of expropriation under international law.[34] OPIC concluded that the Argentine government's actions had violated the relevant international law standards and duly indemnified Ponderosa in respect of its insured losses up to the policy limit of $50 million.[35]

What is most interesting is that the two PRI claim decision makers—OPIC in Enron's case and an arbitral tribunal in Sempra's—apparently readily found that the Argentine government's actions constituted regulatory expropriation when they—unlike the (somewhat) parallel ICSID tribunals—had no option to label the offensive government acts as unfair or inequitable. This whole area of overlap (or not) between investment treaty violations and political risk deserves—and undoubtedly will command—more examination by scholars and practitioners.

AZURIX V. ARGENTINA

In another ICSID case against Argentina brought under the Argentina-United States BIT, relating to a privatization of a potable water and

[31] Sempra Energy v. Nat'l Union Fire Ins., Co. of Pittsburgh, Pennsylvania, 2006 WL 3147155 (S.D.N.Y. Oct. 31, 2006).

[32] *Id.* at 2.

[33] OPIC's Memorandum of Determinations regarding the Expropriation Claim of Ponderosa Assets, L.P. Argentina (Feb. 8, 2005), *available at* http://www.opic.gov/insurance/claims/report/index.asp.

[34] *Id.* at 1, 4 (defining expropriation as requiring a violation of international law or a material breach of local law).

[35] The claimant in *Sempra* invoked the OPIC determination in *Ponderosa*. Sempra Energy International v. Argentine Republic, *supra* note 27, at ¶ 273.

sewerage company (and thus not relating to the energy sector and the January 2002 Argentine Emergency Law and associated measures), the ICSID tribunal in *Azurix v. Argentina* found a breach of the fair and equitable treatment clause, but no indirect expropriation.[36] The tribunal concluded that the impact on the investment attributable to Argentina was

> not to the extent required to find that, in the aggregate, these actions amounted to an expropriation; Azurix did not lose the attributes of ownership, at all times continued to control [the investment] and its ownership of 90% of the shares was unaffected. No doubt the management of [the investment] was affected by the Province's actions, but not sufficiently for the Tribunal to find that Azurix's investment was expropriated.[37]

However, as in the other decisions addressed in this paper, the *Azurix* tribunal concluded that there had been a breach of the fair and equitable treatment clause, on the basis of, *inter alia*, the politicization of the tariff regime and repeated calls by the Argentine government for non-payment of bills by customers.[38] The tribunal assessed damages on the basis of fair market value, looking at the value ''in a hypothetical context where the State would not have resorted to such maneuvers but would have fully respected the provisions of the treaty and the contract concerned.''[39]

SALUKA V. CZECH REPUBLIC

In *Saluka Investments BV v. Czech Republic*, Saluka Investments BV (Saluka) was unsuccessful in its claim for indirect expropriation but successfully claimed that the Czech Republic had failed to provide fair and equitable treatment of its investment.[40] Saluka initiated the arbitration for deprivation of the value of its shares in a privatized Czech bank arising out of the Czech Republic's intervention in and forced administration of the bank, alleging violations of the Czech Republic-Netherlands BIT. As an initial matter, the tribunal found that Saluka had in fact been deprived of its investment:

[36] Azurix Corp. v. The Argentine Republic, Award, ICSID Case No. ARB/01/12 (July 14, 2006).

[37] *Id.* at ¶ 322.

[38] *Id.* at ¶¶ 375-377.

[39] *Id.* at ¶¶ 417, 424.

[40] Saluka Investments BV v. Czech Republic (UNCITRAL), Partial Award, ¶¶ 265, 281 (Mar. 17, 2006), *available at* http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf. Freshfields represents Saluka in the UNCITRAL proceedings.

> [I]n imposing the forced administration of [the bank] . . . the Czech Republic adopted a measure which was valid and permissible as within its regulatory powers, *notwithstanding that the measure had the effect of eviscerating Saluka's investment* in [the bank].[41]

The tribunal declined to find indirect expropriation, explaining that the Czech government's actions were ''permissible regulatory actions'' under customary international law and the BIT because they were aimed at promoting the general welfare and/or maintaining public order.[42]

The *Saluka* tribunal found that the Czech Republic had failed to accord Saluka's investment fair and equitable treatment because the Czech Republic had not met its ''obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations.''[43] Quantum was bifurcated from the merits, and no decision has yet been issued.[44]

PSEG V. TURKEY

In *PSEG v. Turkey*, an ICSID tribunal again found no indirect expropriation, but awarded (relatively minimal) damages on the basis of a breach of the fair and equitable treatment clause of the Turkey-US BIT.[45] The tribunal noted that:

> The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.[46]

[41] *Id.* at ¶ 276 (emphasis added).
[42] *Id.* at ¶¶ 254-255, 265, 267.
[43] *Id.* at ¶ 309.
[44] *Id.* at ¶¶ 506-509.
[45] PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC630_En&caseId=C212.
[46] *Id.* at ¶ 238.

The tribunal concluded that there had been a lack of stability and transparency in the Turkish law, leading to a breach of the fair and equitable treatment clause. However, the tribunal found that there was no indirect expropriation as there had been no ''extreme forms of interference.''[47] The tribunal continued:

> Many things were wrongly handled, but none could be considered to amount to regulatory expropriation. The rights that were affected one way or the other, including the Claimants' legitimate expectation, have indeed resulted in a finding of breach of the standard of fair and equitable treatment, yet none of the measures adopted envisaged the taking of property, which is still the essence of expropriation, even indirect expropriation. Although measures tantamount to expropriation may well make the question of ownership irrelevant, it does require a strong interference with clearly defined contract rights that in this case were in the end incomplete.[48]

Like the *LG&E* tribunal, the *PSEG* tribunal declined to award damages on the basis of fair market value. This was because the investment at issue was merely in the planning or negotiation stage, and there had been no damage to productive assets. Finding that damage to the investor was caused by the Turkish government's failure to conduct negotiations in a proper way and other forms of interference by the government,[49] the tribunal awarded damages to compensate for investment expenses, resulting in a damages award of just over U.S.$9 million.[50]

OBSERVATIONS

As one commentator noted:

> One could argue that the failed expropriation claims in the . . . *LG&E, Saluka,* and *Azurix* arbitrations demonstrate investor-state arbitral tribunals' wariness of indicating state responsibility under that traditional international law delict. It would appear that expropriation

[47] *Id.* at ¶ 279.
[48] *Id.* (footnote omitted).
[49] *Id.* at ¶ 307.
[50] *Id.* at ¶ 316 et seq. The claimant had claimed U.S.$114 million on the fair market value approach (excluding interest), U.S.$223 million on the loss of profits approach (excluding interest), or U.S.$28 million on the amount of investment approach (including interest).

> is out of fashion, if such a thing can occur in law. Of course, the results in these recent cases may largely be due to the fact that the measures at issue are not outright nationalizations or traditional direct expropriations with transfer of the property to government. Investments are often complex, and modern government regulation has become much more subtle with respect to investors and investments. Tribunals may simply not be prepared to label serious conduct that may otherwise be unfair and inequitable as being expropriatory in effect. Moreover, if the government measure does not result in (according to the often-cited phrase of the *Pope & Talbot* tribunal) a ''substantial deprivation,'' effectively destroying the investment, tribunals may indeed be wary of granting such a claim.[51]

Based on the awards discussed in this paper and earlier awards, the fine dividing line between the two categories of BIT claims—violation of the prohibition against indirect expropriation without compensation and violation of the prohibition against unfair and inequitable treatment—is readily apparent. This fine line, called into even sharper focus by the seemingly overlapping reasoning employed by tribunals in assessing the two categories, has caused some commentators to question whether tribunals are applying sufficient intellectual rigor in finding violations of the fair and equitable treatment standard in what seems (to some) to be instead (or, at least, also) an indirect expropriation.[52]

As noted above, a finding of regulatory or indirect expropriation is by nature fact specific and subjective. It is easier to make such a finding if, as in old-fashioned nationalization, a tribunal can identify 100 percent interference with use and control of the investment by the investor. (The *CMS* tribunal found that the value of CMS's investment had been drastically reduced but nonetheless declined to find that an indirect expropriation had occurred, while the *LG&E* tribunal chose to emphasize that the value of the investment had been preserved in certain important respects in declining to find expropriation.) Where such a finding is elusive, but nonetheless the investor clearly suffered a crippling loss at the hands of the host State, a finding of unfair and inequitable treatment—leading to the same quantum of damages as indirect expropriation—could be a tempting fallback.

[51] Mark Friedman et al., ''International Arbitration,'' 41 *Int'l Law.* 251, 280-81 (2007) (footnote omitted).

[52] *See, e.g.,* Fietta, *supra* note 4, at 375 (referring to ''the continuing failure of some of the most pre-eminent arbitral tribunals to address, in a clear, consistent, and analytical manner, the precise content of, and interrelationship between, the 'expropriation' and 'fair and equitable' heads of claim in the context of investor's expectations''); *see also id.* at 391-98.

If the fair and equitable treatment standard is used as a fallback by tribunals reluctant to find State liability for indirect expropriation, one could well ask whether such a result is consistent with the intentions of the State parties that entered into BITs with fair and equitable treatment clauses. As to such intentions, there is general consensus that the fair and equitable treatment standard was meant to provide a basic and general international standard that is separate from the host State's domestic law.[53] There has been long-standing debate as to whether the fair and equitable treatment standard in modern investment treaties is the same as the minimum standard for the treatment of the property of foreigners required by customary international law or whether it is an independent concept.[54] On balance, it appears that, in treaties other than those that explicitly include fair and equitable treatment as part of the minimum standard of customary international law (such as the NAFTA), fair and equitable treatment is meant to be an autonomous and self-contained concept.[55]

Accepting that the international minimum standard of treatment and the fair and equitable treatment standard contained in BITs are not one and the same, the fact that ''the breadth of the fair and equitable standard today stands in sharp contrast with the 'international minimum standard' as it stood in the early twentieth century'' is not disturbing.[56] That is fine as far as it goes.

However, if tribunals find violations of fair and equitable treatment obligations as a fall-back alternative to findings of indirect expropriation, this will impede rather than help the quest for independent substantive content for the fair and equitable treatment standard. As Jan Paulsson has observed informally, one imprecision will have been replaced with another.

One area where precision should be demanded is the appropriate methodology for quantifying damage. In the regulatory expropriation context, tribunals often award the fair market value of the investment immediately before the expropriation, being immediately before the investor lost actual or effective control of the asset, calculated using the discounted cash flow method. Indeed, BITs often define this standard as the formula to be used for the determination of compensation for expropriation.[57] In the fair and equitable treatment context, the methodology for

[53] *See, e.g.,* Dolzer & Stevens, *supra* note 3, at 58.

[54] *Id.* For a statement of the international minimum standard under customary international law as understood in the early 20th century, see *Neer v. Mexico*, 4 R.I.A.A. 60 et seq. (1926).

[55] Organisation for Economic Co-operation and Development, *Fair and Equitable Treatment Standard in International Investment Law,* Working Papers on International Investment No. 2004/3, 40 (Sept. 2004); Dolzer & Stevens, *supra* note 3, at 58-59.

[56] Fietta, *supra* note 4, at 398.

[57] *See, e.g.,* art. IV(1) of the Argentina-United States BIT: ''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; be

quantifying damage is less well defined. In the awards discussed in this paper, most (correctly, in our view) used the fair market value in determining damages for violations of fair and equitable treatment, while two chose alternative methods. As the *Sempra* tribunal noted, the expropriation compensation standard might be the appropriate standard of reparation in respect of non-expropriatory breaches 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.''[58]

A very short answer to the question posed above—are tribunals applying sufficient intellectual rigor in finding violations of the fair and equitable treatment standard in a regulatory expropriation situation? It depends, and will continue to depend, on the quantity and quality of the reasoning offered by the tribunal to support its distinct holding of the distinct violation of unfair and inequitable treatment.

paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.''

[58] Sempra Energy International v. Argentine Republic, *supra* note 27, at ¶ 403 (footnote omitted); *see also* Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 8.2.8 (Aug. 20, 2007) (''Of course, the level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different from a case where the same government expropriates the foreign investment. The difference will generally turn on whether the investment has merely been impaired or destroyed. Here, however, we are not faced with a need to so differentiate, given our earlier finding that the same state measures infringed both relevant Articles of the BIT and that these measures emasculated the Concession Agreement, rendering it valueless. Put differently, the breaches of Articles 3 [fair and equitable treatment] and 5 [expropriation] caused more or less equivalent harm.'').

In Search of the Frontiers of Indirect Expropriation

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To begin with, I would like to advise that this paper is written in my position of professor, as an academic, and that I purport to make an objective analysis of current trends concerning the definition of indirect expropriation. As a result, no inference should be drawn as to my personal position as an arbitrator relating to these questions. I would like to add, to make things perfectly clear, that when I speak of, let's say, a ''dominant jurisprudence,'' this does not mean that I approve it, nor indeed that I disapprove it. It means only that it is the position adopted by more tribunals than other positions are by other tribunals.

This being said, direct expropriation has become rare, although there seems to be a new wave of nationalizations that prevail in certain South American countries—gas in Bolivia and oil in Venezuela. However, despite the periodic resurgence of this sovereign risk *par excellence*, foreign investors are, as a practical matter, no longer threatened by these types of risks. Yet, obviously, their investments can nevertheless suffer from the effect of regulatory measures. The risk flowing from more or less restrictive regulations is, to tell the truth, the same whether it concerns national or foreign investors. However, the latter benefit from protections—primarily conventional, whether flowing from bilateral, regional, or multilateral agreements on the protection of investments, or sometimes contracts—which aim to protect them against the eventual confiscatory effects of such measures, mainly through possible recourse to international arbitration.

The central question raised by what is called indirect expropriation is how to draw the line, if there is one, between legitimate regulations that do not give rise to compensation and regulatory takings that do. This is a very sensitive issue situated at the crossroads between the protection of private interests of investors and the safeguarding of the sovereign prerogatives of the host States.

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AN IMPRECISE TERMINOLOGY AND A TENTATIVE CLASSIFICATION

An Imprecise Terminology

International Investment Agreements, be they bilateral, regional, or multilateral, do not provide definitions of expropriation. Several terms are employed to designate the substance of the measures concerned. The term *expropriation* is used in a generic manner: one can use it to designate all types of confiscatory measures whose effect is regarded as requiring compensation of the investor. In Anglo-Saxon law, the term ''*taking*'' is often used: the Fifth Amendment to the U.S. Constitution, for example, concerns, among other things, ''*Compensation for Takings.*'' The term is also largely used in the field of international investment. Again, one can find the terms ''*deprivation*'' or ''*dispossession*'' used in jurisprudence, doctrine, and conventional agreements. Although these different concepts each focus on a distinct aspect of the measure, they must be considered as interchangeable. Thus, the arbitral tribunal, in *Lauder v. Czech Republic,* noted that:

> The Bilateral Investment Treaties (hereinafter: ''BITs'') generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession (''dispossession'', ''taking'', ''deprivation'', or ''privation''). Furthermore, the practice shows that although the various terms may be used either alone or in combination, most often no distinctions have been attempted between the general concept of dispossession and the specific forms thereof.[1]

It should be recalled that each one of these terms target measures whose common feature is to *dispossess* the investor. Some examples of the wordings of treaty provisions on expropriation in multilateral, regional, and bilateral treaties follow.

As an example from a multilateral treaty, Article 13, Section 1 of the Energy Charter Treaty[2] provides that:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be *nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation*

[1] Ronald S. Lauder v. Czech Republic, Tribunal constituted under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), Award, ¶ 200 (Sept. 3, 2001).

[2] Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 (1995).

(hereinafter referred to as ''Expropriation'') except where such Expropriation is:

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation [emphasis added].

As far as regional treaties are concerned, the best-known expropriation clause today is Article 1110, Section 1 of the North American Free Trade Agreement (NAFTA):[3]

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) [Minimum Standard of Treatment]; and

(d) on payment of compensation in accordance with paragraphs 2 through 6 [emphasis added].

As for bilateral treaties, generally speaking, the structure followed by bilateral investment treaties (BITs) is the same as in multilateral and regional agreements.[4] Almost all of them target direct and indirect nationalization and expropriation as well as other measures that are regarded as equivalent.

As an example, Article 5 of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The

[3] North American Free Trade Agreement, Dec. 8-14, 1992, 32 I.L.M. 289 (1993).

[4] All BITs discussed in this article are available at http://www.unctadxi.org/templates/DocSearch_779.aspx.

Netherlands and the Czech and Slovak Federal Republic, signed on April 29, 1991, reads as follows:

> Neither Contracting Party shall take any measures depriving, *directly or indirectly*, investors of the other Contracting Party of their investments unless the following conditions are complied with:
>
> a. the measures are taken in the public interest and under due process of law;
>
> b. the measures are not discriminatory;
>
> c. the measures are accompanied by provision for the payment of just compensation [emphasis added].

Quite often, this simple dichotomy between direct and indirect expropriation is somewhat complexified by a reference to measures tantamount to expropriation, either as part of indirect expropriation or as an addition to indirect expropriation. For example, in the Argentine cases, Article IV of the BIT between Argentina and the United States reads:

> 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 non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2) [emphasis added].

Another example is the 1993 Agreement for the Promotion and Reciprocal Protection of Investments between Greece and Egypt, which was relevant in *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*,[5] and whose Article 4 reads:

> Expropriation
>
> Investments by investors of either Contracting Party shall not be *expropriated, nationalized* or subjected to any *other measure the effects of*

[5] Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002). Note that all ICSID cases discussed in this article are available at http://icsid.worldbank.org/ICSID and http://ita.law.uvic.ca/alphabetical_list.htm.

which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except under the following conditions:

a) the measures are taken in the public interest and under due process of law,

b) the measures are clear and not discriminatory, and

c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation [emphasis added].

At first sight, there seem to be two slightly different types of formulation, one emphasizing the equivalence of the measure, the other focusing on the equivalence of the effect, but as will be seen, this is more a formal difference than a substantive one.

In some agreements, the emphasis is on the equivalence of the effect: ''measures having equivalent effects'' or ''measures of similar effect''[6] are targeted. For example, the BITs concluded by France target ''all other measures whose effect is to dispossess directly or indirectly''[7] the investors of their investment.

In other agreements, it seems that the equivalence attaches to the measure itself. The BITs concluded by the United States prior to 2004 targeted the ''measures tantamount to expropriation or nationalization,'' whereas the new agreements concluded on the basis of the new U.S. BIT

[6] One finds this expression in several BITs concluded by Belgium. See in particular, the BIT between Belgium and Czechoslovakia of April 24, 1989 which targets ''other measures of direct or indirect dispossession, total or partial, having a similar effect.'' See also the BIT between Belgium and Mexico of August 27, 1998, the BIT between Belgium and the Federation of Russia of February 9, 1989. Other examples are the BIT between Mexico and Spain of June 23, 1995, the BIT between India and Pakistan of July 19, 1997, and the BIT between Belgium and China of June 4, 1984. It is also the formula that was retained by the *Guidelines of the World Bank*, Article IV, paragraph 1, *available at* http://ita.law.uvic.ca/alphabetical_list.htm, on the treatment of foreign investment.

[7] The most frequently used formula is: ''toute(s) autre(s) mesure(s) dont l'effet est de déposséder, directement ou indirectement.'' This can be found, for example, in Article 5 of the BIT between France and Hungary of November 6, 1986, Article 5 of the BIT between France and Algeria of February 13, 1993, Article 6 of the BIT between France and Ecuador of September 7, 1994, Article 5 of the BIT between France and Morocco of January 13, 1996, Article 5 of the BIT between France and Cambodia of July 13, 2000, Article 5 of the BIT between France and Barhein of July 4, 2005. A slightly different formulation is used in Article 5 of the BIT between France and Argentine of July 3, 1991, which reads: ''toute autre mesure équivalente ayant un effet similaire de dépossession'' (''a similar effect of dispossession'').

prototype developed in 2004 target ''measures equivalent to expropriation or nationalization.''[8] In other agreements, there is a reference to measures having ''the same character''[9] or ''having the same nature''[10] as an expropriation.

In light of these various expressions, it is particularly difficult to determine whether or not either the measure or the effect must be rigorously equivalent to an expropriation, or if the degree of similarity can be more or less important. In fact, the different formulas are probably quite equivalent. Indeed the new U.S. Model BIT, which seems at first sight to emphasize the equivalence of the measure, must be interpreted in light of an annex that raises useful factors of appreciation. It is specified there that the expropriation clauses target two situations:

> The first is known as direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
>
> The second situation . . . is known as indirect expropriation, where an action or series of actions by a Party has an *effect equivalent to direct expropriation* without formal transfer of title or outright seizure [emphasis added].[11]

So, it can be concluded that whatever the expression used, *indirect expropriation is probably best characterized by its effect equivalent to direct expropriation.*

Having first seen that the vocabulary is diversified, the second approach to the frontiers of indirect expropriation could be to try to make a classification of the different expressions used in the field of expropriation.

A Tentative Classification

To attempt a classification and best define indirect expropriation, it seems that the most logical approach is to start from the paradigmatic concept of direct expropriation.

[8] This change in terminology may be explained by the fact that the term ''*tantamount*'' was considered to be more ambiguous than that of ''*equivalent.*''

[9] See in particular the BIT between Swizterland and the Philippines of March 31, 1997, and the BIT between Peru and Paraguay of February 1, 1994.

[10] Formula used in the BITs concluded by Sweden. See also the BIT concluded between Peru and Paraguay of February 1, 1994, Article 6.

[11] The U.S. Model BIT is available at http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html.

Direct expropriation is a measure that aims at the forced transfer of the property of a private person to the State (or the forced transfer by the State to the benefit of another private person). A clear definition of direct expropriation has been given in the award on liability in *LG&E*: ''the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action.''[12] Expropriation thus involves, in its traditional sense, not just the effective loss of any right on—or flowing from—the property concerned but also the loss of the title: the State appropriates the property concerned. This definition of direct expropriation as necessarily implying the transfer of property has been reaffirmed recently in the *Enron* case:

> the Tribunal does not believe there can be a direct form of expropriation if at least some essential components of property rights have not been transferred to a different beneficiary, in particular the State.[13]

A first question that can be raised is thus whether the distinction between direct expropriation and indirect expropriation can be retained as the *summa divisio*. Even on such a simple question, there seems to be controversy. Some think that a measure can ultimately be analyzed as both a direct expropriation and an indirect expropriation. Others think that the two concepts cannot be coextensive. This last position was adopted in the just quoted award, where it is stated that ''if a given measure qualifies as a form of direct expropriation, it cannot at the same time qualify as an indirect expropriation, as their nature and extent are different.''[14]

It is indeed the specificities in the nature and extent of an indirect expropriation—this ''second class expropriation,'' as aptly characterized by Andy Lowenfeld (Rubin Professor of Law at NYU Law School)[15]—that I will try to underscore in this short presentation.

The prism of *indirect expropriation* includes a broad array of very different measures that do not involve a transfer of the investment but result in a serious interference with it. This generic category includes different

[12] LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 187 (Oct. 3, 2006).

[13] Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 243 (May 22, 2007).

[14] *Id.* at ¶ 250.

[15] Comments made during this year's Fordham Law School Conference on International Arbitration.

types of expropriatory measures. Some of the most frequently referred to expressions will be mentioned.

The expression *indirect expropriation* is sometimes used in an interchangeable manner with that of *de facto expropriation*, in order to distinguish it from the direct expropriation considered as an expropriation *de jure*. There is usually in the latter situation a legal instrument that directly brings about such taking. However, indirect expropriation results also quite often from a legal instrument, and it does not seem therefore that it is particularly relevant to speak of *de facto* expropriation. Although the two expressions are used, they are probably not strictly coextensive, and I will refer to indirect expropriation, which seems more general and relevant, and is also the most commonly used expression.

The expression *indirect expropriation* is also sometimes used in an interchangeable manner with that of *creeping expropriation*.[16] According to the jurisprudence, a creeping expropriation is a process extending in time and comprising a succession of measures that, taken separately, do not have the effect of dispossessing the investor but when taken together do lead to such a result.[17] Creeping expropriation can in fact be viewed as a composite act, as established by the International Law Commission in its Articles on

[16] See in particular Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 99 (1995); 1 United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements: Key Issues* ch. 8—Taking of Property, at 236 (2004). This confusion is also made by arbitral tribunals: Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, *supra* note 5, at ¶ 107; S.D. Myers Inc. v. Canada, Tribunal instituted under the UNCITRAL rules, First Partial Award, ¶ 286 (Nov. 12, 2000).

[17] See the definitions given in the following awards: Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8, Award, ¶ 263 (Feb. 6, 2007); Telenor Mobile Communications AS v. Republic of Hungary, ICSID Case No. ARB/04/15, Award on Competence, ¶ 63 (Sept. 13, 2006); Compañia del Desarrollo de Santa Elena S.A., v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award on the Merits, ¶ 76 (Feb. 27, 2000); Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award, ¶ 191 (Apr. 29, 1999); Biloune v. Ghana Investments Centre, Tribunal instituted under the UNCITRAL rules, Award (Oct. 27, 1989), 95 I.L.R. 209 (1995). See also dissenting opinion of the arbitrator Keith Highet in the case of *Waste Management*: ''a 'creeping expropriation' is comprised of a number of elements, none of which can—separately—constitute the international wrong. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth. The 'measure' at issue is the expropriation itself; it is not merely a sub-component part of expropriation.'' Waste Management Inc. v. Mexico, ICSID Case No. ARB (AF)/00/3, Award, ¶ 17 (Apr. 30, 2004). In the doctrine, see E. Gaillard, ''Chronique des sentences arbitrales du CIRDI,'' 3 *JDI* 310 (2007); W.M. Reisman & D.R. Sloane, ''Indirect Expropriation and its Valuation in the BIT Generation,'' 74 *Brit. Y.B. Int'l L.* 125 (2003). *See also* UNCTAD, *World Investment Report* 110 (2003); UNCTAD, *supra* note 16, at 238.

State Responsibility (Article 15).[18] An indirect expropriation is, however, not always creeping, as it can result from a single measure, and thus creeping expropriation targets only one category of measures that can be qualified as indirect expropriation. More simply, a creeping expropriation is always an indirect expropriation, while the contrary is not necessarily true.[19]

In the same vein, it is not correct to assume that *indirect expropriation* is necessarily a *"disguised" expropriation*.[20] The ostensible or hidden intention of gaining the property is not always present in the process that leads to the dispossession; it can even be assumed that it is rarely present.

Therefore, if creeping expropriation and disguised expropriation are certainly two sub-categories in the range of measures covered by indirect expropriation, they do not constitute the bulk of the measures that are today under discussion of indirect expropriation. In fact, the most heated discussion relates to measures that Anglo-Saxon doctrine calls *regulatory expropriation*[21] or *regulatory taking*.[22]

Investors frequently claim compensation for what they consider an expropriation through measures taken by the State. Governments oppose compensation, maintaining that no obligation to compensate results from the normal exercise of a government sovereign right to regulate for a legitimate public purpose. This controversy has been aptly described by Vaugham Lowe, who said that this is

> one of the most controversial and fast developing areas of international law: the area in which the claims of a State to regulate its economy come up against the claims of the investors to keep their investments in the State in a stable regulatory framework. The central question is, how should we draw the line between, on the one hand, legitimate regulatory measures imposed by governments on foreign businesses

[18] Siemens A.G. v. Argentina, *supra* note 17, at ¶¶ 264-265; C. Schreuer, ''The Concept of Expropriation under the ECT and Other Investment Protection Treaties,'' *in* C. Rebeiro ed., *Investment Arbitration and the Energy Charter Treaty* 132 (2006).

[19] See, for example, for such an analysis, Tecnicas Medioambientales TECMED S.A. v. The United Mexican States, ICSID, Case No. ARB(AF)/00/2, Award, ¶ 114 (May 29, 2003).

[20] See, however, F. Detlev, ''Foreign Investment Risk Reconsidered: The View from the 1980s,'' 2 *ICSID Rev.—Foreign Inv. L.J.* 14 (1987).

[21] A. Newcombe, ''The Boundaries of Regulatory Expropriation in International Law,'' 1 *ICSID Rev.—Foreign Inv. L.J.* 1 (2005).

[22] T. Wälde & A. Kolo, ''Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law,'' 50 *In'tl Comp. L.Q.* 811 (2001).

and, on the other hand, illegitimate interference with the rights and interests of foreign investors?[23]

It seems that in order to find the dividing line, two successive questions have to be asked. First, it has to be ascertained whether indeed a deprivation of property occurred (is there a potential ''expropriation''?); second it has to be determined whether a dispossession entails compensation in all cases, when it is the result of a general measure whose aim was to regulate in the public interest, although its result may have been at first sight expropriatory (are there, however, reasons not to compensate?).

First question: what are the criteria required to make a determination that a regulation constitutes a potential indirect expropriation because of the *effect of the measure* taken? It appears that the answer to this question is given primarily through what could be called a *quantitative approach.*

Second question: although a measure is found to be potentially expropriatory by application of a quantitative approach, should this be supplemented by a *qualitative approach*; in other words, should the *nature of the measure* be taken into account in order possibly to modify this conclusion (that there is potentially an expropriation)? If the answer is positive and results in a finding that the measure(s) cannot be considered an indirect expropriation, then no compensation is due.

A QUANTITATIVE APPROACH IS USED IN ORDER TO DETERMINE THE EXISTENCE OF A POTENTIAL INDIRECT EXPROPRIATION

There are, under this general approach, different views on the intensity of the effect on the economic situation needed for a measure to be qualified as a potential indirect expropriation.

The question raised here is to try to determine how serious the interference with the rights of an investor must be in order to find that an indirect expropriation has occurred. It seems that the cases have followed two trends, with one appearing nowadays as dominant.

[23] V. Lowe, ''Regulation or Expropriation?,'' 55 *Current Legal Probs.* 447 (2002).

One Position: Indirect Expropriation Is a Lesser Interference With Property Than Direct Expropriation

This first possible approach consists in considering that for an indirect expropriation to occur, the effect of the challenged measure would have a lesser adverse impact on the legal and economic situation of the investor than the effect of a direct expropriation. This first position considers that the difference between direct and indirect expropriation is the result, not the manner in which the interference with the investors' rights is brought about. This approach seems more or less to have been adopted by the arbitral tribunal in the award in *Metalclad v. Mexico*, rendered on August 30, 2000:

> Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or 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 reasonably-to-be-expected economic benefit of property* even if not necessarily to the obvious benefit of the host State.[24]

In other words, a deprivation of expected benefits, in whole or significant part, without any specific interference with the title to the property, could qualify, according to this decision, as an expropriation.

Another Position: Indirect Expropriation Is Similar in Result to Direct Expropriation

A second approach, which seems more generally accepted, considers that in order to constitute an indirect expropriation, a measure must essentially have the same effect on property rights as a direct expropriation. In other words, the measure must interfere substantially with the property itself, not only with its proceeds. This position holds that the difference between direct and indirect expropriation is not the result, which has to be the same, but the manner in which the interference with the investors' rights is brought about. As simply stated by the tribunal in *Pope & Talbot*

[24] Metalclad Corporation v. United States of Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000), emphasis added. It should be noted that, although the formulations used were very large in principle, in fact, in *Metalclad* a complete neutralization of the investment was considered an indirect expropriation.

''(s)omething that is equivalent to something else cannot logically encompass more.''[25]

In the case of *Pope & Talbot*, Canada contended that ''mere interference is not expropriatory; rather, a significant degree of deprivation of fundamental rights of ownership is required.''[26] The tribunal accepted this approach as it stated ''the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner.''[27] Then, the tribunal devoted itself to a meticulous analysis of the investor's methods of business management after the disputed measure was adopted. It cited the following indicators, concluding that the investor had not lost control of his investment:

— [the investor] directs the day-to-day operations of the Investment and
— no officers or employees of the Investment have been detained by virtue of the Regime.
— Canada does not supervise the work of the officers or employees of the Investment
— [It] does not take any of the proceeds of company sales (apart from taxation),
— [It] does not interfere with management or shareholder's activities,
— [It] does not prevent the Investment from paying dividends to its shareholders,
— [It] does not interfere with the appointment of directors or management and
— [It] does not take any other actions ousting the Investor from full ownership and control of the Investment.[28]

Most arbitral tribunals are therefore systematically examining and formulating an appreciation of the control that the investor may exercise or not on his or her investment in order to hold that a measure is equivalent to an indirect expropriation. If there is still a possibility for the investor to pursue certain activities, even much less profitable ones, the finding of indirect expropriation cannot be made, according to this trend of jurisprudence.

On the one hand, when the measure adopted by the State has the effect of destroying totally and irremediably the activity concerned, there is no doubt that it must be described as an expropriation. On the other hand,

[25] Pope & Talbot Inc. v. Canada, Interim Award, ¶ 104 (June 26, 2000).
[26] *Id.* at ¶ 99.
[27] *Id.* at ¶ 103.
[28] *Id.* at ¶ 100. The ''em'' dashes have been added.

when it clearly appears that the investment is not substantially neutralized and deprived of any value, tribunals refuse to find an expropriation. This analysis was adopted in many cases, whether they relied on *Pope & Talbot* or not, like *Feldman,*[29] *Waste Management,*[30] *Encana,*[31] *Santa Elena,*[32] and *Nykomb Synergetics Technology.*[33] It is also by application of this second approach that ICSID tribunals have not so far determined that the interferences with the rights of foreign investors resulting from the Argentine measures adopted to cope with the economic crisis of 2001-2002 constituted indirect expropriations. See the different Argentine cases: *CMS,*[34] *LG&E,*[35] *Enron,*[36] as well as *Azurix.*[37]

The arbitral tribunal concluded in *CMS* that there had been no indirect expropriation as ''*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.''[38]

A similar position was adopted in *LG&E*:

> In considering the severity of the economic impact, the analysis focuses on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need for compensation due to expropriation. In many arbitral decisions, the compensation has been denied when it has not affected all or almost all the investment's economic value. *Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate,*

[29] Marvin Roy Feldman v. United States of Mexico, ICSID Case No. ARB(AF)/99/1, Award, ¶ 152 (Dec. 16, 2002).

[30] Waste Management v. Mexico, *supra* note 17, at ¶ 175.

[31] Encana Corporation v. Republic of Ecuador, Tribunal instituted under the UNCITRAL rules, Award, ¶ 14 and ¶¶ 117-178 (Feb. 3, 2006).

[32] Santa Elena v. Costa Rica, *supra* note 17, at ¶ 77: ''there is ample authority for the proposition that a 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.''

[33] Nykomb Synergetics Technology Holding AB v. Latvia, The Arbitration Institute of the Stockholm Chamber of Commerce, Award, ¶ 4.3.1 (Dec. 16, 2003): ''[t]he decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail.''

[34] CMS Gas Transmission Company v. The Argentine Republic, Award, ICSID Case No. ARB/01/8, ¶¶ 263-264 (May 12, 2005).

[35] LG&E v. Argentina, *supra* note 12, at ¶ 200.

[36] Enron v. Argentina, *supra* note 13, at ¶¶ 245-246.

[37] Azurix v. Argentine Republic, Award, ICSID Case No. ARB/01/12, ¶ 322 (July 14, 2006).

[38] CMS v. Argentina, *supra* note 34, at ¶ 263 (emphasis added).

> *even if profits are diminished.* The impact must be substantial in order that compensation may be claimed for the expropriation. . . .
>
> In the circumstances of this case, although the State adopted severe measures that had a certain impact on Claimants' investment, especially regarding the earnings that the Claimants expected, such measures did not deprive the investors of the right to enjoy their investment. As in *Pope & Talbot*, the true interests at stake here are the investment's asset base, the value of which has rebounded since the economic crisis of December 2001 and 2002.
>
> Further, *it cannot be said that Claimants lost control over their shares in the licensees, even though the value of the shares may have fluctuated* during the economic crisis, or that they were unable to direct the day-to-day operations of the licensees in a manner different than before the measures were implemented.
>
> Thus, the effect of the Argentine State's actions has not been permanent on the value of the Claimants' shares', and Claimants' investment has not ceased to exist. Without a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment, the Tribunal oncludes that these circumstances do not constitute expropriation.[39]

In the *Enron* decision, it was also held that there had been no indirect expropriation:

> The question of indirect or creeping expropriation is more complex to assess. The Tribunal has no doubt about the fact that indirect or creeping expropriation can arise from many kinds of measures and these have to be assessed in their cumulative effects. Yet, in this case, the Tribunal is not convinced that this has happened.
>
> The list of measures considered in the *Pope & Talbot* case as tantamount to expropriation, which the Respondent has invoked among other authorities, is in the Tribunal's view representative of the legal standard required to make a finding of indirect expropriation. *Substantial deprivation results in that light from depriving the investor of the control of the investment,* managing the day-to-day operations of the

[39] LG&E v. Argentina, *supra* note 12, at ¶ 191 and ¶¶ 198-200 (emphasis added).

> company, arrest and detention of company officials or employees, supervision of the work of officials, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part[40].

Thus, in this line of cases, arbitral tribunals have required that the investor be very substantially deprived of the enjoyment of his or her investment in order to make a finding of indirect expropriation.[41] To identify cases of economic damage equivalent to a true dispossession, arbitral tribunals require a ''sufficiently restrictive'' interference, interference ''of the kind in which the property must be regarded as seized,''[42] a ''substantial deprivation,''[43] an ''effective repudiation of the right, unredressed by any remedies available to the Claimant.''[44] In other words, ''the analysis focuses on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need for compensation due to expropriation.''[45]

In conclusion, the dominant jurisprudence considers today that to qualify as a potential indirect expropriation, a measure's effect on the investor's property right must reach a certain quantitative threshold, which can vary from one tribunal to the other, but which requires a *serious interference with the control over the investment, which amounts to a neutralization of the investment.*

As soon as it appears that the measure has potentially an effect equivalent to expropriation, the expropriation regime should apply in principle: the measure must be accompanied by compensation, unless there

[40] *See* Enron v. Argentina, *supra* note 13, at ¶¶ 244-245 (emphasis added). See also the statement in *Azurix*: ''Therefore, the Tribunal finds that the impact on the investment attributable to the Province's actions was not to the extent required to find that, in the aggregate, these actions amounted to an expropriation; Azurix did not lose the attributes of ownership, at all times continued to control ABA and its ownership of 90% of the shares was unaffected. No doubt the management of ABA was affected by the Province's actions, but not sufficiently for the Tribunal to find that Azurix's investment was expropriated.'' Azurix v. Argentine Republic, *supra* note 37, at ¶ 322.

[41] Tecmed v. Mexico, *supra* note 19, at ¶ 115; it is also one of the elements utilized by the Iran-United States Claims Tribunal; see Tippetts, Abbett, Mc Carthy, Stratton v. TAMS-AFFA, 6 *Iran-U.S. Cl. Trib. Rep.* 219 (1984), where the tribunal stated that an indirect expropriation must affect ''the fundamental rights of ownership.''

[42] Pope & Talbot Inc. v. Canada, s*upra* note 25, at ¶ 102.

[43] CMS v. Argentina, *supra* note 34, at ¶ 262.

[44] Waste Managment v. Mexico, *supra* note 17, at ¶ 175.

[45] LG&E Energy Corp. v. Argentina, *supra* note 12, at ¶ 191.

are circumstances that make it possible to exclude the payment of compensation. It is only at this stage that it is relevant to consider whether it is necessary to take into account the goals pursued by the State through a qualitative appreciation of the measure.

SHOULD A QUALITATIVE APPROACH BE USED IN ORDER TO MODIFY THE CONCLUSIONS OF THE QUANTITATIVE APPROACH?

There are three answers here: No, Yes, Sometimes.

A legitimate regulation can indeed have an effect equivalent to expropriation. Faced with such a regulatory expropriation, some examine only one side of the coin, that is, look at the expropriatory effect, and conclude that the consequence is that there should always be compensation for the damages suffered by the investors. Others examine the other side of the coin, that is, look at the legitimate exercise of a sovereign power and conclude that there should be no compensation for the exercise by the State of its powers. And there is a third position that considers that one should take into account both sides of the coin and that the challenge is precisely to know where to draw the line in balancing the conflicting interests of investors and States.

A First Approach: A Unique Legal Regime Applicable to All Expropriatory Measures Concerned

This approach is sometimes referred to as the *sole effect doctrine.*[46] In this approach, one does not look at the nature of the measure but looks only at the expropriatory effect of the measure. If the effect is expropriatory, no other consideration should impede compensation.

It is referred to in the *Santa Elena v. Costa Rica* award of February 27, 2000, to maintain the principle that the public interest goal of an otherwise expropriatory measure does not relieve the State from an obligation to pay compensation:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect

[46] R. Dolzer, ''Indirect Expropriations: New Developments?,'' 11 *N.Y.U. Envtl. L.J.* 90 (2003).

> either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.[47]

Expropriation having intervened in the case for reasons of environmental protection, the tribunal stated that:

> Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[48]

The *Santa Elena* award is based on the idea that the State can only carry out an expropriation for reasons of public utility. Consequently, it is not acceptable that it could invoke the public interest, even a particularly important one, in order to release itself from the obligation to pay compensation to the dispossessed investor. It should however be mentioned that this was a case of direct expropriation, for which the presence of public purpose is indeed a condition of the legality of the taking,[49] and this has to be kept in mind before applying this solution to an indirect expropriation.

A Second Approach: The State Does Not Need to Compensate a Potential Expropriation Resulting From the Exercise of Its General Regulatory Powers

The point made here is that whatever the indirect effect on investors' rights, the nature of certain measures exclude compensation. This position starts from the premise that it is a well-established principle of public international law that the State may not be held responsible for the economic consequences resulting from the State's adoption of general regulatory measures, taken in good faith, in the pursuit of a legitimate interest and in a

[47] Santa Elena v. Costa Rica, *supra* note 17, at ¶ 71.
[48] *Id.* at ¶ 72.
[49] On May 5, 1978, Costa Rica issued an expropriation decree of the property of Santa Elena.

non-discriminatory way, or in other words, resulting from the exercise of its regulatory or police powers.

Scholars have adopted this approach, among them Ian Brownlie, according to whom:

> State measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subject to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.[50]

The corollary with regard to foreign investors is that certain regulatory measures remain at their risk. Today, some arbitral tribunals strongly reaffirm the idea that certain risks are the essence of investment and particularly the risk of having the host State intervene in a manner that harms the interests of foreign investors.[51] It is not the function of international law to shelter them from these risks.

This principle was clearly stated by the *Restatement (Third) of Foreign Relations Law of United States* (1987), which is often quoted as a formula of reference[52] and which some regard as reflecting customary international law on this point:[53]

> A state is not responsible for loss of property of for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.

Some general statements to the same effect can also be found in some arbitral awards. In the case of *Feldman v. Mexico*, for example, the arbitral tribunal reminded that:

> Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like.

[50] I. Brownlie, *Principles of Public International Law* 535 (5th ed. 1999).

[51] Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico, ICSID Case No. ARB(AF)/97/2, Award, ¶ 83 (Nov. 1, 1999); Telenor v. Hungary, *supra* note 17, at ¶ 64.

[52] 2 *Restatement of the Law (Third)*, § 712, cmt. g (1987).

[53] See, in this sense, Feldman v. Mexico, *supra* note 29, at ¶¶ 103 and 105.

> Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.[54]

The explanation is due to the use by the State of its police powers, as stated in *Tecmed*:

> The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.[55]

But the clearest and strongest elaboration of this position can probably be found in the *Methanex* award, as well as in the *Saluka* award, a UNCITRAL arbitration under a BIT.

In the *Methanex* case, the arbitral tribunal held that

> the Californian ban was made for a public purpose, was non-discriminatory, and was accomplished by due process, . . . from the standpoint of international law, it was a lawful regulation and not an expropriation.[56]

The *Saluka* award stands for the same general statement:

> It is now established in international law that *States are not liable to pay compensation* to a foreign investor when, *in the normal exercise of their regulatory powers,* they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.[57]

However, as will be seen, despite these general statements, not all measures adopted in the exercise of so-called police powers may be without compensation, according to the same arbitral tribunals.

[54] *Id.* at ¶ 103. *See also* Lauder v. Czech Republic, *supra* note 1, at ¶ 198; Middle East Cement Shipping v. Egypt, *supra* note 5, at ¶ 153.

[55] Tecmed v. Mexico, s*upra* note 19, at ¶ 119.

[56] Methanex Corporation v. United States of America, NAFTA Arbitral Tribunal, Final Award, pt. IV, ch. D, ¶ 7 (Aug. 3, 2005).

[57] Saluka Investments BV v. Czech Republic, Tribunal constituted under Arbitration Rules of UNCITRAL, Partial Award, ¶ 255 (Mar. 17, 2006) (emphasis added).

A Third Position: Depending on Circumstances, A Compensation Will or Will Not Be Due for a Potential Expropriation Resulting From General Regulation

More often, the real question is what happens when a measure is both potentially expropriatory *and* a legitimate regulation. That is the difficult issue. As stated by the tribunal in *Feldman*, ''(n)o one can seriously question that *in some circumstances* government regulatory activity can be a violation of Article 1110.''[58] However, the difficulty in identifying measures of regulation that fall under the shadow of this regime of expropriation is such that ''it is much less clear when governmental action that interferes with broadly-defined property rights . . . crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line.''[59]

According to this construction, although police measures are normally excluded from the prism of expropriation, there are still some circumstances in which compensation is due.[60] The new model of the American BIT envisages therefore that:

> *Except in rare circumstances*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[61]

And for example, Appendix B of the Bilateral Agreement on Investment concluded between the United States and Uruguay provides that:

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

[58] Feldman v. Mexico, *supra* note 29, at ¶ 110 (emphasis added).

[59] *Id.* at ¶ 100.

[60] Consideration of the interference with the expectations of the investor and the nature of governmental action, in addition to the economic impact, is at this juncture directly inspired by the identification criteria of *takings* used by the Supreme Court of the United States: ''*It is well established that a takings case 'entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.*'' Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[61] U.S. Model BIT, *supra* note 11, Annex B, ¶ 4 b.

> (i) the economic impact of the government action, *although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) *the character of the government action.*[62]

Two approaches, the results of which are quite similar, have been adopted, although there might be some differences as far as the burden of proof is concerned. A first approach considers that general regulatory actions are not *per se* not compensable on grounds of expropriation but that a general analysis has to be made of all circumstances to decide whether or not some compensation is due. The second approach considers that general regulatory actions are normally not compensable but that a general analysis has to be made of all circumstances to decide whether or not some compensation is due. In one approach, the principle is that a legitimate regulation can in principle be held to be an expropriation, unless the circumstances entail that it is not to be considered as such. In the other approach, the principle is that a legitimate regulation cannot in principle be found to be an expropriation, unless the circumstances entail that it has to be considered as such. Whatever the approach between principle and exception, the dividing line is to be drawn. Some elements to be taken into account for drawing the dividing line are said to be the following.

First, among the circumstances to be considered, when there is a change in the general legislation, is whether the State has made special commitments to the foreign investors precisely not to change that general legislation. Here, s*tabilization clauses* must be considered. In the *Methanex* award, all claims were dismissed, and the tribunal made a strong statement to the effect that legitimate regulation should not entail an obligation to compensate the foreign investors that claim to have been expropriated as a consequence thereof, unless there are specific commitments to the contrary:

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment

[62] Emphasis added. Canada adopts the same identification criteria in its model of the Foreign Investement Protection Agreement (FIPA); *see* http://www.international.gc.ca/trade-agreements-accords-commerciaux/.

> is not deemed expropriatory and compensable *unless specific commitments had been given* by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[63]

Another example of such an approach can be found in *Encana*, where the tribunal stated:

> *In the absence of a specific commitment from the State*, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment. Of its nature all taxation reduces the economic benefits an enterprise would otherwise derive from the investment; it will only be in extreme case that a tax which is general in its incidence could be judged as equivalent in its effect to an expropriation of the enterprise which is taxed.[64]

Second, another possible approach, in order to draw the dividing line, is to use the principle of proportionality, as is being done by the European Court of Human Rights.[65] One could examine here whether there is a good balance, a *proportionnality* between the needs of the public interest and interference with private property rights.

This test was referred to in *Tecmed*: after stating that there is ''no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole—such as environmental protection,''[66] the tribunal stated that compensation was dependent on the proportionality of the infrigment to private rights of the investor to the publc interest fostered:

> After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the

[63] Methanex Corporation v. United States of America, *supra* note 56, at pt. IV, ch. D, ¶ 7 (emphasis added).

[64] Encana Corporation v. Republic of Ecuador, *supra* note 31, ¶ 173.

[65] European Court of Human Rights, In the case of Matos e Silva, Lda., and Others v. Portugal, judgment of Sept. 16, 1996, ¶ 92, at 19, http://hudoc.echr.coe.int; European Court of Human Rights, In the case of Mellacher and Others v. Austria, judgment of Dec. 19, 1989, ¶ 48, at 24; In the case of Pressos Compañía Naviera and Others v. Belgium, judgment of Nov. 20, 1995, 38, at 19, http://hudoc.echr.coe.int; European Court of Human Rights, In the case of James and Others, judgment of Feb. 21, 1986, ¶ 50, at 19-20, http://hudoc.echr.coe.int.

[66] Tecmed v. Mexico, *supra* note 19, at ¶ 121.

> Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, *whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments,* taking into account that the significance of such impact has a key role upon deciding the proportionality.[67]

This idea seems also to be underlining some developments in *LG&E*:

> There must be a balance in the analysis both of the *causes and the effects* of a measure in order that one may qualify a measure as being of an expropriatory nature.[68]

This being said, things are still far from being clear and simple. As stated in the cited *Saluka* case,

> international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered ''permissible'' and ''commonly accepted'' as falling within the police or regulatory power of States and, thus, noncompensable. *In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.*[69]

It is hoped that this paper is a contribution to the ongoing effort to draw this ''bright and easily distinguishable line.''

[67] *Id.* at ¶ 122 (emphasis added).
[68] LG&E v. Argentina, *supra* note 12, at ¶ 194 (emphasis added).
[69] Saluka v. Czech Republic, *supra* note 57, at ¶ 263 (emphasis added).

Understanding Performance Requirement Prohibitions in Investment Treaties

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Performance requirements are the least understood of the substantive prohibitions set forth in modern bilateral investment treaties (BITs). In this paper, I will first explore what performance requirements are and why they are so poorly understood. I will examine why they are prohibited. I will conclude by reviewing how such prohibitions have evolved and the limited jurisprudence to date addressing performance requirements.

WHAT ARE PERFORMANCE REQUIREMENTS?

As a recent study by the United Nations Conference on Trade and Development (UNCTAD) puts it:

> Performance requirements are stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country. They are and have been used by developed and developing countries . . . to enhance various development objectives.[1]

Performance requirements, in other words, are measures that require foreign investments to perform in a certain manner to meet host State investment policy objectives. For example, a host State wishing to ensure that a major foreign-owned manufacturing plant benefits the local economy may require the manufacturer to buy a set amount or percentage of local goods for use in assembling the final product. A State wishing to protect a

*This article was prepared with the assistance of Mr. Alexander Mocanu and Ms. Aude Prady, respectively a summer associate and an intern at the firm.

[1] United Nations Conference on Trade and Development (UNCTAD), *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* 2, UNCTAD/ITE/IIA/2003/7, U.N. Sales No. E.03.II.D.32 (2003).

weak local industry from an efficient foreign investor in that industry may require the foreign investment to export everything it produces.

WHY PERFORMANCE REQUIREMENTS ARE POORLY UNDERSTOOD

Performance requirement prohibitions are poorly understood by investment arbitration practitioners for four reasons: their scarcity, their very different origins, their focus on trade, and the difficulty of the text of the prohibitions.

Scarcity

Explicit, independent prohibitions of performance requirements are consistently found only in the investment treaties of the United States[2] and Canada.[3] As we will see, some French and German BITs slip into the provision on ''fair and equitable treatment'' a reference to certain types of performance requirements as violating that provision.[4] But in treaties providing for investor-State arbitration, provisions addressing performance requirements are relatively rare. The rarity of this form of prohibition likely contributes to the lack of understanding concerning them among investment arbitration specialists.

This is not to say, however, that performance requirements are unfamiliar to specialists in international trade. The World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs),[5] signed at the end of the Uruguay Round in 1994, prohibits local content requirements, trade-balancing requirements, certain foreign exchange restrictions, and export controls for each of the WTO's members.[6]

[2] 2004 United States Model Bilateral Investment Treaty, art. 8, http://www.state.gov/e/eeb/rls/othr/38602.htm.

[3] Canada Model BIT (last modified May 31, 2005), art. 7, http://www.dfait-maeci.gc.ca/tna-nac/whatfipa-en.asp#structure.

[4] *See infra* note 22 and accompanying text.

[5] Agreement on Trade-Related Investment Measures [hereinafter TRIMs Agreement], Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

[6] It is an interesting, and difficult, question whether the TRIMs Agreement's prohibition of these performance requirements is encompassed by the most-favored-nation clauses found in investment treaties that do not themselves address performance requirements. Happily, that question is beyond the scope of this paper.

Ancestry

The second reason why prohibitions of performance requirements are unfamiliar is that they have an ancestry quite different from that of most other obligations found in BITs. The substantive obligations of fair and equitable treatment and expropriation, for example, trace their roots to notions of natural justice that informed the development of international law in the 19th century.[7] These, like BIT substantive obligations such as national treatment, are echoed in widely recognized human rights instruments.[8]

Substantive BIT obligations similarly derived from this body of customary international law naturally appeal to an arbitrator's sense of justice, and often find analogues in prohibitions in national laws. Their broad outlines, in short, are easy to grasp.

By contrast, performance requirements find their origin in economic policies adopted by some developing countries in the 1970s.[9] As a general rule, there is nothing inherently unjust or wrong about the policies they implement, or, in many instances, the measures implementing those

[7] *See* Patrick Daillier & Alain Pellet, *Droit International Public* §§ 23-27, at 54-59 (7th ed. 2002) (describing role of natural justice in development of international law in formative period of 16th to 18th centuries); *id.*, § 38, at 78 (noting that legal theorists began rejecting natural justice as a basis for formation of international law only at end of 19th century); *see, e.g.,* Elihu Root, ''The Basis of Protection of Citizens Residing Abroad,'' 4 *Am. J. Int'l L.* 517, 521-22 (1910) (describing legal basis for protection of aliens and their property as follows: ''There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of its citizens.'').

[8] Indeed, the body of customary international law addressing the treatment of aliens and their property by host States is widely viewed as a precursor to modern international human rights law. *See* Richard Lillich, ''Duties of States Regarding the Civil Rights of Aliens,'' 161 *R.C.A.D.I.* 333 (1978).

[9] *See* UNCTAD, *Host Country Operational Measures* 7, UNCTAD/ITE/IIT/26, U.N. Sales No. E.01.II.D.18 (2001) (''A number of [host country operational measures] gained prominence as an investment policy tool during the 1970s. During that period, host countries increasingly evaluated the contribution of [foreign direct investment] towards their own major development objectives (e.g. the improvement of their balance of payments, the strengthening of technological capacity and improved labour skills) and their non-economic interests (e.g. social and cultural values, environmentally friendly development).'').

policies. Promoting development of the national economy and the productive employment of residents is a common objective of government. Prohibitions of performance requirements generally exist not because such requirements offend natural justice, but because—according to a respected line of economic thought—those requirements lead to substantial inefficiencies and ultimately are ineffective in achieving their development goals.

In sum, the prohibition of expropriation accords readily with a lawyer's view of what is or is not just. The prohibition of performance requirements, by contrast, may accord readily with an economist's view of what is or is not efficient, but it does not come naturally to a lawyer.

Trade and Investment

Modern investment treaties generally focus narrowly, as one would expect, on *investment* in the host State. They do not generally address trade in goods or services. For example, the national treatment obligation in investment treaties generally addresses discrimination based on the nationality of the investor. It does not address discrimination based on the origin of goods or services supplied by the investment.[10] Other substantive obligations such as expropriation and fair and equitable treatment similarly focus on the treatment accorded to investments as investments.

By contrast, the prohibition of performance requirements squarely addresses trade in goods and services, although it does so at the cusp where the disciplines of trade in goods, trade in services, and investment intersect. The implantation of a trade discipline in an investment treaty requires a small paradigm shift on the part of the user of the treaty. This too contributes to the difficulty of performance requirements.

[10] *See* Methanex Corporation v. United States of America, Award on the Merits and Jurisdiction, ¶ 34, at 17 (Aug. 9, 2005), http://www.state.gov/s/l/c5818.htm (''It may also be assumed that if the drafters of NAFTA had wanted to incorporate trade criteria in its investment chapter by engrafting a GATT-type formula, they could have produced a version of Article 1102 [on national treatment] stating 'Each Party shall accord to investors [or investments] of another Party treatment no less favorable than it accords its own investors, in like circumstances with respect to any like, directly competitive or substitutable goods'. It is clear from this constructive exercise how incongruous, indeed odd, would be the juxtaposition in a single provision dealing with investment of 'like circumstances' and 'any like, directly competitive or substitutable goods'.'').

Difficulty of Language

The final reason why investment treaty specialists find performance requirements hard is the difficulty of expressing this prohibition in terms that are sufficiently broad to achieve the intended goal. Consider, for example, the formulation of the prohibition of performance requirements in the 2004 U.S. Model BIT:

> Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:
>
> (a) to export a given level or percentage of goods or services;
>
> (b) to achieve a given level or percentage of domestic content;
>
> [and five other specified types of measures].[11]

Perhaps I am a slower study than most, but it took me many readings to be able fully to grasp the thrust of what the drafters were trying to address. I do not mean to suggest that the provisions are poorly drafted. Instead, my point is that expressing the prohibition of performance requirements is a difficult drafting exercise, and the result, inevitably, is difficult text.

WHY PERFORMANCE REQUIREMENTS ARE PROHIBITED

As noted above, the rationale for prohibiting performance requirements is not that they offend natural justice but that they are bad economics. The economic argument is that performance requirements reduce overall economic welfare.[12] In other words, they are not only unattractive for

[11] 2004 United States Model Bilateral Investment Treaty, art. 8, http://www.state.gov/e/eeb/rls/othr/38602.htm.

[12] *See* K. Scott Gudgeon, ''United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards,'' 4 *Int'l Tax & Bus. Law* 105, 126-27 (1986) (''Performance requirements imposed on an investor by law, or by review or screening mechanisms, may have a disruptive effect on trade and investment patterns.''); *id.* at 127 n.78 (''Screening and review mechanisms condition entry or establishment of new investments on the investor's acquiescence to on-going requirements with respect to local sourcing, export promotion, and other undertakings. These requirements can be sufficiently burdensome to discourage investors from investing, likewise causing a distortion of market forces.''); *see also*

foreign investors but also fail in the long term to promote the development of the local economy. They therefore fail either to promote foreign investment inflows or to promote local development.

Examine, by way of example, a measure requiring that a foreign-owned manufacturing plant use all locally produced materials in manufacturing the final product. Some of the locally produced components do not meet standards for export to the most rigorously regulated markets and are more expensive than better quality materials produced elsewhere. From the manufacturer's perspective, the local content requirement significantly reduces the value of the investment, because the plant cannot produce products for sale in all markets and cannot produce even the products that it does produce at the most efficient cost. From the host State perspective, while the local content requirement does transfer wealth to local producers, it provides those producers no incentive to produce materials that are competitive on the world market. As a result, if the foreign investor decides to close the plant and move production to a different location, the local producers will find themselves with no local market and unable to compete on global markets. Thus, while the measure results in a short-term transfer of wealth to local producers, in the long term it does not promote the development of the local economy.[13]

That, then, is the economic argument for the prohibition of performance requirements. I should note that in economic circles there is a continuing debate as to whether various performance requirements are or are not harmful.[14]

UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* 8, UNCTAD/ITE/IIA/2003/7, U.N. Sales No. E.03.II.D.32 (2003) (''a number of . . . studies have concluded that local content requirements can be a costly and inefficient policy tool in terms of resources allocation and growth (see e.g. WTO/UNCTAD, 2002, pp. 28-29 for a summary)'').

[13] *See also* UNCTAD, *Host Country Operational Measures* 60, UNCTAD/ITE/IIT/26, U.N. Sales No. E.01.II.D.18 (2001) (''[Host country operational measures] can generate high cost and relatively inefficient firm behaviour. Furthermore, they may not generate the dynamic learning and positive incentive structure to move firms or their suppliers along the path from infancy to competitive maturity. There has been, for example, some evidence that foreign affiliates subject to local-content requirements, adopted with an infant-industry logic to promote industrial development or job creation, have high costs, can lead to less efficient production, and have little hope to mature to competitive levels.'').

[14] *See generally* UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, UNCTAD/ITE/IIA/2003/7, U.N. Sales No. E.03.II.D.32 (2003). It is also interesting to note that a recent UNCTAD study shows that the use of performance requirements among both developed and developing countries has decreased significantly over the past three decades. *Id.* at 33.

EVOLUTION OF PERFORMANCE REQUIREMENT PROVISIONS

Prohibitions of performance requirements have evolved from broad, often hortatory, provisions to increasingly more precise and detailed provisions. The first provisions addressing performance requirements date from the 1980s. An example of one of the first such provisions is that in the Turkey-United States investment treaty of 1985:

> Each party shall seek to avoid performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.[15]

The concept of ''performance requirements'' is not defined as such, but it is given context by reference to the two examples of export and local content requirement. It is not limited to those examples, however, extending to ''any other similar requirements.''

The next major evolution in the prohibition of performance requirements came in the North American Free Trade Agreement (NAFTA),[16] which elaborated detailed provisions not only on performance requirements but also on a more limited set of investment incentives. Later U.S. and Canadian treaties largely follow the outline of the NAFTA's performance requirement provision, with some refinements.[17]

The NAFTA provides a definitive list of prohibited performance requirements rather than a series of examples. In the first paragraph, NAFTA Article 1106 lists seven specific types of host State measures that the State cannot impose or enforce.[18] In the third paragraph, the article lists

[15] Bilateral Investment Treaty, Dec. 3, 1985, Turkey-United States, art. II(7), http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005487.asp.

[16] North American Free Trade Agreement, Dec. 8-14, 1992, 32 I.L.M. 289 (1993).

[17] *See supra* notes 2 and 3 (citing relevant provisions from U.S. and Canadian model investment treaties).

[18] NAFTA Article 1106(1) provides in pertinent part as follows:

> 1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of goods or services;
>
> (b) to achieve a given level or percentage of domestic content;
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

four specific types of incentives that the State cannot offer as a condition of making the investment.[19] There is limited overlap between the first and third paragraphs, meaning that the drafters considered that some performance requirements that were harmful when imposed as a stick, were not harmful when offered as a carrot. Recognizing the complexity of these provisions, the remaining four paragraphs of Article 1106 consist of provisions clarifying the operation of the first and third paragraphs in certain circumstances.[20]

> (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
>
> (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
>
> (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
>
> (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

[19] NAFTA Article 1106(3) provides as follows:

> 3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:
>
> (a) to achieve a given level or percentage of domestic content;
>
> (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
>
> (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
>
> (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

[20] These paragraphs of NAFTA Article 1106 provide as follows:

> 2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure. . . .
>
> 4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or

A tremendous step forward in prohibiting a more narrow set of performance requirements was taken not in an investment treaty, but in the 1994 TRIMs agreement. The TRIMs agreement prohibits local content requirements, trade-balancing requirements, foreign exchange restrictions related to foreign exchange inflows attributable to an enterprise, and export controls.[21]

employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1 (b) or (c) or 3 (a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or non-living exhaustible natural resources.

[21] Article 2 of the TRIMs Agreement, concerning ''National Treatment and Quantitative Restrictions,'' is relatively brief and provides as follows:

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

However, the Annex referenced in the article elaborates a much more detailed ''Illustrative List'' that prohibits specific local content requirement. It provides as follows:

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

While the TRIMs agreement is in effect for all WTO members, it does not provide for investment arbitration. Some BITs containing an investment arbitration provision, however, explicitly incorporate the TRIMs agreement's prohibition. The 1998 BIT between Costa Rica and Canada is a case in point.[22]

Another approach is that taken by France in its 1999 Model BIT, followed in a number of French BITs in force. That BIT references a number of performance-requirement measures as examples of violation of the obligation of fair and equitable treatment. Notably, the BIT lists, as examples of violations of fair and equitable treatment,

> any restriction on the purchase or transportation of raw and auxiliary materials, energy and combustible supplies, as well as on production and exploitation of any kind, any restriction on the sale and transportation of products within the country or abroad, as well as measures with an analogous effect.[23]

> 2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
>
> (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
>
> (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
>
> (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

[22] Agreement for the Promotion and Protection of Investments, Mar. 18, 1998, Canada-Costa Rica, art. 6, http://www.international.gc.ca/tna-nac/cr-oth-en.asp (''Neither Contracting Party may impose, in connection with permitting the establishment or the acquisition of an investment, or enforce in connection with the subsequent regulation of that investment, any of the requirements set forth in the World Trade Organization Agreement on Trade-Related Investment Measures contained in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 april 1995.'').

[23] UNCTAD, *Host Country Operational Measures* 38 (reproducing art. 4 of 1999 French Model BIT) (''Chacune des Parties contractantes s'engage à assurer, sur son territoire et dans sa zone maritime, un traitement juste et équitable, conformément aux principes du Droit international, aux investissements des nationaux et sociétés de l'autre Partie et à faire en sorte que l'exercice du droit ainsi reconnu ne soit entravé ni en droit, ni en fait. En particulier, bien que non exclusivement, sont considérées comme des entraves de droit ou de fait au traitement juste et équitable,

This provision may be perplexing if taken at face value as intended to elaborate the content of fair and equitable treatment. If, however, it is understood as an expedient means of adding on a prohibition of certain performance requirements to the existing obligations of France's model investment treaty, it is easier to grasp.

WHAT CASES ON PERFORMANCE REQUIREMENTS HAVE FOUND

By my count, there are so far just two cases that have examined the content of the prohibition of performance requirements in any depth.[24] The first of the two cases is not an investment treaty case—it is the decision of the WTO dispute resolution panel in the *Indonesia—Certain Measures Affecting the Automobile Industry* case.[25] There, the panel found that Indonesian measures provided more favorable tax and import duty treatment for automobiles

toute restriction à l'achat et au transport de matières premières et de matières auxiliaires, d'énergie et de combustibles, ainsi que de moyens de production et d'exploitation de tout genre, tout entrave à la vente et au transport des produits à l'intérieur du pays et à l'étranger, ainsi que toutes autres mesures ayant un effet analogue.'').

[24] I am putting aside, for these purposes, cases like *ADF Group* and *S.D. Myers* where a performance requirements claim was asserted but it received little attention, whether because the implication of the provision was undisputed or because the claim was undeveloped. *See* ADF Group Inc. v. United States of America, Final Award, 6 *ICSID Rep.* 470, 520 ¶ 159 (Jan. 9, 2003), *available at* http://www.worldbank.org/icsid/cases/ADF-award.pdf (''Turning to the NAFTA Article 1106 claim of the Investor, the U.S. measures here at stake appear, by their own terms, to be requirements of local content and other performance requirements. The Respondent did not dispute that the U.S. measures constitute a requirement of domestic content within the sense of Article 1106(1)(b), and a requirement to accord preference to goods produced or services provided in the U.S. for purposes of Article 1106(1)(a). The Respondent instead focused on the applicability to the present case of certain provisions of Article 1108 which exclude the operation of, inter alia, Article 1106 in cases of 'procurement by a Party.' ''); S.D. Myers Inc. v. Government of Canada, First Partial Award, 8 I*CSID Rep.* 18, 58 ¶¶ 277-278 (Nov. 13, 2000, *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf. (''Looking at the substance and effect of the Interim Order, as well as the literal wording of Article 1106, the majority of the Tribunal considers that no 'requirements' as defined were imposed on SDMI that fell within Article 1106. Professor Schwartz considers that the effect of the Interim Order was to require SDMI to undertake all of its operations in Canada and that this amounted to a breach of subparagraph (b). By a majority, the Tribunal concludes that this is not a 'performance requirements' case.'').

[25] Indonesia—Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/54R00.DOC.

manufactured with at least a specified level of local parts. The panel found this measure constituted a trade-related investment measure prohibited by the TRIMs agreement.

The second decision is that in the *Pope & Talbot v. Canada*[26] investment arbitration under the NAFTA. In a 2000 interim award, the tribunal rejected the investor's contention that Canada's quota system for the export of softwood lumber breached the prohibition of performance requirements. It found that, while the quota system might have the effect of promoting similar policy goals in some respects, it did not do so through one of the means prohibited by the NAFTA.[27] It thus underlines what I noted earlier: the performance requirements prohibition addresses not the end but a specific means sometimes used to reach the end.

CONCLUSION

In conclusion, the limited jurisprudence available to date illuminates only a little the difficult area of performance requirements. The text, context, and historical background thus still provide today the best guide to those requirements.

[26] Pope and Talbot Inc. v. Government of Canada, Interim Award, 7 *ICSID Rep.* 69 (June 26, 2000), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc7.pdf.

[27] *Id.* at 80-82, ¶¶ 70-80.

Damages in Investor-State Arbitration

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The following criticism of an arbitral award may seem familiar to observers of recent developments in investment treaty arbitrations:

> It is . . . to be regretted that the award fails to give a satisfactory explanation of the manner in which the tribunal has arrived at the amounts awarded. While purporting to award compensation on the basis of the fair market value of the property taken, the tribunal has seen fit to omit discussion of the particular circumstances of the different claims or of the methods of calculation applied, or of the reasons for determining upon the amounts awarded in each case. Indeed, any definite disclosure or specification of the particular grounds of the awards to respective claimants is so entirely lacking that the award gives to one who examines it no clue to the method of determining why one amount was awarded rather than another.[1]

These arguments, however, are 85 years old: they were made by the U.S. Secretary of State, Charles Evans Hughes, in nonetheless paying the award of U.S.$12,239,852.47 rendered against the United States by the arbitral tribunal in the so-called ''Norwegian Shipowners' Claims'' arbitration in 1923.[2] A lot of Hughes' criticisms—in particular his complaints that the arbitral tribunal failed to explain the manner in which it had arrived at the amounts awarded and omitted all discussion of the methods of calculation applied—continue to resonate today.[3]

[1] Letter from Charles E. Hughes, U.S. Secretary of State, to Mr. H.H. Bryn, Minister of Norway re: Norwegian Shipowners' Claims (Feb. 26, 1923), http://www.haguejusticeportal.net/eCache/DEF/5/186.html.

[2] *Id.*

[3] *See, e.g.,* Irmgard Marboe, ''Compensation and Damages in International Law: The Limits of 'Fair Market Value','' 7 *J. World Investment & Trade* 723, 723 (2006) (''The calculation of compensation and damages always presents a particular

The persistence of these criticisms results from the fact that questions of damages and compensation largely have been considered by lawyers and academics as the ''poor cousin''[4] of more important legal battles about jurisdiction over claims and their merits, and hence have received less systematic attention. This is perhaps surprising, given the very real importance of compensation in any dispute resolution system. Indeed, in investment arbitrations the main concern of the foreign investor is, obviously, to recover damages for alleged violations by the State party of an obligation incumbent on it.[5] A large monetary award in favor of such an investor also may have important consequences for a dispute resolution system that is based on the consent of State parties, for, as one commentator has put it, ''[t]here is nothing as likely to fuel backlash [against investment arbitration] as damages awards that are seen as excessive and are not founded on a satisfactory reasoning.''[6] This tension between the justified expectations of foreign investors and the necessity of maintaining the legitimacy of the investment arbitration system highlights the need for both clarity and a degree of precision in the determination of damages and compensation in investment treaty arbitrations.

This article pursues such clarity and precision by reviewing recent major developments in arbitral practice, looking at both the legal doctrines that establish differing standards of compensation and damages for lawful and unlawful acts by State parties and the methods of valuation that these doctrines necessarily entail. In particular, this review will focus on practical considerations faced by tribunals in arriving at their awards of compensation

challenge in legal proceedings. . . . It is difficult to discern general principles or methodologies that are accepted on a wider scale. This is exacerbated by the fact that the judgments and awards often lack sufficient reasoning or consistency.''); Todd Weiler & Luis Miguel Diaz, *''Causation and Damages in NAFTA Investor-State Arbitration,'' in* Todd Weiler ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* 179 (2004).

[4] Thomas W. Walde & Borzu Sabahi, ''Compensation, Damages and Valuation in International Investment Law,'' 3(5) *Transnat'l Dispute Mgmt.* 1 (2006).

[5] *See* Gus Van Harten, ''The Public-Private Distinction in the International Arbitration of Individual Claims Against the State,'' 56 *Int'l & Comp. L.Q.* 371, 380-81 (2007) (''an investor's decision to submit a dispute to investment treaty arbitration is . . . like the decision of an individual to seek damages against the State under domestic public law.'').

[6] *Id.* at 2; *see also* CME v. Czech Republic, Separate Opinion of Ian Brownlie on the Issues at the Quantum Phase, ¶ 78 (Mar. 14, 2003) (''It would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the Czech Republic.'' (Internal quotation marks omitted.)).

or damages, particularly in the recent *ADC v. Hungary*[7] and *Siemens v. Argentina*[8] awards, as well as in earlier jurisprudence of the Iran-United States Claims Tribunal.

STANDARDS OF COMPENSATION FOR UNLAWFUL ACTS

The obligation of a State party to pay compensation or damages to a foreign investor may be based on any number of legal grounds. Investment treaties may contain express standards of compensation for certain defined situations. When this is the case, tribunals have found that a treaty provision ''can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law.''[9] As commentators have noted, the recent explosion in the number of bilateral investment treaties (BITs) that address the question of the compensation due for a *lawful* expropriation has meant that ''the debate on the customary international law standard has lost its explosiveness.''[10] Accordingly, this article will focus on customary international law standards of damages due for *un*lawful actions by States—be they unlawful expropriations or other treaty violations—as remedies for breaches of a treaty continue to be governed by customary international law.[11]

At this juncture it is important to underscore the distinction between ''damages'' and ''compensation,'' as terminological imprecision has contributed to the anomaly noted 85 years ago by Secretary of State Hughes.[12]

[7] ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16 (Oct. 2, 2006), *available at* http://www.worldbank.org/icsid/cases/pdf/ARB0316_ADCvHungary_AwardOctober2_2006.pdf.

[8] Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8 (Feb. 6, 2007), *available at* http://www.investmentclaims.com/decisions/ICSIDARB0208-Siemens-Argentina-Award.pdf.

[9] ADC v. Hungary, *supra* note 7, at ¶ 481.

[10] Marboe, *supra* note 3, at 730; *see also* Walde & Sabahi, *supra* note 4, at 26 (''Calculation of compensation due for expropriation, in spite of debates, is relatively well-established.'').

[11] *See, e.g.,* MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7 ¶ 238 (May 25, 2004), *available at* http://www.investmentclaims.com/decisions/MTD-Chile-Award-25May2004.pdf; Siemens A.G. v. Argentina, *supra* note 8, at ¶ 349 (''The law applicable to the determination of compensation for a breach of . . . Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.'').

[12] Letter from Charles E. Hughes, U.S. Secretary of State, to Mr. H.H. Bryn, Minister of Norway re: *Norwegian Shipowners' Claims* (Feb. 26, 1923), http://www.haguejusticeportal.net/eCache/DEF/5/186.html; Marboe, *supra* note 3, at 723-24. *See generally* Markham Ball, ''Assessing Damages in Claims by Investors Against States,'' 16 *ICSID Rev.—Foreign Inv. L.J.* 408, 408 (2001) (using the term ''damages'' ''both for the sake of brevity and to denote the measure of compensa-

While there is no inherent, fundamental distinction between ''damages'' and ''compensation,'' the two terms are employed differently in the context of expropriations—with practical effects of some consequence on the quantum of the award. Put simply, ''damages'' are the remedy for unlawful State acts, while compensation is understood as a component of lawful behavior, for example as one of the conditions that render expropriations lawful.[13] The crucial distinction is that between lawful and unlawful actions—whether they be expropriations or other actions—by States, as the remedies for each will vary accordingly.[14]

The starting point in discussing the standard applicable to the award of damages to a foreign investor for an unlawful action by the host State is the Permanent Court of International Justice's (PCIJ) famous pronouncement in the *Chorzów Factory* case:[15]

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice

tion to be paid in cases in which compensation is held to be due under international law'').

[13] See D. Bowett, ''Claims Between States and Private Entities: The Twilight Zone of International Law,'' 35 *Cath. U. L. Rev.* 929, 938 (1986) (noting that ''it may be best to refer to compensation as the remedy for *lawful* taking or termination of contract and damages as the remedy for an *unlawful* taking or termination''). It is, of course, well established that under international law, expropriations can be either lawful or unlawful. The conditions for a lawful expropriation include the payment of compensation, the requirement that the expropriation be for a ''public purpose,'' be conducted in a non-discriminatory manner and in accordance with due process. *See* Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 104 et seq. (1995). If the expropriating State does not comply with these requirements, it has acted unlawfully and the remedy available is the payment of damages. Marboe, *supra* note 3 at 725.

[14] Indeed, the PCIJ made this distinction clear in the *Chorzów Factory* case, noting that it would be ''unjust'' if legal and illegal behavior led to the same financial consequences, as ''[s]uch a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 of the Convention—that is to say the prohibition, in principle, of the liquidation of the property . . .—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.'' Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 48 (Sept. 13). This distinction was also preserved by the Iran-United States Claims Tribunal in the context of expropriations, as the tribunal noted that a clear distinction must be made between lawful and unlawful expropriations under customary international law ''since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking.'' Amoco International Finance Corp. and The Government of the Islamic Republic of Iran, 15 *Iran-U.S. Cl. Trib. Rep.* 189, 246 (1987).

[15] Factory at Chorzów, *supra* note 14, at 48.

> and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due to an act contrary to international law.[16]

This statement sets out both the goal that ''reparation'' must ''wipe out all the consequences of the illegal act'' and a hierarchy of methods to achieve this goal: restitution is preferred, otherwise its monetary equivalent,[17] plus, in either case, ''damages'' for losses not covered by either; or, put another way, ''the compensation due to [the claimant] is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment,'' as that is the standard of compensation for lawful expropriations.[18]

The *Chorzów* Court's pronouncement has been carried forward in the International Law Commission's Articles on State Responsibility,[19] which likewise articulate a standard that is applicable to States that have violated

[16] *Id.* at 47-48. Some commentators refer to this statement as ''dictum.'' *See, e.g.,* J. Patrick Kelly, ''The Twilight of Customary International Law,'' 40 *Va. J. Int'l L.* 449, 521 n.302, 526 n.318 (2000); Marboe, *supra* note 3, at 732. The sole arbitrator in the TOPCO Arbitration, Prof. René-Jean Dupuy, addressed this argument as follows in the Award on the Merits in that case: ''It could be claimed that, in the case where the above-mentioned principle was laid down, the principle had only the value of *obiter dictum* and not of a true *ratio decidendi* since restitution in kind was not formally requested and the impossibility of restitution in kind had been established by agreement between the parties. But the fact remains that the principle was expressed in such general terms that it is difficult not to view it as a principle of reasoning having the value of precedent.'' Texaco Overseas Petroleum Co. (TOPCO) & Cal. Asiatic Oil Co. (CALASIATIC) v. Libyan Arab Republic, Award on the Merits (Jan. 19 1977), 17 I.L.M. 1 (1977).

[17] *See* James Crawford ed., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* art. 35 comm. 3 (2002). With regard to *Chorzów* itself, the PCIJ noted that ''[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution.'' Factory at Chorzów, *supra* note 14, at 48.

[18] *Id.* at 47.

[19] *See* Crawford, *supra* note 17, art. 31 comm. 1; *see also* Walde & Sabahi, *supra* note 4, at 8.

any international obligation—and not only in the context of expropriations.[20]

Article 31 sets out a State's basic obligation ''to make full reparation for the injury caused by the internationally wrongful act,''[21] while Chapter II further spells out the general principle of Article 31. Thus, Article 34, entitled ''Forms of reparation'' states:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.[22]

The obligation to make restitution (Article 35) is one ''to re-establish the situation which existed before the wrongful act was committed,''[23] and the obligation to pay compensation is described in Article 36 as follows:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.[24]

The standard of compensation for an unlawful act derived from *Chorzów* and the Articles on State Responsibility is therefore the obligation to provide

[20] While the applicability of the Articles on State Responsibility to investment arbitration has been questioned, since the articles are said to address solely responsibility between States, commentators have confirmed that ''there is no doubt that the . . . Articles play a very important role also in investment arbitration,'' as the official commentary of the Articles makes clear that Article 1 covers all international obligations of the State including those owed to non-State actors. Kaj Hober, *State Responsibility and Investment Arbitration*, http://www.ila-hq.org/pdf/Foreign%20Investment/ILA%20paper%20Hober.pdf; Crawford, *supra* note 17, at 192-93.

[21] Crawford, *supra* note 17, art. 31(1). The remainder of Article 31 defines ''injury'' as including ''any damage, whether material or moral, caused by the internationally wrongful act of a State.'' *Id.,* art. 31(2).

[22] *Id.,* art. 34.

[23] *Id.,* art. 35. This obligation contains the proviso that restitution is due ''provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.'' *Id.*

[24] *Id.,* art. 36.

''full reparation.'' As Article 36 makes clear, compensation includes ''any financially assessable damage,'' including lost profits.[25]

Chorzów itself pointed to what this meant in practice by noting that ''full reparation'' requires a comparison of the actual financial situation of the injured entity with ''the situation which would, in all probability, have existed if [the illegal act] had not been committed.''[26] This ''differential method'' measures damages from the perspective of the adversely affected party, including the ''specific significance of an asset for the financial situation and the specific rights, plans or competences of the owner,'' as well as consequential damages.[27] A concise summary of how this standard can operate, based on the language in *Chorzów*, was provided by Judge Brower in his Concurring Opinion in the *Amoco* case at the Iran-United States Claims Tribunal.[28] There, Judge Brower contrasted the customary international law standard of compensation for a lawful expropriation, where the compensation envisioned by *Chorzów* was the '' 'value of the undertaking' . . . lost, including any potential future profits, *as of the date of the taking*,'' with the standard of compensation for an unlawful expropriation.[29] He noted that the party injured by the unlawful act should either be restored to enjoyment of his or her property or, if this is not possible, be awarded damages equal to

> the greater of (i) the value of the undertaking at the date of loss (. . . including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance *subsequent to the date of loss and prior to the date of the award*, based on actual post-taking experience, plus (in either alternative) any consequential damages.[30]

Before turning to two recent arbitral awards in which application of the *Chorzów* standard made an appreciable difference in the recovery awarded to the investor, it is interesting to note that before the *Siemens* and *ADC* awards no BIT or multilateral investment treaty arbitration award had actually

[25] *Id.*, art. 36 comm. 21 (noting that the financially assessable damage is ''usually assessed by reference to specific heads of damage relating to (i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental expenses'').

[26] Factory at Chorzów, *supra* note 14, at 47.

[27] Marboe, *supra* note 3, at 733.

[28] Amoco International Finance Corp. and The Government of the Islamic Republic of Iran, *supra* note 14, at 189, 298-305 (Concurring Opinion of Judge Brower).

[29] *Id.* at 300 (emphasis added).

[30] *Id.* (emphasis added).

applied the *Chorzów* standard in calculating the damages due.[31] It seems that even if the expropriation was considered unlawful, there was no application of the *Chorzów* standard to derive a *Chorzów* value higher than the value of the enterprise at the time of the taking, nor were consequential damages awarded.[32] One can only speculate as to why this was the case, but two plausible reasons come to mind based on past experiences. It is possible that counsel for claimants in some of those investment arbitrations lacked a clear understanding of the different standards of compensation and consequently failed to advance claimants' best arguments (including use of the *Chorzów* standard for unlawful expropriations). Alternatively, perhaps both claimants and their counsel realized that the value of the investment at the time of the award would not be greater than the value at the time of the expropriation, and that there were no consequential damages, and consequently they advocated for the applicable treaty standard of compensation for a lawful expropriation, which was clear and would give them no less than would *Chorzów*.

In the two arbitration awards mentioned at the outset—*ADC* and *Siemens*—the factual circumstances were rather egregious, both expropriations were found to be unlawful, and each tribunal applied the *Chorzów* standard to the benefit of the investor. In the *ADC* arbitration, two Cypriot

[31] *See* ADC Affiliate Ltd. v. Republic of Hungary, *supra* note 7, at ¶¶ 484-496 (describing cases that have applied the *Chorzów* standard, but none that found an unlawful expropriation or that the *Chorzów* standard of compensation for unlawful expropriations resulted in a higher value than what the value of the investment was at the time it was expropriated). In the slightly different context of the European Court of Human Rights—cases that do not involve BITs or other investment treaties—the Court has used the date of the award as the valuation date for damages resulting from an unlawful exproriation. *See* Papamichalopoulos and Others v. Greece, 21 E.H.R.R. 439 (ser. A) (1995), 1995 WL 1082483 (finding, not in the context of a bilateral or other investment treaty, that the Greek government *de facto* had expropriated the applicants in the case and awarding them as damages the higher value enjoyed by the property at the moment of the Court's judgment rather than the lesser value at the date of the expropriation, in accordance with the *Chorzów* standard); Iatridis v. Greece, 1999-II Eur. Ct. H.R. 75; Iacob v. Roumanie, E.C.H.R. No. 39410/98 ¶ 39 (2005); Strain and others v. Romania, E.C.H.R. No. 57001/00 ¶ 83 (2005).

[32] *See* ADC Affiliate Ltd. v. Republic of Hungary, *supra* note 7, at ¶ 496 (''The present case is almost unique among decided cases concerning the expropriation by State of foreign owned property, since the value of the investment after the date of expropriation . . . has risen very considerably while other arbitrations that apply the *Chorzów Factory* standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of expropriation as the date for the valuation of damages.'').

companies had entered into a series of agreements with Hungary between 1995 and 1997 to renovate an existing terminal at Budapest Airport, build a new terminal there, and manage the non-airside activities of the airport for a significant term of years.[33] In December 2001, however, Hungary issued a decree providing that the State must be a majority owner in the operation of the airport and that the agreements with claimants would become void as of January 1, 2002.[34] The Cypriot companies instituted ICSID arbitration proceedings against Hungary pursuant to the Cyprus-Hungary BIT, alleging expropriation of their investment. In its award, the tribunal held that Hungary's actions constituted an unlawful expropriation because (1) the taking was not in the public interest, (2) it did not comply with due process, (3) the taking was discriminatory, and (4) the taking was not accompanied by the payment to the expropriated parties of the compensation required by the applicable BIT.[35]

Turning to damages, the tribunal rightly rejected the BIT's ''just compensation'' standard, as it referred only to lawful expropriations, and instead applied the standard of compensation enunciated in *Chorzów,* namely ''payment of a sum corresponding to the value which a restitution in kind would bear.''[36] The tribunal then recognized that since the Budapest Airport had been reprivatized through the signing in December 2005 of a U.S.$2.23 billion privatization contract with BAA (International Holdings) Ltd., the ''value of the investment after the date of the expropriation had risen very considerably.''[37] The tribunal consequently decided, based on the language of *Chorzów* and also on the jurisprudence of the European Court of Human Rights, that given those circumstances ''the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed,''[38] *Chorzów*, and subsequent practice at the Iran-United States Claims Tribunal, having made clear that damages for an unlawful expropriation ''are not necessarily limited to the value of the undertaking at the moment of dispossession.''[39]

The *Siemens* case also applied the *Chorzów* standard of compensation for unlawful actions in a manner that made a difference to the investor. In

[33] *Id.*, ¶¶ 107-109.
[34] *Id.*, ¶¶ 179-190.
[35] *Id.*, ¶¶ 426-445.
[36] *Id.*, ¶ 496.
[37] *Id.*
[38] *Id.*, ¶ 497 (citing Papamichalopoulos and Others v. Greece, *supra* note 31).
[39] *Id.*, ¶ 497 (citing Factory at Chorzów, *supra* note 14, at 47 and Amoco International Finance Corp. and The Government of the Islamic Republic of Iran, *supra* note 14, at 247).

Siemens, the Argentine subsidiary of Siemens AG, Siemens IT Services, S.A. (SITS), had been awarded a contract to create anew and operate Argentina's immigration control, personal identification, and electoral information system, based on national identity cards.[40] Following one abortive post-contract attempt at renegotiation, Argentina terminated SITS's contract in May 2001, allegedly pursuant to the powers of Argentina's Economic-Financial Emergency Law.[41] After an unsuccessful administrative appeal, SITS instituted ICSID arbitration, claiming that Argentina had breached the Germany-Argentina BIT. The ICSID Tribunal found that Argentina's actions with respect to claimant's investment amounted to an unlawful expropriation in breach of the treaty,[42] and also that Argentina had breached the treaty by failing to provide claimant's investment fair and equitable treatment and full protection and legal security.[43]

In its assessment of the standard of compensation, the *Siemens* tribunal noted that the BIT stipulated only the compensation required for lawful expropriations, and then looked at *Chorzów* and the ILC's Articles on State Responsibility to conclude that ''[u]nder customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of the expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.''[44] The tribunal emphasized the effect of the *Chorzów* standard by noting that it was ''only logical'' that ''if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award be compensated in full. Otherwise compensation would not cover all the consequences of the illegal act.''[45] Accordingly, the tribunal awarded Siemens the fair market book value of its investment as of the date of the award as well as U.S.$9 million in consequential damages—which are, of course, not available in the case of a lawful expropriation.[46]

The standard of compensation for an unlawful act by a State therefore is one that emanates from the *Chorzów* case and has been reinforced by the ILC's Articles on State Responsibility. It is a standard of ''full reparation,'' which includes ''any financially assessable damage,'' including lost profits. The recent *ADC v. Hungary* and *Siemens v. Argentina* awards, following the European Court of Human Rights' approach to the *Chorzów* standard, have applied *Chorzów* in a manner that has made a demonstrable difference to

[40] Siemens A.G. v. Argentina, *supra* note 8, at ¶¶ 81-84.
[41] *Id.*, ¶¶ 92-97.
[42] *Id.*, ¶ 273.
[43] *Id.*, ¶ 349.
[44] *Id.*, ¶ 352.
[45] *Id.*, ¶ 353.
[46] *Id.*, ¶ 403.

the recovery of foreign investors—by using the date of the award as the valuation date and by granting consequential damages. This approach differs from the standard of compensation for lawful expropriations contained in many BITs, which allows neither valuation as of the date of the award nor consequential damages.[47] That such a difference exists between recoveries by foreign investors for lawful acts of States and for unlawful ones is both necessary and logical, as it would ''offend[] against all common sense'' to allow the same recovery for a lawful act as for an unlawful one.[48]

METHODS OF VALUATION

Once a standard of compensation—such as the standard of ''full reparation'' for unlawful acts of State parties—is established, a tribunal must derive an appropriate quantum of damages. From the perspective of the parties in an investment treaty arbitration, this step in a tribunal's analysis is crucial, and in order to avoid the type of criticism leveled by Secretary of State Charles Evans Hughes at the Norwegian Shipowners' award, a tribunal must explain its methodology ''and in some detail.''[49] As commentators

[47] *See, e.g.*, North American Free Trade Agreement (pts. 1 & 2), United States-Canada-Mexico, Dec. 17, 1992, 32 I.L.M. 289 and 605, art. 1110 (1992) (''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.''); U.S. Model BIT art. 6, *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (''The compensation . . . shall . . . be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . [and] not reflect any change in value occurring because the intended expropriation had become known earlier.''); Marboe, *supra* note 3, at 730; *but see* CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, ¶ 410 (May 12, 2005) (holding in a case involving breaches of the treaty that compensation is best assessed under the fair market value standard as ''[w]hile 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'').

[48] D. Bowett, ''State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach,'' 59 *Brit. Y.B. Int'l L.* 49, 61 (1988); see *also* SEDCO, Inc. v. National Iranian Oil Co., Second Interlocutory Award, 10 *Iran-U.S. Cl. Trib. Rep.* 189, 205 n.40 (1985) (Separate Opinion of Judge Brower) (arguing that a difference in remedies for lawful and unlawful actions is to be desired as otherwise ''the injured party would receive nothing additional for the enhanced wrong done and the offending State would experience no disincentive to repetition of unlawful conduct'').

[49] Walde & Sabahi, *supra* note 4, at 10.

have noted, however, valuation is a ''harder'' task for arbitral tribunals than that of arriving at the proper standard to be applied, as it often requires recourse to technical accounting and corporate finance principles with which tribunals may be unfamiliar.[50] Before addressing certain practical considerations faced by tribunals in the process of valuation, it may be helpful briefly to outline some of the most widely used methods of valuation in investment treaty arbitration. In this context, it is interesting to note that while the ''full reparation'' and ''fair market value'' standards of compensation are different (insofar as the latter excludes consequential damages) and therefore may result in the awarding of different amounts of damages, a tribunal must nonetheless determine what the ''value'' of the investment is, and tribunals determining the damages due to foreign investors for unlawful acts by States have used the same general methods of valuation as those employed to determine ''fair market value'' of the expropriated property (albeit potentially as of a later date).[51] A few of these methods of valuation for different types of assets are discussed briefly below.

Book Value

One traditional method of valuation is the ''book value'' method, which is based on the available historic information of expenditures actually incurred in making the investment in issue and which has been applied to both tangible property and ongoing concerns.[52] This method looks at the

[50] Ball, *supra* note 12, at 417; *see also* Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 538 (1998) (''The actual valuation of expropriated property often is an involved and difficult exercise. This results from the various accounting principles to which one must resort when, as most often is the case . . . no market for the property exists from which to determine an actual market value.'').

[51] *See* ADC Affiliate Ltd. v. Republic of Hungary, *supra* note 7, at ¶ 501 (noting, after having established that the standard of compensation was the *Chorzów* standard of the market value of the expropriated investment as of the date of the award, that it needed to determine ''the appropriate method to determine the fair market value of the expropriated investments''). The ADC tribunal then applied a method of valuation frequently used in the ''fair market value'' analysis common to lawful expropriations, the Discounted Cash Flow method, based on the date of the award, however, as the *Chorzów* standard requires, and not on the date of the taking. *Id.*, ¶ 517.

[52] Walde & Sabahi, *supra* note 4, at 17. One tribunal noted that the method may not be appropriate for compensating an investor for loss of a contract. Amco Asia Corp. v. Indonesia: Resubmitted Case, ICSID Case No. ARB/81/1, Final Award, ¶ 100 (June 5, 1990), *in* 17 *Y.B. Comm. Arb.* 73 (1992) (''It can immediately be seen that [net book value] is a method unsuited to placing a party in the position of his contract having been performed.'').

difference between the total assets of a business and its total liabilities as shown on its books.[53] The classic book value case is one in which the claimant seeks the value of an enterprise it alleges will be making a profit over future years and where the respondent argues that there is no legal right to loss of profits but that only the book value should be recovered.[54]

The clear advantages of this method, in addition to being ''easily and objectively assessed,''[55] are that it is based on actual costs, the figures used are not created exclusively for the purpose of the claim, and they usually are based on a contemporaneous record.[56] The disadvantages of the book value method are its reliance on historical figures that may not have any relevance in the valuation context. As one analysis has pointed out, ''a balance sheet may contain an entry for goodwill, but the reliability of such a figure depends upon their [sic] proximity to the moment of an actual sale.''[57] These disadvantages are reflected in the practice of the Iran-United States Claims Tribunal, which rejected book value as the proper value of a going concern,[58] and also rejected the valuation of certain fixed assets in the *SEDCO* case based on historical book value, as requested by respondent in that case.[59] Rather, the tribunal in *SEDCO* adopted the claimant's ''current cost accounting'' method to the valuation of the fixed assets at issue, a method based on the calculation of the ''current book value'' of the assets, which adjusted the historical book value to reflect inflation through application of the consumer price indices for both Iran and the United States.[60]

The valuation in the *Siemens* case serves the useful function of pointing out that while the methods of valuation being described here are usually applicable to investment treaty arbitrations, tribunals have to calculate damages based on the facts of the case—and these will not always fall neatly into the traditional methods of valuation. Thus, while the claimant in *Siemens* had requested U.S.$283,859,710 as what it termed the ''book value

[53] *See* Weiler & Diaz, *supra* note 3, at 198; *see also* Amco Asia Corp. v. Indonesia: Resubmitted Case, *supra* note 52 (''Net book value has been described as 'assets minus liability without consequential damages.' '' (citation omitted)).

[54] *See, e.g.,* Phelps Dodge Corp. v. Iran, 10 *Iran-U.S. Cl. Trib. Rep.* 121, 132-33 (1986).

[55] Amoco International Finance Corp. and The Government of the Islamic Republic of Iran, *supra* note 14, at 265.

[56] Walde & Sabahi, *supra* note 4, at 17-18.

[57] Weiler & Diaz, *supra* note 3, at 199.

[58] George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 250 (1996).

[59] SEDCO, Inc v. National Iranian Oil Co., 15 *Iran-U.S. Cl. Trib. Rep.* 23, 115 (1987).

[60] *Id.* at 113-15.

of its investment,''[61] the particular facts of the case led the tribunal to depart from the traditional book value approach, and *Siemens* is best understood as an example of a *sui generis* case that defies traditional categorization. Indeed, correctly understood, the claimant in *Siemens* requested lost contractual profits—that is the difference between the cost of performance and the prospective revenues of the contract—but since the contract terms created a situation in which no revenues would be received until the claimant had incurred most of the costs of performance, its ''sunk costs'' at the time of expropriation already amounted essentially to the full cost of performance.[62] As the tribunal found that the enterprise was not one that promised to make profits on a continuing basis, the tribunal instead awarded the book value of what had actually been invested in the project, adjusted downward to eliminate ''excessive interest rates, tax credits and risks associated with Contract termination.''[63] The tribunal then added U.S.$9,178,000 in consequential damages reflecting the costs incurred by SITS in maintaining a skeleton operation in Argentina after the expropriation.[64]

The Discounted Cash Flow Method

One commonly used ''modern'' valuation method is the Discounted Cash Flow (DCF) method. The DCF method is an income-based method of valuing an ongoing enterprise or a long-term contractual right, for example to exploit a natural resource.[65] Briefly stated, the DCF method values the relevant object based on its ability to create financial benefits for the owner in the future.[66] The actual analysis required by the DCF method is a three-step process: first, a calculation must be made of the anticipated future cash flows to be generated from the enterprise for each year during the

[61] *Id.,* ¶ 362.
[62] Siemens A.G. v. Argentina, *supra* note 8, ¶ 355.
[63] *Id.,* ¶ 375.
[64] *Id.,* ¶¶ 386-387.
[65] Crawford, *supra* note 17, art. 36 comm. 26. Crawford notes that while the DCF method has become more common, tribunals have adopted a ''cautious approach to the use of the method,'' as the DCF method ''analyses a wide variety of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks).'' *Id.*; *see also* ADC v. Hungary, *supra* note 7, at ¶ 502 (''Like many other tribunals in cases such as the present one, the Tribunal prefers to apply the DCF method, although it is mindful of Respondent's admonition that 'international tribunals have exercised great caution in using the [DCF] method due to its inherently speculative nature.' '').
[66] See Brower & Brueschke, *supra* note 50, at 576.

anticipated life of the enterprise or agreed term of the contract; second, there must be a calculation of future costs; and, third, there must be a determination of an appropriate discount rate to be applied to future profits to reduce them to present value.[67] The discount factor should take into account both the real value of money, prospective inflation, and risk, and it is ''generally calculated on the basis of the Capital Asset Pricing Model, which helps to identify the (opportunity) cost of capital of the valuation object.''[68] Each of the three steps of the analysis ''may involve multiple subcalculations depending upon the type, nature and circumstances of the business entity being valued.''[69]

The DCF method has frequently been advanced by parties in investment treaty arbitrations, and tribunals have applied it in a variety of contexts. The Iran-United States Claims Tribunal, for example, first employed the DCF analysis in the *Starrett Housing Corporation* case, which involved the expropriation of a housing project northwest of Tehran.[70] After finding that by the end of January 1980 the actions of the Iranian government had constituted a taking, the tribunal set the valuation date as January 31, 1980, and appointed an expert to ''give his opinion on the value of [the expropriated property], considering as he deems appropriate the discounted cash flow method of valuation.''[71] The expert employed the DCF method in his analysis, and the tribunal adopted this approach.[72] Judge Holtzmann's Concurring Opinion emphasized the correctness of the DCF method in the following terms:

> [t]he valuation procedure proved the great usefulness of the DCF Method as a technique for establishing the fair market value of an enterprise, notwithstanding that in this case the expropriated business consisted of a relatively complex organization of related companies, including minority interests.[73]

As previously noted, the DCF method was also used in the *ADC* case to determine the damages due to the foreign investor as ''full reparation'' (with the addition of consequential damages) for Hungary's unlawful

[67] *Id.*
[68] Marboe, *supra* note 3, at 737-38.
[69] Brower & Brueschke, *supra* note 50, at 576.
[70] Starrett Housing Corp. and the Government of the Islamic Republic of Iran, 16 *Iran-U.S. Cl. Trib. Rep.* 112 (1987).
[71] *Id.* at 122, 157.
[72] *Id.* at 201.
[73] *Id.* at 237, 241 (Concurring Opinion of Judge Holtzmann).

expropriation based, as the *Chorzów* standard requires, on the date of the award.[74]

Replacement Value

Where actual restitution under *Chorzów* is unavailable, another method for valuing tangible assets is the replacement value of the asset lost by the unlawful action of the State, as the International Court of Justice (ICJ) noted in the *Corfu Channel* case.[75] Of course, this method is available only if the asset in question is replaceable, which signifies that unique business opportunities and assets with unique qualities cannot be valued using this method.[76] Nonetheless, this method of valuation has been used by parties and tribunals where the damage incurred is the loss of a replaceable asset.[77]

The Iran-United States Claims Tribunal, for example, employed this method of valuation in the *Oil Field of Texas* case, where the tribunal found that Iran was responsible for lawfully taking claimant's blowout preventers.[78] The claimant requested the replacement value of the assets, and the tribunal agreed that this was the correct approach, noting that replacement value ''in the circumstances of this Case . . . is an appropriate measure of the value of the equipment . . . [and] what has to be determined is the amount it would have cost to replace the three blowout preventers . . . based on the market conditions for such equipment at the time.''[79] The Iran-United States Claims Tribunal also employed the ''replacement value'' method as a ''confirmatory valuation''[80] in the *Phillips Petroleum* case.[81] There, while the tribunal adopted a DCF method of valuation, it also employed what it termed an ''underlying asset valuation approach,'' which

[74] ADC Affiliate Ltd. v. Republic of Hungary, *supra* note 7, at ¶ 502 (''Like many other tribunals in cases such as the present one, the Tribunal prefers to apply the DCF method.'').

[75] The Corfu Channel Case (U.K. v. Alb.), Assessment of the Amount of Compensation, 1949 I.C.J. 243, 249 (Dec. 15). In that case, the loss was the destruction of one destroyer and severe damage to another, and the destroyed ship was valued at its replacement cost while the damage to the other was valued by the necessary cost of repair.

[76] *See* Marboe, *supra* note 3, at 744-45.

[77] *See* SEDCO, Inc v. National Iranian Oil Co., *supra* note 59, at 105-06 (claimant using replacement value as one of the methods of calculating damages due to it for Iran's expropriation of its interests in drilling rigs in Iran).

[78] Oil Field of Texas and The Government of the Islamic Republic of Iran, 12 *Iran-U.S. Cl. Trib. Rep.* 308 (1986).

[79] *Id.* at 319.

[80] Brower & Brueschke, *supra* note 50, at 602.

[81] Phillips Petroleum Co. Iran v. Iran, 21 *Iran-U.S. Cl. Trib. Rep.* 79 (1989).

in practice entailed a calculation of the ''tangible assets at their depreciated replacement value, which means the net book value of the original investments is escalated for variations of costs in time and adjusted for various other factors.''[82]

The Comparative Method

As its name indicates, this approach is based on ''actually paid prices for comparable items on the market.''[83] In the *SEDCO* case before the Iran-United States Claims Tribunal, for example, the claimant advanced a proposed valuation of certain expropriated oil rigs based (among other methods) on the comparative method, using data from the sale of three other oil rigs in Dubai in 1981, which were ''much smaller and technically less advanced'' than those at issue in the *SEDCO* case, and then adjusting this value to reflect the ''newer, technically more advanced and larger rigs.''[84] The tribunal noted that such sales data was ''a useful but only approximate guide,'' one ''requiring substantial explanation in justification of its relevance.''[85] As the *SEDCO* case illustrates, application of this method depends on the existence of a sufficient number of comparable transactions, as otherwise the valuation will be too speculative to be of any value.[86]

* * * *

This brief overview of a few of the valuation methodologies available in investment treaty arbitrations highlights that tribunals must be conversant with a number of different ways of valuing an investment, and the *Siemens* case further illustrates that tribunals must value investments based on the particular facts of the specific case in front of them. As a practical matter, tribunals are more likely to be persuaded to arrive at a particular figure if presented with a number of different ways of valuation that provide a comparable range of figures. Precisely this occurred in the *SEDCO* case, where the claimant requested the tribunal to value its expropriated rigs at U.S.$76,600,000 based on (1) a valuation carried out by an expert with first-hand knowledge of the rigs in question that calculated their value as U.S.$76,600,000, (2) a comparative valuation approach based on sales of comparable rigs in the region and appraisal information that confirmed the

[82] *Id.*, ¶ 160.
[83] Marboe, *supra* note 3, at 740-41.
[84] SEDCO, Inc v. National Iranian Oil Co., *supra* note 59, at 104.
[85] *Id.* at 50 n.33.
[86] Brower & Brueschke, *supra* note 50, at 596 (''It is important . . . that in presenting testimony or other evidence of such [comparative] transactions the parties focus on transactions that are truly comparable.'').

expert's figure, (3) the insurance policy coverage of the rigs, which valued them at U.S.$57,623,419, (4) the replacement value of the rigs of U.S.$92,513,111, calculated based on market prices, and (5) the current net book value approach, which resulted in a figure of U.S.$57,276,370.[87] After reviewing these methods and describing them as ''helpful,'' the tribunal valued the rigs at U.S.$62,500,000 based on its own modification of the net book value approach.[88]

The *SEDCO* case also illustrates a major practical problem faced by tribunals in determining compensation or damages. In *SEDCO,* the tribunal was faced with the claimant's valuation of U.S.$76,600,000 and respondent's valuation of U.S.$21,693,047, a magnitude of disparity in valuation that is far from rare in the investment arbitration context.[89] Indeed, it is common for each side to provide its own valuation—supported by significant amounts of evidence in the form of expert reports and relevant documents—and obviously each side's request will suit its position. A tribunal facing such a scenario is then left with three alternatives. First, the tribunal can call the parties back to determine whether they agree on any factors that must be included in the valuation. This approach, however, is time consuming and costly to the parties. Second, the tribunal can decide itself to appoint an impartial expert to the valuation. While this approach has the advantage of leaving the valuation to a professional, it suffers from the same deficiencies as the first approach—it adds time to the awarding of damages at the expense of the parties. In the *Siemens* case, for example, the tribunal rejected Argentina's request to appoint an expert to analyze claimant's accounts, arguing that doing so would needlessly prolong the proceedings.[90] Finally, a tribunal can somehow choose a figure between the amount requested by the claimant and that put forward by the respondent.[91]

Perhaps recognizing that the latter approach has been preferred by tribunals in the investment treaty context, and understanding also the

[87] SEDCO, Inc v. National Iranian Oil Co., *supra* note 59, at 103-08.

[88] *Id.* at 111.

[89] *See, e.g.,* S.D. Myers, Inc. v. Canada, NAFTA/UNCITRAL Tribunal, Second Partial Award, ¶ 175 (Oct. 21, 2002), *available at* http://www.appletonlaw.com/cases/Myers%20-%20Damages%20Award%20-%20Oct21-02.pdf (''The Tribunal is faced with the widely differing proposals of two distinguished accountants, supported by the equally distinguished firms of which they are partners, together with the opinions of a number of other experts retained by the Parties.'').

[90] Siemens A.G. v. Argentina, *supra* note 8, at ¶ 360.

[91] *See, e.g.,* S.D. Myers, Inc. v. Canada, *supra* note 89, at ¶ 175 (''[T]aking into account the significant disparities in the position of the Parties, the Tribunal considered it necessary to perform its own analysis of the facts and figures disclosed during the second stage of the arbitration, guided by the party-appointed experts and the evidence overall.'').

potential limitations of tribunals in arriving at appropriate damages based on different and often contradictory methods of valuation, parties to investment treaty arbitrations have sometimes sought to aid tribunals in arriving at a quantum of compensation by providing appropriate electronic financial models. In *ADC*, for example, after the hearing on the merits, claimant filed, together with its post-hearing brief, a post-hearing report containing an updated electronic model for the calculation of damages that could be used by the tribunal to arrive at a precise figure based on whatever assumptions as to revenue, costs, and discount rate it ultimately would make.[92] The respondent objected, arguing that this report constituted new evidence, but the tribunal ruled that the report did not contain new evidence,[93] and indeed relied on the model contained in that report in its award of damages.[94] In the *TANESCO*[95] arbitration, by contrast, the parties themselves agreed upon a financial model to be used in calculating damages. That case concerned a contract between a Tanzanian public utility company, TANESCO, and a foreign-controlled joint venture company incorporated in Tanzania, IPTL, for IPTL to design, construct, own, operate, and maintain an electricity-generating facility and to deliver electricity generated there to TANESCO.[96] One of the issues before the ICSID Tribunal was how to calculate the ''Reference Tariff'' that TANESCO had to pay to IPTL under the terms of the power purchase agreement, and a ''financial model'' ultimately was agreed upon by the parties[97] and provided to the tribunal ''in both hard copy and electronic form to be used for the calculation of the initial Reference Tariff.''[98]

Agreement between the parties in arbitrations on how to calculate the quantum of compensation, such as occurred in *TANESCO*, is rare, as is agreement on the standard of compensation due to a foreign investor in investment treaty arbitration. Disagreement between the parties, however, need not lead to the type of criticism leveled at the award in the Norwegian Shipowners' Claim by Secretary of State Charles Evans Hughes, as tribunals now have plentiful sources of both law and practice from which to determine both the standard and the quantum of compensation—and can

[92] ADC Affiliate Ltd. v. Republic of Hungary, *supra* note 7, at ¶ 70.

[93] *Id.*, ¶ 78.

[94] *Id.*, ¶ 514.

[95] Tanzania Electric Supply Company Ltd. v. Independent Power Tanzania Ltd., ICSID Case No. ARB/98/8, Final Award (June 22, 2001), *available at* http://www.worldbank.org/icsid/cases/tanesco-full.pdf.

[96] *Id.*, ¶¶ 1-5.

[97] *See id.,* Appendix F: Stipulation and Agreement (noting the parties' agreement that the tariff to be calculated based on the contract should be calculated based on the agreed-upon financial model attached to the award).

[98] *Id.*, ¶ 64.

do both with clarity and precision. Indeed, *Chorzów* and the ILC's Articles on State Responsibility make clear that the standard of compensation for an unlawful act by a State is the standard of ''full reparation,'' while lawful acts by States that result in compensation being paid to a foreign investor usually will involve a standard of compensation specified in the relevant BIT. The recent *ADC* and *Siemens* cases, building upon the jurisprudence of the Iran-United States Claims Tribunal and the European Court of Human Rights, have applied, for the first time in an investment treaty context, the *Chorzów* standard of compensation in a manner that recognized that damages for unlawful acts by States may be higher than compensation for lawful acts—by valuing the investment as at the date of the award rather than as of the date of the taking in *ADC*, and by awarding consequential damages when incurred and proven (as in *Siemens*). Additionally, theses two cases illustrate how methods of valuation common for compensation for lawful expropriations—such as the DCF method and the book value method—also can be used in applying the *Chorzów* standard of damages for unlawful acts by States.

Part II

Conduct of International Arbitration and Jurisdiction Issues

How the Proceedings Are Managed Up to the Hearing

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It is very difficult to describe the part of the proceedings that starts from the moment when the arbitral tribunal receives the initial file and concludes when everything is ready for the final hearing. Indeed, each arbitration is different, as its features depend very much on the origin of the parties and of the arbitrators. The world is divided among a number of legal traditions, and the fact that the participants in the proceedings belong to one tradition or to another may affect considerably the way arbitration is conducted. Yet, all arbitrators share or should share a number of goals, and some techniques may be used irrespective of the legal traditions represented in a specific arbitration.

THE COMMON GOALS

An international arbitrator must have three main concerns: one is to approach the proceedings with a cultural neutrality; the second is to organize proceedings that are tailor made for the case he or she has to conduct; and the third is to maintain at all times equality of treatment among the parties.

Cultural Neutrality

Among the various advantages that may explain the impressive success of international arbitration as a way of settling international disputes, its neutrality is probably the most significant. If the parties to an international transaction include an arbitration agreement in their contract, it is essentially because each of them is reluctant to accept the jurisdiction of the State courts of the country of the other party. What they want is a neutral judge, and they feel that a State court in the country of the other party cannot be that neutral judge. It is not a question of impartiality, with the exception of pathological cases. Impartiality, as partiality, is a subjective

concept: it implies the will to favor one of the parties. On the contrary, neutrality is an objective concept. It does not refer to any prejudice towards one of the parties but to the distance that exists between the decision maker and each of the parties. From that point of view, a State court of one of the parties cannot be neutral: the many common values that its judges share with one of the parties allow them to easily understand that party's arguments and its procedural positions. They speak the same language, and this remark is not just made from a linguistic point of view, although this aspect is important. What is fundamental is that the court and one of the parties share the same cultural language.

International arbitration is the framework that may provide the parties with the neutrality they need. They may choose as sole arbitrator or as chair of a three-person tribunal someone from a country different from their own countries. They may do this either directly, or indirectly, by referring to the rules of an institution, such as the International Chamber of Commerce (ICC), which provides that ''The sole arbitrator or the chairman of the arbitral tribunal shall be of a nationality other than those of the parties.''[1] However, although a third nationality seems to contribute to cultural neutrality, it is not a sufficient condition as far as international arbitration is concerned. There are more nationalities than legal traditions, and it is more than probable that an arbitrator selected from a third country will belong to the same legal tradition as one of the parties, for example, an English chair in a case between a U.S. company and a German company. In order to avoid such an inevitable situation jeopardizing the expected neutrality, the arbitrators must endeavor to behave with cultural neutrality.

With a view to implementing such cultural neutrality, an international arbitrator must be aware of the fundamental differences between the main legal systems both as to merits and procedure. He or she must be able to distinguish in a legal system the essential from the historical or circumstantial. This is necessary in order to understand the parties' respective procedural positions and to assess whether they are defending fundamental concepts or just trying to complicate the proceedings for dilatory purposes. The international arbitrator must also be convinced that the solutions of his or her own national law do not amount to natural law, as unfortunately did Lord Asquith of Bishopstone in the well-known award in the case between Petroleum Development (Trucial Coast) and the Sheik of Abu Dhabi, in 1951.[2] It may seem a paradox, but the arbitrator's cultural neutrality is particularly at risk when the law applicable to the merits and his or her own

[1] Rules of Arbitration of the International Court of Arbitration of the ICC, art. 9(5).

[2] 1 *Int'l Comp. L.Q.* 248 (1952). In this award, the arbitrator presented some rules of English law as part of a ''modern law of nature.''

national law belong to the same legal family or when his or her own national procedural law belongs to the same legal family as those of the parties. The arbitrator must make a special effort not to forget that within a legal family there are many differences, procedurally and substantively.

The international arbitrator's cultural neutrality requires also the knowledge that the meaning of legal words may be different in two different legal systems. The concept of ''witness'' provides a good example. ''Témoin'' in French, ''testigo'' in Spanish and ''witness'' in English are not interchangeable, and the function of each of them in their respective legal systems is different. In civil law countries, it is the independence of its author that gives relevancy to the statement of a ''witness.'' In the laws of the common law family, a person under the control of a party or who has an interest in the outcome of the dispute, even the party itself, may give testimony. Since the word ''witness'' is used in any international arbitration proceedings conducted in English—and they represent the overwhelming majority—there are too often misunderstandings when one party belongs to the civil law family and the other to the common law family. Failing appropriate guidance from the arbitrators, one party will be convinced that it has very few witnesses to present, while the other feels that it cannot present its case properly without the witness evidence of all the persons who played a significant role in the genesis of the dispute.

As a result of the basic independence of the ''witness,'' the procedural laws of most civil law countries, as applied in State courts, forbid the preparation of ''witnesses'' by lawyers.[3] In common law countries, there is an obligation for lawyers to prepare a witness. A responsible international arbitrator, in particular a chairman of a tribunal, must be aware of these differences, and must ensure that each side understands the rules of the game from the outset. Those rules must be the same for everybody to avoid the situation in which, during the hearing, one lawyer suddenly discovers that the witnesses were prepared by the other lawyer, when he or she wrongly believed that rules applicable in court proceedings in his or her country were universally applicable.

[3] Many civil law counsel, not familiar with the practice of international arbitration proceedings, resist the concept of witness and expert preparation, and some do not hesitate to declare that it is incompatible with their professional deontology. This reaction is misconceived. The prohibition against the preparation of witnesses, when it exists in civil law jurisdictions, is consistent with the limited role of witness evidence in those jurisdictions. There, the witness is supposed to be independent from the party requesting his or her testimony, and is examined by the judge, not by the opposite counsel, the latter being a painful exercise for which the witness must be prepared. It is meaningless to object to contacts between the witnesses and counsel when most witnesses are active members of his or her client's organization and, in general, have played a significant role in devising the claim or the defense to the claim.

This is just an example among others. What matters is that each party feels at home. For this goal to be reached, each party should not be surprised by an approach to the proceedings that comes directly, and without warning, from a culture that is different from that party's culture. This is obviously very difficult, but if each party comes from a different culture, and the arbitrator, as is usually the case, belongs to one of them, he or she must maintain a certain balance. To be able to do it, the arbitrator must show some cultural neutrality. He or she must appreciate the differences between the parties' legal traditions and, whenever procedural rules are introduced in the proceedings, must make sure that each of the parties fully understand them, with all their consequences.

Tailor-Made Proceedings

This aspect is clearly linked to the first issue. With a view to implementing cultural neutrality, experienced international arbitrators have progressively and increasingly sought to develop procedures that borrow from the different legal traditions of the parties to the arbitration as well as from their own legal traditions. Doing so, they have been influenced both by the civil law and the common law traditions with the result that a standard international arbitration procedure is almost always organized as follows, after the initial exchange of a request (or notice) of arbitration and when the arbitral tribunal has been constituted:

- A statement of claim with all the documents on which the claimant intends to rely and the witness statements of those persons that the claimant wants to present as witnesses; then,
- A statement in answer with all the documents on which the respondent intends to rely and the witness statements of those persons that the respondent wants to present as witnesses; the answer often includes one or more counterclaims accompanied by documentary and witness evidence; then,
- A rejoinder of the claimant with documents and witness statements in rebuttal; this submission will also include, when applicable, an answer to the counterclaim; then,
- A rebuttal of the respondent to the claimant's rejoinder with documents and witness statements in rebuttal and, when applicable, a rejoinder as far as the counterclaim is concerned; then
- A rebuttal of the claimant to the respondent's rejoinder relating to the counterclaim, when applicable.

This standard pattern presents great advantages. First, it constitutes a combination of the civil law and common law traditions, which meets the

needs of procedural and cultural neutrality in international arbitration. Second, it provides predictability, which is indispensable in proceedings with parties from different legal traditions where the parties require knowledge of the rules of the game in advance. Unfortunately, this standard pattern is proposed—sometimes imposed—on the parties without knowing anything about the subject matter of the dispute and without any attempt to adapt it to the specificities of the case. It is wrong because what is gained in predictability is lost in flexibility.

Moreover, the juxtaposition of practices originating from two different procedural traditions explains in part the length, the complication, and, as a result, the cost of too many international arbitration proceedings. Refusing to choose between the civil law tradition concerning documentary evidence and the importance that the common law tradition attaches to witness evidence is the cause of too many unnecessary procedural duplications. As has been shown above, after exchanges of written submissions, as in the civil law tradition,[4] which may last almost one year, a one- or two-week[5] hearing devoted to the examination of witnesses and experts, according to the common law tradition, takes place. The preparation and organization of such hearing is long and costly, let alone the elaboration of the witness statements, more and more drafted with significant participation by counsel. Then, counsel must prepare the witnesses or the experts for the hearing. Even more significantly, the witnesses are not only used by counsel to prove disputed facts, but also and often, principally, to draw the arbitrators' attention to the content of the documentary evidence already on record, and on the contradictions of their opponent, an exercise already performed in their written submissions. Then, post-hearing briefs are submitted over about an average four-month period, which is a new tribute to the civil law tradition.

Consequently, international arbitrators have recently tried to devise efficient procedures that are appropriate for the case at hand, at reasonable cost and acceptable timewise. Each case calls for a tailored approach to the organization of the proceedings, depending not only upon the legal tradition of the parties and of the arbitrators, but also, and probably more significantly, upon the substance of the case and the factual issues that need to be proved. The standard procedure that now prevails in modern international arbitration meets the needs of neutrality among the legal systems. A necessary further step is to adapt it, on a case-by-case basis, to the

[4] Although this last observation is generally accurate, it must be pointed out that in the United States, long written submissions are exchanged.

[5] These are average duration of hearings, but three- or four-week hearings are not exceptional while two- or three-day hearings, although not unheard of, remain the exception.

factual and legal issues to be solved. For instance, why try to prove facts or legal issues, through costly and time-consuming witness and/or expert evidence when such issues are irrelevant to the solution of the dispute? Likewise, when a disputed fact is efficiently proved by documents the existence, content, and interpretation of which is not controversial, is it really useful to ask witnesses to present them at the hearing to the arbitrators? When those documents are introduced in the parties' memorials and discussed by the parties' counsel, the intervention of witnesses may have no practical input. Is it really useful to submit to the arbitral tribunal hundreds, if not thousands, of documents when only 20 percent of them constitute decisive evidence and may play a role in the resolution of the case? Those are just a few examples of the many questions that most international arbitrators ask themselves at the end of a case, when preparing their awards. The answer has a very significant impact on the cost and duration of the proceedings. But, unfortunately, it is too late to raise such questions at the end of the proceedings. The arbitrators often blame the parties for having inundated them with documents and testimonies that proved to be of no practical use in their decision. In reality, they are to be blamed as well as counsel, since long and complicated arbitral proceedings seem often to be the result of a lack of active management of cases by arbitral tribunals themselves.

The Equality of Treatment Among the Parties

This third general goal, to maintain equality among the parties, seems to be absolutely evident as a principle. For instance, Article 15(1) of the United Nations Commission on International Trade Law (UNCITRAL) Rules[6] or Article 18 of the UNCITRAL Model Law on International Commercial Arbitration[7] provide that the parties are to be treated ''with equality.'' However, it is not always easy to apply the principle in practice. In some cases, treating the parties in precisely the same manner may lead to unfair results, at least if ''equality'' is viewed in the abstract. A case has been given as an example.[8] Party A refuses to make a payment, apparently due under a contract with party B, on the ground that it was discharged of its obligation

[6] United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules,* adopted Apr. 28, 1976, U.N. Doc. A/3/17 (1976).

[7] *See* United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration,* adopted June 21, 1985, U.N. Doc. A/40/17 (1985).

[8] *See* Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 229 (2d ed. 2005).

by a letter from a representative of party B. Party B alleges that the letter was obtained through bribery. If there is *prima facie* evidence that party B's allegation might be true, fairness could require the arbitrator to treat the parties ''unequally'' by giving party B more time to gather its evidence, since proving bribery is more time consuming than presenting a letter of discharge. With this type of concern in mind, Article 15 of the ICC Rules of Arbitration is worded as follows:

(1) 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.

(2) In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

This does not mean that in some cases, the parties should not be treated equally but that *equality* does not necessarily mean giving exactly the same amount of time to each party. Likewise, when there are 20 witnesses on one side and two on the other side, giving the same time to each party to cross-examine witnesses would not be an equal treatment. In reality, equal treatment is a principle that must be adapted to the practical characteristics of each case. This is not always easy and requires that the arbitrators have, as soon as possible, a full grasp of the issues at stake.

SOME USEFUL TECHNIQUES

These techniques are neither aimed at being exhaustive nor at being applicable to any particular international arbitration proceedings. They are just practical tips that have proved to be useful in practice. They deal with the language of the proceedings, the need of a management conference, and the production of documents.

The Language of the Proceedings

It is absolutely necessary to agree on the language or languages of the proceedings as soon as possible. It is not easy when each party wants to use its own language, and both the arbitration agreement and the arbitration rules are silent in this respect. The issue must be settled on practical terms. It would be ideal if each party could use its own language, but it is not always possible, although it is achieved when all arbitrators and parties have at least a passive understanding of the languages involved. In that case, everybody

will write and speak the language of his or her choice. No translation of documents or of witness evidence will be necessary. However, even in such a fortunate case, one language must be chosen for the text of the award as well as for the procedural orders and, in the ICC proceedings, for the terms of reference. To write an award in several languages is a painful and dangerous exercise. But what should not be accepted is to have an award in two languages, since providing two identical versions of an award is almost impossible.

When practical solutions of that kind cannot be achieved, to use the language of the contract is a way out, but is not always possible, depending on the ability of the arbitrators and of counsel. The issue must be solved as soon as feasible at the beginning of the proceedings and, in the absence of an agreement of the parties, the language of the arbitration must be the subject of the arbitral tribunal's first procedural order.

The Management Conference

In order to devise tailor-made proceedings, it is advisable to organize a management conference with the participation of the arbitrators, the parties, and their counsel. However, it should not take place before the parties have sufficiently presented their case. Before that, the arbitrators are not able to organize the procedure on the basis of what is actually disputed in the arbitration. Thus, if the request for arbitration and the answer are very short, as is often the case, the management conference should be postponed until the first full exchange of memorials has been completed. When each party has presented its factual and legal position with all the documentary evidence at its disposal at this stage, the arbitrators can determine with the parties what are the substantial issues in the case and how they could possibly be proved. Time limits adapted to the actual needs of the case can be fixed. This approach also provides the arbitrators with the opportunity to inform the parties, without prejudice, of the issues that they consider particularly important and those for which they think that further evidence is necessary. It is then possible to assess the necessity for disclosure of documents and the reasonable scope of such disclosure. Witness and expert evidence can also be restricted to those issues for which the arbitrators indicate that documentary evidence is insufficient, bearing in mind that the function of witnesses in this case is only to prove disputed facts or disputed technical or legal data.

Obviously, the arbitrators should not express any view as to the merits of each party's case, and, as a matter of fact, they cannot do it at such an early stage of the proceedings. But it is important that they tell the parties how they understand the case. This will help the parties considerably. They may discover that the arbitrators have an incorrect understanding of their

positions, and it is better that the parties know that as soon as possible. They may also be very pleased to know that there are a number of points that the arbitrators find as unimportant and that they do not need to spend time on them with witnesses or documents.[9]

Document Production

This very important issue cannot be adequately dealt with in a limited time. Yet, some practical tips may be useful since, whatever the origin of the parties, requests for disclosure of documents are more and more frequent in international arbitration, even between civil law parties. Two important points must be underscored.

First, no useful procedure for production of documents may be established if the arbitrators do not have a sufficient understanding of the substance of the case. When the arbitrators have an insufficient knowledge of the substance of the case, when a request for document production is made, they are rarely able to make a sound decision. Some continental lawyers, wrongly prejudiced against disclosure of documents, are tempted to dismiss the request. Most arbitrators grant it, as they are reluctant to deprive a party of what could turn out to be a fundamental right. But in so doing, they deprive both parties of their rights to efficient document production and speedy arbitral proceedings at a reasonable cost. So, one basic rule for any arbitrator is to read the memorials of the parties as soon as possible in order to understand the substance of the case. Unfortunately, too many arbitrators do not do so until some weeks before the hearing, when they are preparing themselves for the hearing.

Second, the use of what is called in London and elsewhere a ''Redfern Schedule''[10] is to be commended. Under this practice, the parties make a joint application in the form of a table containing each party's request for the production of documents. The table should be presented in four columns, as follows:

- First column: identification of the document(s) or categories of documents that have been requested;
- Second column: short presentation of the reasons for each request;
- Third column: summary of the objections made by the other party to the production of the document(s) requested;

[9] The UNCITRAL notes may be very helpful to the parties in reviewing at a management conference a great many procedural matters and reaching agreement with each other and with the arbitrators.

[10] Named after Alan Redfern, who devised the schedule.

- Fourth column: left blank for the arbitral tribunal's decision.

On this basis, the arbitral tribunal is able to make its decision promptly and efficiently. The schedule obliges the parties to be very concise, and it helps the arbitrators to decide rapidly. Obviously, the arbitrator must give some reasons for their decisions and cannot say just ''yes'' or ''no'' to the request for production. A practical way to do it is to have a code system provided to the parties on a separate sheet: For instance AN will mean ''admittance necessary,'' TC, ''refused because too cumbersome,'' NR is ''not relevant,'' etc. These are the kinds of answers needed in the fourth column.

* * *

In conclusion, it is necessary to stress that to fully benefit from the foregoing tips, the arbitral tribunal must be composed of truly independent arbitrators. This is essential because if the tribunal is not so composed, it is impossible to have free discussions within the arbitral tribunal on the substance of the case and to organize the proceedings on that basis. The danger is that one of the arbitrators may disclose the content of these discussions to one party. So, an arbitrator must test the independence of the other members of the arbitral tribunal as soon as possible. If the result of the test is negative, the proceedings cannot be conducted in an ideal way.

The Conduct of Substantive Hearings in International Arbitrations: What Approach Should an Arbitrator Adopt?

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INTRODUCTION

If there is one feature that unites contentious lawyers the world over, it is the tendency to believe that the way in which litigation is conducted in their home jurisdiction, and with which they are familiar, is the ''right'' way to do it. This tendency goes a long way to explain both the misunderstandings and disappointed expectations that parties and their counsel can sometimes experience in international arbitration and also towards explaining the behavior of arbitrators in their conduct of proceedings. Of course there is a cadre of arbitrators who expertly bridge cultural differences. They tend to be individuals whose breadth of experience has exposed them to a range of procedures such that they are able both to understand and evaluate the respective merits of different approaches. However, there are many individuals who sit as arbitrators around the world without the benefit of that level of experience. How then should they approach the procedure to be adopted, particularly when faced with parties advocating very different courses of action?

The aim of this article is to highlight some of the issues that arise in the particular context of substantive arbitration hearings when arbitrators and counsel are from different cultural and legal backgrounds. It will also look at techniques that have their origins in different cultural systems and have been adapted for widespread use in international arbitration. Of course, issues are less likely to arise where members of the tribunal and counsel are from the same or similar jurisdictions, as their respective approaches are likely to be similar, and in many cases the tribunal will adopt a process for the hearing that, at least in broad terms, accords with the expectations of those involved based on their domestic legal system. Nevertheless, many of the techniques to be mentioned may, as a matter of good practice, be

adopted even in what may be considered essentially domestic arbitration hearings.

This article will first make some general observations about approaches to the management of arbitral hearings and will then address briefly each of the main procedural and management issues upon which an arbitral tribunal will need to make decisions in the course of conducting a typical arbitration hearing.

GENERAL OBSERVATIONS

An arbitration tribunal should assume primary responsibility for ensuring that the parties and their counsel know what to expect at the hearing. This can only be achieved by dialogue between the tribunal and the parties concerning the procedural format of the hearing. This may be discussed at a preliminary meeting or be dealt with in correspondence or teleconferences between the tribunal and the parties or their counsel. In some cases it will be addressed in a pre-hearing review arranged specifically to discuss, amongst other things, the arrangements for the hearing. When deciding upon the procedure to adopt both before and during the hearing, the tribunal will attach importance to the wishes of the parties and indeed in some jurisdictions the parties' agreement on such matters will be determinative. Whatever procedure is ultimately decided upon, and whatever form its communication takes, the key consideration is for the tribunal to ensure that all concerned understand what the procedure will be and how the hearing is to be conducted.

It has been suggested that when contemplating a hearing, arbitrators should ensure that the procedure adopted is ''culturally neutral.'' While this is a worthy aim, in reality it is likely that the background of the tribunal members will influence their approach to particular issues and thereby give rise to a degree of ''cultural bias.'' For instance, in relation to document disclosure or ''discovery,'' it is often much harder for counsel to persuade a continental European arbitrator to make an order requiring disclosure of broad categories of documents than it will be to persuade a common law arbitrator for whom such disclosure would be the norm in his or her home jurisdiction. In a similar vein, while an English arbitrator may see nothing unusual about a hearing lasting for several weeks, arbitrators from some other jurisdictions would find extraordinary the suggestion that any hearing should last more than two days. In these circumstances, it is important for both arbitrators and counsel involved in an international arbitration to recognize that there is no ''right'' way to go about the arbitral process that is suitable in all circumstances and for every case. An arbitrator who adopts the attitude that the only ''proper'' way to do things is that done in his or her home jurisdiction will rapidly run into the problem of disgruntled

parties or a procedure that may be inefficient and ineffective in the context of the jigsaw of legal cultures that makes up many international arbitrations. Instead, and in addition to ensuring that all involved are clear on what will happen in the arbitration, the tribunal should take a flexible approach to determining the needs of the case and prescribing a procedure that is focused on meeting those needs.

INTERVENTIONS

There are a number of specific areas in which the procedures adopted by different tribunals in the context of a hearing may vary. The first of these is the subject of interventions by the tribunal. Many advocates welcome a degree of intervention from the tribunal as providing guidance on areas of particular concern or interest, but should it be limited in any way and, if so, how? At one extreme, there exists the arbitrator who intervenes on a regular basis throughout the course of the hearing, even during cross-examination of witnesses. At the other, there is the arbitrator who says nothing other than to announce the coffee and lunch breaks. I would suggest that the generally accepted view is that best practice falls somewhere between the two extremes. In other words, arbitrators should feel free to intervene to the extent of putting questions, making observations, and raising the points that trouble them so that counsel may then address them, but in doing so they should take care with the timing and frequency of any interventions so as not to interrupt the flow of counsel's submissions or questioning of witnesses.

Unfortunately, it is sometimes apparent that one arbitrator is not only interventionist but is also effectively acting as advocate for their appointing party. In practice, this approach will often be counterproductive, as such conduct rarely goes unnoticed by fellow arbitrators who may then tend to treat that arbitrator's contribution to deliberations with a degree of circumspection. Furthermore this situation often generates an enhanced spirit of collaboration amongst the other arbitrators, again defeating the rogue arbitrator's intentions.

TIMING

Arbitrators frequently have to make decisions about allocating time and find themselves having to monitor the parties' use of time. Again this is an area where the attitude of tribunals can vary. In practice, there needs to be a degree of flexibility for a number of reasons. Witnesses may ramble in their testimony and need direction from the tribunal. Where oral evidence needs to be translated, then this can slow things down considerably. If there are

disproportionate numbers of witnesses on each side, splitting the time evenly may not be appropriate.

As far as monitoring time goes, quite often ''chess clock'' timing will be adopted, in which the duration of each party's submissions and questioning of witnesses is recorded and the respective totals compared against a notional allocation of the time available overall. In practice, this is often done by the secretary of the tribunal, with a member of the legal team on each side also keeping track. However, a party should not try to enforce these timings too rigidly. In a recent arbitration, despite the fact that the hearing would inevitably finish early, the chairman was surprised by, and rejected, an objection by one party to the fact that the other party was in danger of exceeding the notional allotted time. The chairman considered it obvious that if there was plenty of time left, the tribunal did not have to apply the equality of time principle down to the last few minutes. Where timing is tight on the other hand, fairness may dictate a more rigid application of the chess clock.

Obviously other matters may have an impact on timing, including whether transcripts of the hearings will be produced (if so, more breaks may be needed in order to accommodate the stenography process). Further, if the giving of evidence by video conference is to be adopted, all timings will have to be precise in order to ensure that the connections are properly coordinated.

Overall, as we saw in relation to interventions, best practice in the area of timing indicates that arbitrators should retain flexibility and not have a fixed approach. This flexibility can enable them to consider all the issues affecting timing and to strike a balance between the parties so as to achieve fairness in the circumstances of the particular arbitration.

OPENING STATEMENTS

The first issue with regard to opening statements at hearings is whether to have them at all. In most cases, there will be some form of opening statement, but where the parties have submitted detailed briefs or skeleton arguments setting out the main elements of their case, it may be possible to dispense with opening submissions altogether and proceed to the hearing of evidence, on the basis that there will be an opportunity for closing submissions in due course. When opening statements are permitted, it is usual to place a time limit (often an hour or two at most) on them.

In terms of the contents of opening statements, tribunals sometimes request that the parties give an outline of the evidence that they intend to present during the course of the hearing. Often however counsel use the opening statement as an opportunity to present a summary of their case, focusing on what they consider to be the key issues.

The opening statement can also be useful as an opportunity to familiarize the tribunal with the documents that are to be relied upon by the respective parties, but such an approach should be adopted with caution. It can be helpful to introduce key provisions and documents to the tribunal and to show the tribunal where they can be found in the papers. However, the practice found in some jurisdictions of reading out the contents of documents at length is both wasteful and irritating for the tribunal and should be avoided. Much will depend on the complexity of the case and the number of key documents, and flexibility is once again the watchword.

DOCUMENTS

There are two principal approaches to document management during hearings. The first is to make reference to documents exhibited to the parties' submissions and evidence. This is a simple method and means counsel and arbitrators can refer to what has previously been submitted to the tribunal. An alternative approach, used especially in heavier cases, is to use ''hearing bundles,'' whereby the parties (usually the claimant) effectively produce new sets, or ''bundles,'' of the previously exchanged documents marked with a common pagination system. The bundles should contain all or a majority of the documents to which the parties will refer during the hearing. While more expensive, this approach has two main advantages. First, it is easy and convenient for participants to refer to documents or to particular pages within a document by giving the common pagination reference, thereby ensuring all involved are looking at the same page. Second, the documents can be collated into groups by category (e.g., having a separate bundle of relevant agreements or minutes of meetings) and also put into chronological order, which can facilitate the tribunal's task of mastering a collection of documents produced at different times and in a less ordered fashion. A further refinement is to have a ''core bundle'' containing copies of the most important documents, that is, those to which frequent reference will be made during the hearing. Whichever approach is adopted, if translations of documents will be needed, it is important to agree to these in advance where possible. No tribunal wishes to be faced with each party presenting different translations of documents to the tribunal if this can be avoided.

Neither of the approaches to document management discussed above can be said in the abstract to be the best. Different cases give rise to different considerations. In some arbitrations, the exhibits to successive rounds of submissions and evidence can be voluminous, haphazard, and confusing, making some kind of rationalization eminently desirable. In other cases, such documents are compact and well ordered and represent most of what will be required at the hearing. Cost may well be a significant

factor. Once again, one sees a need for flexibility and the abandonment of rigidity. However flexibility brings with it the need for judgment—which has to be manifested in an early, considered assessment of where matters stand and how the interests and convenience of the parties and the tribunal can best be served in the circumstances of the particular arbitration.

Tribunals often have to deal with attempts by a party to introduce new documents into evidence for the first time during a hearing. Here again, the practice of tribunals varies. Some will take a tough line and opt for exclusion, particularly if earlier procedural orders or directions have imposed time limits for the submission of documents that the tribunal warned would be strictly enforced. However, provided that the document is relevant and there is some credible explanation given for it being produced at such a late stage, many tribunals will often permit a new document to be used in evidence. The exceptions to this are where a party attempts to introduce an entirely new line of inquiry, or it is felt that the document could and should have been produced earlier. In such instances, the tribunal will be more resistant to admitting the new evidence. It is difficult to be prescriptive about the introduction of new documents, as much will depend on the circumstances of the particular case, but provided the tribunal has made clear a deadline for exchange of documents and that no further documents will be permitted thereafter, there is no reason why a robust approach should not be taken to the introduction of new documents in the case after that time and in particular during the course of a hearing.

Before leaving the topic of documents, mention should be made of the practice of some arbitrators who wish to be addressed by way of submission and to listen to the evidence, but who resist being taken to specific documents and indeed may not have brought their copies of the documents to the hearing. Whether or not the arbitrator feels that he or she can perfectly well decide the case without them, this practice can leave counsel and the parties with some concern about whether their case has been properly followed and understood, and is therefore to be avoided, notwithstanding the desire of arbitrators to lessen their documentary burdens.

FACT WITNESS EVIDENCE

In international arbitrations, U.S. style depositions are very rare indeed. Witness evidence is usually given by means of witness statements, which then effectively stand as the witness's direct evidence. The main issue therefore tends to be the extent to which one can ask the witness supplemental questions in direct testimony. The answer is that most tribunals will allow a few additional questions but not extensive further questioning and not

questions that introduce whole new areas that were not dealt with at all in that witness's statement.

Cross-examination is not of course limited to issues that are dealt with in the witness statements. Consequently, the main issue for the tribunal is striking the balance between allowing counsel to ask the questions that they consider important to their case and managing the scope of the cross-examination to ensure that it is dealing with relevant issues rather than lingering over points of limited or peripheral relevance. The tribunal may also wish to intervene when faced with unduly argumentative or aggressive cross-examination. Generally though, counsel are given a fair degree of leeway in terms of their style, and tribunals are often slow to protect witnesses absent a complaint from a witness or counsel.

One relatively recent development is the concept of witness conferencing or ''hot-tubbing.'' In this process, a number of different witnesses, either fact or expert, give their evidence concurrently. The tribunal normally questions the witnesses, although they may also have given the parties an opportunity to suggest questions that the tribunal then puts to the witnesses along with their own questions. Following the tribunal's questioning, there is an opportunity for the parties' counsel to ask a limited number of further questions. Common law lawyers are often taught to cross examine by leading a witness down a particular path with a series of carefully constructed propositions with which the witness is asked to agree, leading to the *coup de grace* proposition-cum-question, with which the witness is intended to have no credible alternative but to agree. Those used to such an approach can find having to leave the examination to the tribunal a rather disconcerting experience. This perhaps explains why this method of witness examination is championed by continental European lawyers for whom cross-examination is a less familiar practice. A number of arbitrators also seem to find witness conferencing a useful tool in some circumstances, such as when there are a large number of witnesses whose evidence covers technical areas. The process of having the opposing sides of the technical debate in the same room can be positive and time saving.

EXPERT EVIDENCE

Tribunals generally expect experts to be treated with a greater degree of deference as regards their expert opinions than witnesses of fact. This means being less argumentative with the expert and attacking his or her credibility only on the basis of a solid foundation. For the tribunal, one of the managerial issues to determine is whether to take the experts in sequence, that is, all of the claimant's experts and then all of the respondent's, or to take them on a topic-by-topic basis. The latter approach

may make it easier for the tribunal to focus on a particular area, but both approaches are regularly adopted.

As regards the independence of the expert, there is keen debate as to whether the genuinely independent expert truly exists. In some jurisdictions the legal culture places great emphasis on independence, whereas in others that is considered a rather naive ambition. While parties naturally do not put forward expert witnesses whose opinions are quite contrary to their case, most tribunals recognize and value a witness offering his or her own expert opinion as opposed to arguing their appointing party's case. Arbitrators will rightly attach far more weight to such independent evidence. Like the arbitrator advocate mentioned above, the hired gun expert is often counterproductive.

CLOSING SUBMISSIONS

Finally, the arbitral tribunal has to decide how closing submissions should be presented. It is rare for them to be dispensed with altogether where there has been an oral hearing. One option is to have oral closing submissions immediately at the end of the hearing. Alternatively there may be some form of written closing submissions and possibly replies to written closing submissions. In larger cases, the exchange of written closing submissions may be followed by oral closing submissions. The tribunal should look at all the circumstances of the case and decide whether both written and oral submissions are necessary or whether something more limited will suffice.

As a matter of content, what tribunals will look for in closing submissions will vary. Some tribunals will clearly direct that they want the parties to focus on what it is said the tribunal should draw from the evidence that they have heard and not to repeat earlier arguments. Other tribunals will request that the parties essentially present a summary of their respective cases; however, even where this summary approach is requested, counsel should be wary of repeating every detail of earlier submissions. The parties will often be assisted by the tribunal giving some indication in advance of the areas that it wants the parties to address in closing submissions, as this enable them to focus on the matters of concern or interest to the tribunal.

One simple means of restricting the length of closing submissions is for the tribunal to put a page limit on them. This approach is adopted occasionally, but understandably tribunals are often reluctant to limit the parties' final opportunity to put their case.

CONCLUSIONS

There are a number of ways to go about a hearing, and some of the different approaches taken to a few of the most important procedural issues,

such as opening and closing submissions, and documentary and witness evidence, are touched on above. Rather than viewing any of these individual approaches as rigid norms, it is suggested that they should be regarded as an armory of procedures that may be adopted, should they be warranted by the particular circumstances of the case. Such flexibility necessarily involves the exercise of judgment in assessing the relevant circumstances and the most appropriate procedures. In making this assessment, the tribunal should consult with the parties at an early stage and ensure that the parties and their counsel are clear as to what to expect during the hearing. This will help to avoid misunderstandings and frustrated expectations, and will often result in lower costs overall.

International arbitration is a rich vein of procedural diversity, and its practitioners naturally encounter a wide range of procedural approaches. As we have seen, some of these approaches, like ''hot-tubbing,'' seem to be evolving in somewhat Darwinian fashion. Such developments should be encouraged, because flexible procedures that can adapt are the most likely to respond to the needs of parties involved in dispute resolution and thereby secure the place of arbitration amongst the preferred alternatives.

Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements

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An anti-foreign-suit injunction is controversial because it constrains judicial proceedings in another sovereign country. It does so indirectly by controlling the actions of private parties. The enjoining court in one country (F1) orders a private litigant before it to suspend or terminate a legal proceeding in another country (F2)–on pain of sanctions that F1 will impose on the private party for disobedience. Although formally there is no direct interference with, or order addressed to, a foreign judicial power, as a practical matter, the effect in the foreign jurisdiction can be substantial. If the enjoined party has assets in F1, or a thriving business there, or just attractive future business prospects in F1, it will not want to risk transgressing the F1 order. Thus, the litigant will comply and terminate (or not initiate) legal proceedings in F2.

As is well known, civil law jurisdictions generally find anti-foreign-suit injunctions offensive, even violative of international law.[1] On the other hand, common law jurisdictions, especially courts in the United Kingdom and the United States, consider an anti-foreign-suit injunction appropriate under some circumstances. Although I agree with the view that courts should give considerable weight to ''international comity'' before issuing an anti-foreign-suit injunction and in general should use this remedy only sparingly, I argue in this essay that the remedy is appropriate and useful in a particular context.

[1] *See* judgment of the Oberlandesgericht [OLG] Düsseldorf [German Court of Appeal of Düsseldorf] Jan. 10 1996 in Re the Enforcement of an English Anti-Suit Injunction (*quoted in* relevant part in West Tankers, Inc. v. Ras Riunione Adriatica de Sicurta SpA, [2005] 2 Lloyd's Rep. 257, [2005] 2 All E.R. (Comm.) 240, 2005 WL 699582 (QBD (Comm. Ct.)). *See also* Emmanuel Gaillard, ''Il Est Interdit d'Interdire: Réflexions sur l'Utilisation des Anti-Suit Injunctions dans l'Arbitrage Commercial International,'' 2004 *Rev. Arb.*, at 47-62; Marco Stacher, ''You Don't Want to Go There—Antisuit Injunctions in International Commercial Arbitration,'' 23 *ASA Bull.,* at 644-45 (2005). *Cf.* Emmanuel Gaillard ed., A*nti-Suit Injunctions in International Arbitration* (2005).

That context arises where the parties have agreed to arbitrate disputes in F1 and have chosen F1 law to govern the arbitration agreement. In that case, I argue an F1 court should have discretion to issue an anti-foreign-suit injunction to enforce the arbitration agreement.

I would make room for one major exception—where there are relatively strong (and appropriately applicable) public policy considerations in the alternative forum (F2) for avoiding the arbitration agreement. Ordinary issues of fact finding or contract construction to decide, for example, whether an arbitration agreement came into existence, would not suffice. On the other hand, relatively strong public policy considerations embedded in F2 law for disallowing arbitration should be respected (to the extent of not being thwarted by an anti-suit injunction)—even if the parties' preference for arbitration is clearly expressed.

Two closely related arguments support this approach. First, the injunction merely effectuates the parties' agreement to resolve all disputes through arbitration. The enjoined party, if it invokes judicial proceedings in F2, does something that it promised not to do. The injunction holds that party to its agreement. Second, the injunction is a particularly effective way of giving force to a principal goal of the New York Convention[2]—ensuring that international arbitration agreements are honored and enforced.

The opposing view rejects all (even indirect) interference with foreign legal proceedings, because it considers such interference an offense against sovereignty. The injunction opponents do not disagree that parties should be held to their agreements and that arbitration agreements should be enforced. They look instead, however, to the courts of F2 to make that determination, not exclusively those of F1.

If the controversy were left at this level of generality, one might wonder what all the fuss is about. So many countries have become parties to the New York Convention[3] that the convention's support for enforcing arbitration agreements is now respected in all parts of the world. So why should F2 care if an F1 court issues an anti-suit injunction to enforce an arbitration agreement that F2 also has an obligation under the New York Convention to enforce? The court in F1 is simply protecting the pro-arbitration litigant from incurring the unnecessary and wasteful expense of litigating once again, this time in F2, to enforce the arbitration agreement. The parties presumably chose arbitration in the first place to avoid just such vexatious parallel proceedings in different national forums.

[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 [hereinafter New York Convention].

[3] There were 142 parties as of June 1, 2007. *See* http://www.uncitral.org for the latest count.

This way of looking at the problem, however, obscures the fundamental difficulty. A dispute's arbitrability is not always clear-cut. Sometimes the party opposed to arbitration resorts to F2 courts in open breach and complete disregard of the arbitration agreement. This is the easy case, where not very much can be said against an injunction that holds a breaching party to its agreement. At other times, however, the parties take different positions on whether their underlying dispute is in fact ''arbitrable''—that is, whether an arbitration agreement (or an obligation to arbitrate) binding the two parties has actually come into existence; or whether, if it did come into existence, it is valid; or whether, if it did come into existence and is valid, a particular disputed issue is within the agreement's scope. These are the three fundamental issues of ''arbitrability'': existence, validity, and scope of the arbitration agreement.

On these three questions, different legal systems may give different answers on the same basic set of facts. Thus F1, applying its own choice-of-law rules, might decide that ''X'' law governs and that under that law the dispute is arbitrable. But F2, applying its own (potentially different) choice-of-law rules, might decide that ''Y'' law applies and conclude that the dispute is not arbitrable. Even if both courts apply the same law, they might apply the law differently or assess the facts differently and reach different results.

With this added complexity in view, one can understand why commentators and courts might object to an F1 order that seeks to control the outcome in F2. Indeed some commentators believe that the New York Convention can be invoked as authority opposed to anti-foreign-suit injunctions—even where the injunction's purpose is to enforce an arbitration agreement. The claim is not so much that the New York Convention directly regulates the issue of parallel proceedings—because it does not—but rather that the convention's structure and spirit contemplate and indirectly legitimize parallel proceedings, and hence that anti-foreign-suit injunctions tend to clash with the logic and harmony of the convention regime.

THE NEW YORK CONVENTION AND ANTI-FOREIGN-SUIT INJUNCTIONS

The anti-injunction argument proceeds as follows.[4] Article II of the New York Convention deals with a State's obligation to enforce an arbitration

[4] *See* Marco Stacher, ''You Don't Want to Go There—Antisuit Injunctions in International Commercial Arbitration,'' 23 *ASA Bull.,* at 647-49 (2005).

agreement. The obligation is subject, however, to two qualifications. First, under Article II(3) a court need not refer parties to arbitration if it finds that the arbitration agreement is ''null and void, inoperative or incapable of being performed.'' The issue here is whether the dispute is ''arbitrable.'' The court need not ''refer the parties to arbitration'' if it finds that (1) the agreement is non-existent or (2) the agreement is invalid or (3) the dispute is not within the agreement's scope. An existence question arises, for example, where one of the litigants may not be a party to the agreement (or otherwise bound by the arbitration obligation). A validity question is in issue, for example, if a party argues that the arbitration agreement is not in writing or was induced by a misrepresentation. A scope issue arises if the agreement's language may not be broad enough to include the underlying merits-based dispute. Existence, validity, and scope, then, are the central issues of what I will call ''ordinary arbitrability.''

Second, the obligation applies only if, according the Article II(1), the arbitration agreement concerns ''a subject matter capable of settlement by arbitration.'' This second condition—that of what I prefer to call ''non-arbitrable subject matter''—could be seen as subsumed within the first (''ordinary arbitrability''), because it is simply a specific instance of an invalid arbitration agreement. Because the issue turns heavily on public policy considerations, however, it is useful to treat it separately.

Article II does not say which State's law should decide ordinary arbitrability (existence, validity, and scope). Presumably a given court will apply its own choice-of-law rules to decide what law governs these issues. If the parties have specifically chosen a given State's law to govern the arbitration agreement,[5] however, most choice-of-law systems will respect that choice. Thus, in this situation—the one with which I am principally concerned (where the parties have chosen the law of the seat)—most States will apply the same law in deciding ordinary arbitrability (the law of the seat—because that law was specifically chosen by the parties). Thus, where an F1 court, interpreting and applying its own, party-chosen law, finds a dispute arbitrable and enjoins a litigant from proceeding anew in F2, it is hard to see why F2 would be especially upset. Presumably F2 would apply

[5] Parties do not normally choose a law specifically to govern the arbitration clause. Typically, instead, they include the choice-of-law clause in a different part of the contract and intend it to apply to the entire contract, including the arbitration clause. If the parties do not include a choice-of-law clause in and for the arbitration clause itself, it seems reasonable to treat a choice-of-law clause included for the entire contract to apply as well to the arbitration clause. This is all the more so when the parties choose that same State's law as the *lex arbitri* (by choosing that State as the seat of the arbitration). This of course is the special case with which this essay deals—the case in which the parties place the seat in F1 and also choose F1 law to govern the arbitration agreement.

the same law and reach the same result as to arbitrability. F2 could hardly quarrel with F1's interpretation and application of F1's own law. The injunction merely saves the parties the additional and unnecessary expense of duplicative litigation.[6]

Neither party autonomy nor uniform choice of law will apply, however, for the question of non-arbitrable subject matter (''non-arbitrability''). Although Article II does not mention choice-of-law issues, Article V, dealing with enforcement of the award, does. It provides in Article V(2)(a) that an award may be refused recognition and enforcement if it deals with a subject matter ''not capable of settlement by arbitration *under the law of that country* [the enforcing country].[7] If one assumes, as seems reasonable—at least for the sake of consistency—that the *lex fori* rule of Article V (dealing with award enforcement) should also apply under Article II (dealing with agreement enforcement), then the New York Convention contemplates that courts in different States may reach different results on the issue of non-arbitrability—different results that in a sense would be legitimate.

Thus, an injunction opponent would argue—persuasively I think—that when the dispute concerns the public-policy-infused issue of non-arbitrable subject matter, the New York Convention contemplates legitimately different outcomes in different national legal systems. It would go against the structure and spirit of the convention, the injunction opponent would argue, for F1 to enjoin a party from proceeding in F2, where F2 might consider that the subject matter has such a public impact that private ordering is excluded and the dispute is non-arbitrable. For example, the dispute could concern F2's anti-trust law, and for public policy reasons F2 might deem such issues non-arbitrable. The convention clearly contemplates and legitimizes such an F2 reaction, leaving it to F2 to decide when non-arbitrability applies.

One might even take this reasoning a step further (beyond the New York Convention) to argue that whenever the dispute involves matters of legitimate public policy concern in F2, F1 should not enjoin a party from proceeding in F2. Here the logic would be that ''international comity'' considerations are particularly strong when public policy issues are in play, and that it is particularly offensive for an F1 injunction to interfere with the safeguarding in F2 of its legitimate public policy concerns. Indeed, approving an injunction in this setting might be seen as a form of collusion

[6] The parties could easily be understood to have agreed (by placing the seat in F1 and choosing F1 law) that F1 (and not F2) should decide any disputes over ''ordinary arbitrability.'' Thus, an F1 anti-suit injunction could be seen as enforcing not only the parties' agreement to arbitrate in F1, but also their implicit agreement to resolve ordinary arbitrability questions in F1 as well.

[7] Emphasis added.

between F1 and private parties to evade F2's mandatory, public-regulatory law—law that F2 trusts only its judges to enforce, not arbitrators.

Up to this point in the discussion, I would agree with the injunction opponents. But this line of reasoning—concerning non-arbitrable subject matter—does not extend to ordinary arbitrability issues that do not raise public policy concerns—in particular to those involving ordinary contract enforcement issues concerning the existence, validity, and scope of the arbitration agreement. On these matters it is difficult to find in the New York Convention any particular support for multiple parallel proceedings. The convention seems either neutral, or, if anything, might be cited in support of a system effecting strong enforcement of an arbitration agreement—given that making arbitration agreements fully enforceable is one of the convention's principal goals.

I believe this point comes home even more forcefully, if one applies it in the specific context I mentioned at the outset of this essay—where the parties have placed the seat of their arbitration in F1 and have chosen F1 law to govern the arbitration agreement. In most of the jurisdictions of which I am aware, such an agreement would provide good personal jurisdiction over both parties in F1 courts to enforce the arbitration agreement.[8] If the pro-arbitration litigant seises an F1 court seeking enforcement of the arbitration agreement and that court, applying its own law, finds the dispute arbitrable, why would it not be fully legitimate for the F1 court to bar the anti-arbitration litigant from forum shopping to find a court that might reach a different result (or simply to impose further litigation costs on the pro-arbitration litigant)?

Indeed, it does not seem farfetched to cite the New York Convention's basic agreement-enforcing policy as supporting an injunction remedy here. By choosing an F1 seat and F1 law to govern their agreement, the parties can be seen to have agreed that F1 courts should decide all questions of ordinary arbitrability. An injunction barring the arbitration opponent from proceeding in F2 merely enforces this aspect of the parties' intentions. Allowing the respondent to raise the arbitrability question anew in an F2 court (and thereby to impose on the pro-arbitration litigant the corresponding costs of such a proceeding), is just what the parties intended to avoid.

[8] *See, e.g.*, Victory Transp. Inc. v. Comisaria Gen., 336 F.2d 354, 363 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (''By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York.''); Peter Schlosser, ''Anti-Suit Injunctions zur Unterstützung von internationalen Schiedsverfahren,'' 52(7) *Recht der internationalen Wirtschaft* 486, at 491 (2006).

A FORUM FOR STRONG ENFORCEMENT OF AN ARBITRATION AGREEMENT

Consider the perspective of private parties negotiating an international transaction who want to include a reliable and fully enforceable arbitration agreement and who want to avoid parallel proceedings. Their contractual freedom is surely enhanced, if they know that a jurisdiction exists (F1) that will enjoin a parallel proceeding outside of F1 in breach of the arbitration agreement—at least if the seat is in F1, and F1 law applies. The parties then have the freedom to select this system of strong enforcement by drafting their agreement to place the seat in F1 and to choose F1 law to govern the arbitration agreement. This method will not allow them to evade appropriately applicable foreign mandatory law—the kind of law that defines non-arbitrable subject matter. But otherwise they can count on a strongly enforceable arbitration agreement.

If there were no such forum, might we not expect private interests dependent on global transactions to lobby governments for an arbitration law that would serve this end? Is this not how we got Article II of the New York Convention in the first place—through private interests articulating the need for a treaty regime guaranteeing the enforceability of arbitration agreements? In this sense I think it is fair to cite the convention's pro-enforcement policy goal as at least not inconsistent with—and, in fact, more or less supportive of—anti-foreign-suit injunctions to enforce arbitration agreements (under the conditions discussed).

CASE LAW IN THE UNITED STATES AND UNITED KINGDOM FAVORING ANTI-FOREIGN-SUIT INJUNCTIONS TO ENFORCE ARBITRATION AGREEMENTS

Currently the courts of the United States, and especially those of the United Kingdom, are prepared to act as strongly enforcing jurisdictions. In the United States, even the Second Circuit, which generally favors a restrictive approach to anti-foreign-suit injunctions,[9] has been willing to issue an injunction to enforce an arbitration agreement—at least where the seat was in the United States and U.S. law governed the arbitration agreement. Although other factors played a role, the Second Circuit in *Paramedics v. GE*

[9] *See* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 359 (8th Cir. 2007) (listing the First, Second, Third, Sixth, and District of Columbia Circuits as following a ''conservative approach'' and the Fifth and Ninth Circuits, a ''liberal approach'' to anti-foreign-suit injunctions).

Medical Systems[10] cited the strong federal policy in favor of enforcing arbitration agreements as helping to overcome ''international comity'' concerns and justifying an injunction. In another case, *Pepsico v. Oficina Central*,[11] where the parties put the seat in New York but chose Venezuelan law to govern the arbitration agreement, the New York federal district court refused to enjoin a parallel proceeding in Venezuela challenging arbitrability.[12] After all, the parties had chosen Venezuelan law to determine arbitrability; so it was appropriate for a Venezuelan court to be the principal interpreter of what the outcome should be under its own law.

Two recent U.K. cases, *Through Transport*[13] and *West Tankers*,[14] are especially illustrative of the approach I am urging. *Through Transport* involved loss of cargo shipped from India through Finland to Moscow. New India, the cargo insurer, paid and was subrogated to cargo's claim against the carrier, but the carrier was insolvent. All was not lost, however, because the carrier had liability insurance, and Finland had enacted a direct action statute allowing a creditor to bypass the insolvent debtor and sue the liability insurer directly. This is what New India elected to do, by suing in Finland on a theory that the loss-causing event occurred there and that Finnish courts thus had good jurisdiction.

New India had a particular reason for suing in Finland under the Finnish direct action statute rather than in the United Kingdom under the equivalent U.K. statute. The carrier's liability insurance contract contained a ''pay to be paid'' clause obligating the insurer to pay only if the insured had previously paid on a covered claim (an indemnity contract). The ''pay to be paid'' clause was enforceable in English law but arguably not so under Finnish law. The Finnish statute contained anti-evasion provisions that potentially voided both the ''pay to be paid'' clause and the arbitration clause (on a theory of non-arbitrable subject matter). Thus, Finnish public

[10] *See* Paramedics Electromedicina Comercial, Ltda. v. GE Medical Sys. Info. Techs, Inc., 369 F.3d 645 (2d Cir. 2004) (seat was in Miami and New York law applied; *see* 2003 WL 23641529 (S.D.N.Y. 2003)).

[11] Pepsico, Inc v. Oficina Central de Asesoria y Ayuda Tecnica, C.A., 945 F. Supp. 69 (S.D.N.Y. 1996).

[12] *See also* LAIF X SPRL v. Axtel, 390 F.3d 194 (2d Cir. 2004) (refusal to enjoin parallel proceedings in Mexico where arbitrability would be decided under Mexican law).

[13] Through Transp. Mut. Ins. Ass'n v. New India Assurance Ass'n, [2005] 1 Lloyd's Rep. 67, [2005] 1 All E.R. (Comm) 715, 2004 WL 2714108 (CA (Civ. Div.)).

[14] West Tankers Inc. v. Ras Riunione Adriatica di Sicurta, [2005] 2 Lloyd's Rep 257, [2005] 2 All E.R. (Comm.) 240, 2005 WL 699582 (QBD (Comm. Ct).) (affirmed by the House of Lords, but the House of Lords referred to the European Court of Justice the question of the legality of the anti-suit injunction under possibly applicable European Union (EU) law, 20007 WL 504700; *see infra* note 15).

policy seemed to offer New India a chance at recovery for a loss caused in Finland.

The liability insurance contract (including the arbitration clause) was governed by English law and provided for arbitration in London. Not liking its prospects in Finland, Through Transport, the liability insurer, sued New India in the United Kingdom seeking arbitration and an injunction barring New India from continuing with the Finnish action. The court of appeal ordered arbitration, reasoning that under English law (which it found applicable) New India could not enforce the claim stemming from the liability insurance contract without honoring that contract's arbitration clause once Through Transport invoked it.

At the same time the court refused to enjoin New India from continuing with its Finnish action. The court reasoned that by suing in Finland, New India did not ''breach'' the arbitration agreement, to which it was not a party. Its obligation to arbitrate came about through operation of law, not through its specific agreement to arbitrate. But the court also stressed the role of Finnish public policy. The Finnish law was not entirely clear, but it was certainly arguable that Finnish public policy stemming from the anti-evasion provisions of its direct action statute would annul both the ''pay to be paid'' and arbitration clauses. The importance of this public policy element becomes clearer when one compares the outcome in the *West Tankers* case.

West Tankers is an analogous case but with a crucial difference and an opposite result on the injunction issue. There the oil-tanker carrier rammed and damaged the charterer's wharf in Italy. Erg, the wharf insurer, paid and was subrogated to the wharf owner/charterer's claim. Erg sued West Tankers, the ship owner, in Italy on a tort theory for damage to the wharf. West Tankers, preferring arbitration, sued Erg in the United Kingdom to enforce the arbitration clause and for an injunction ordering Erg to dismiss its Italian action. The charterparty, under which the oil tanker operated, provided for English law and London arbitration. The key questions were whether Erg was bound by the arbitration provisions of the charterparty, to which it was not a party, and whether United Kingdom or Italian law should decide that issue.

The court ruled that U.K. law applied, that Erg was required to honor the arbitration clause, and that the clause was broad enough to include the tort claim for wharf damage (governed substantively by Italian law). In *dictum* the court also concluded that Italian law would have reached the same result. Under neither law, however, was Erg a formal party to the arbitration agreement. Therefore Erg did not breach that agreement by suing in Italy—which was one of the prominent reasons the *Through Transport* court gave for not enjoining prosecution of the parallel proceeding in that case. Still, having decided the ''ordinary arbitrability question'' in favor of arbitration, the *West Tankers* court enjoined Erg from continuing

with the Italian proceeding.[15] Although the court noted that the Italian court might well object to the U.K. anti-suit injunction and refuse to enforce it, none of the litigants claimed that Italian public policy was involved in any way or that the subject matter was non-arbitrable in Italy.[16]

Although the *West Tankers* court did not distinguish *Through Transport* on the specific ground for which I am arguing—the presence or absence of public policy concerns in the parallel jurisdiction—I believe that distinction provides a good explanation for the conflicting outcomes. In neither case did filing a claim in the parallel jurisdiction constitute a breach of the arbitration agreement. So this factor cannot explain the different outcomes. In *Through Transport*—where the injunction was refused—the court of appeal noted the importance of not interfering with parallel prosecution of the plausible claim that Finnish mandatory law (public policy) would void the ''pay-to-be-paid'' clause (and even the arbitration clause) under the Finnish direct action statute. In *West Tankers*—where the injunction issued—there were no public policy questions at stake in the enjoined Italian proceeding.

[15] On appeal the House of Lords agreed with the Commercial Court's decision to grant the injunction, but referred to the European Court of Justice (ECJ) the question whether the *Turner v. Grovit* principle would apply to disallow the anti-suit injunction. The *Turner v. Grovit* principle prohibits an EU member State from enjoining the prosecution of a claim in another EU member State. *See* Turner v. Grovit, C-159/02, Judgment of the European Court of Justice of Apr. 27, 2004. *Turner v. Grovit* was based, however, on considerations stemming from the EU's jurisdiction and judgments regulation (Council Regulation (EC) No. 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, at 1-23 (Jan. 16, 2001) (the so-called ''Brussels Regulation'')), which is not applicable to ''arbitration.'' The preliminary reference to the ECJ in *West Tankers* is still pending before the ECJ. The *West Tankers* case is likely to be best known in the future for the answer the ECJ gives to this important question.

[16] For a similar result, see ''Epsilon Rosa'' (No. 2), [2002] 2 Lloyd's Rep. 701 (Com. Ct.), where, after complex analysis, the U.K. court concluded that the bill of lading cross-referenced and hence incorporated the charterparty arbitration clause (choosing U.K. law and a U.K. arbitral seat). The court acknowledged that the parallel proceeding in Poland might not have reached the same result on the arbitrability question, but still enjoined that proceeding. Note that the Polish proceeding involved an ordinary arbitrability issue (existence of an arbitration agreement), not questions of non-arbitrable subject matter or other Polish public policy concerns. The *Epsilon Rosa* court found that language in the bill of lading clearly put the cargo claimant on notice that the referenced charterparty's arbitration clause and applicable law were to be incorporated. Thus, the result accords with the theory that the parties had agreed upon the United Kingdom as the forum to resolve ordinary arbitrability issues, since the charterparty clause implicitly so provided.

One could think of other patterns where this public policy distinction would come into play. For example, suppose a Belgian distributor agrees to distribute an American manufacturer's products in Belgium, and the parties include an arbitration clause, choosing English law to govern the clause, and arbitration in London. Under Belgian mandatory law, a Belgian distributor's claim for an extended termination period and compensation (both provided for in Belgian statutory law) is non-arbitrable subject matter.[17] If the parties fall into dispute over termination of the agreement, a British court would probably order arbitration, but it should not enjoin the Belgian party from pursuing its claim in Belgian courts under Belgian mandatory law. Under Belgian law—designed to protect Belgian distributors—the Belgian distributor's claim is non-arbitrable subject matter. It would constitute an unsupportable disturbance of international comity (perhaps triggering a counter anti-suit injunction) for a British court to enjoin a Belgian distributor from suing in a Belgian court for protection under fully applicable Belgian public policy.

CONCLUSION

In summary I have argued in favor of a pro-arbitration use of anti-foreign-suit injunctions to enforce arbitration agreements where the injunction would not interfere with legitimate public policy interests (making the dispute non-arbitrable) in the parallel jurisdiction. Where the dispute involves ordinary issues of arbitrability (existence, validity, and scope) and the parties have chosen an arbitration seat and that seat's law to govern the arbitration agreement, a court at the seat should be free to enforce the agreement and enjoin the respondent from breaching it through parallel litigation elsewhere. Issuance of an anti-foreign-suit injunction in this situation should not be seen as infringing international comity (much less, international law).

This result seems fair and reasonable; indeed I believe it accords with the basic policy of the New York Convention and with what global economic actors would want to have available for their dispute settlement arrangements. It also seems conceivable that the availability of strong enforcement remedies for arbitration agreements in the United States and United Kingdom (and other common law jurisdictions) will make these venues all

[17] *See* Audi–NSU Auto Union A.G. v. S.A. Adelin Petit & Cie, Cour de Cassation (1979), 5 *Y.B. Comm. Arb'n* 257 (1980). For the major provisions of the Belgian statute, which are quoted in English translation and discussed, see Audi–NSU Auto Union A.G. v. S.A. Adelin Petit & Cie, Cour d'appel de Liege, 4 *Y.B. Comm. Arb'n* 254, 255-56, nn.2, 3, and 7 (1979)).

the more attractive to parties seeking a reliable and cost-saving seat of arbitration. If that prediction turns out to be accurate, might we not expect the arbitration bar itself in countries now opposed to anti-suit injunctions to align themselves with this essay's arguments and to urge their own courts to employ this remedy in suitable cases[18]—or risk a decline in their arbitration business.

[18] Schlosser makes essentially this point, see Schlosser, *supra* note 8, at 487, as does Lord Hoffman in his opinion for the House of Lords in *West Tankers*, *supra* note 14, at 20-21.

Similarity in the Eye of the Beholder: Revisiting the Application of Rules Governing Jurisdictional Conflicts in the *Lauder/CME* Cases

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INTRODUCTION: THE LAW OF JURISDICTION REGULATION

Virtually all legal systems regulate jurisdictional relations between different courts operating within the same legal system: They often direct disputes to specific courts, such as tax or labor courts,[1] and they normally respect choice of forum provisions which the disputing parties have agreed upon.[2] In addition, parallel and consecutive proceedings are usually barred by virtue of rules such as *lis alibi pendens* and *res judicata*.[3] Some legal systems also have rules of a more flexible nature (such as *forum non-conveniens* or judicial comity) designed to govern the jurisdictional relations between their own courts and foreign courts or arbitration tribunals.[4]

Many international legal instruments contain comparable norms that purport to regulate the jurisdictional relations between different international courts and possibly also the relations between national and international courts. For example, Article 292 of the European Community (EC)

[1] *See, e.g.,* Richard L. Revesz, ''Specialized Courts and the Administrative Lawmaking System,'' 138 *U. Pa. L. Rev.* 1111 (1990); Kazuo Sugeno, ''The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform,'' 25 *Comp. Lab. L. & Pol'y J.* 519 (2004); Paul B. Stephan III, ''Courts with Income Tax Jurisdiction: An International Comparison,'' 8 *Va. Tax Rev.* 233, 234-44 (1988).

[2] For a discussion, see Yuval Shany, *Regulating Relations Between National and International Courts* 146 (2007).

[3] *Id.* at 158-60.

[4] *See, e.g.,* Hilton v. Guyot, 159 U.S. 113, 163 (1895); Dallal v. Bank Mellat, [1986] 1 Q.B, 441, 461-62; Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 102 D.L.R.(4th) 96.

Treaty[5] bars European Union (EU) member States from referring disputes governed by EC law to courts other than the ECJ—a provision upheld in the Court's 2006 *MOX* decision.[6] At the same time, Article 282 of the United Nations Convention on the Law of the Sea (UNCLOS)[7] provides that the convention's dispute settlement mechanisms would give way to other procedures agreed upon by the parties if these selected procedures were to entail a binding decision. Besides these forum-selection provisions, one can also identify treaty provisions that seek to curb or otherwise regulate multiple proceedings. For example, Article 35 of the European Convention on Human Rights bars the submission of petitions to the European Court of Human Rights if these same petitions were previously submitted to another international procedures (an *electa una via* or ''fork in the road'' provision).[8]

Analogous treaty-based rules and recommendations also govern some jurisdictional interactions involving international arbitration bodies. For example, Article 26 of the International Centre for the Settlement of Investment Disputes (ICSID) Convention confers exclusive status upon ICSID arbitrations *vis-à-vis* other procedures—provided that the parties consented to ICSID's jurisdiction and unless otherwise stated[9]; Article 2005 of the North American Free Trade Agreement (NAFTA) regulates the choice between NAFTA Chapter 20 panels and the World Trade Organization (WTO) dispute settlement procedures[10]; ICSID Model Clause 12 bars parallel proceedings before ICSID and other dispute settlement procedures[11]; and Article 19(1) of the Organization for Security and Cooperation in Europe (OSCE) Conciliation and Arbitration Convention precludes litigation of a case previously decided by other tribunals.[12]

[5] 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.

[6] Case C-459/03 Commission v. Ireland, [2006] E.C.R. I-04635.

[7] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (1982).

[8] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5 (hereinafter ECHR). Interestingly enough, under Protocol 14 (which has not yet entered into force), Article 35(1) is going to be amended in a way that limits submission to the Court of cases alleging minor human rights infractions, which have already been addressed by domestic courts. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 13, 2004, E.T.S. 194.

[9] Convention on the Settlement of Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

[10] North American Free Trade Agreement, Dec. 17, 1992, art. 1121(1)(b)(2), 32 I.L.M. 289 and 605 (1993).

[11] ICSID Model Clauses, ICSID Doc. ICSID/5/Rev. 2 (1993).

[12] Convention on Conciliation and Arbitration Within the CSCE [Commission on Security and Cooperation in Europe], Dec. 15, 1992, 32 I.L.M. 551 (1993).

Moreover, some jurisdiction-regulating rules governing relations between international fora do not derive from treaty law but were applied by international courts on the basis of customary international law or general principles of law. For instance, the Permanent Court of International Justice (PCIJ) held in the 1928 *Rights of Minorities in Upper Silesia* case that it would normally exercise jurisdiction over disputes that the parties refer to it but that it would refuse jurisdiction in ''those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority''[13]—a holding that confirms the overriding nature of exclusive choice of forum agreements under general international law.[14] Another example may be found in the recent judgment of the International Court of Justice (ICJ) in *Bosnian Genocide,* which confirmed the validity of the *res judicata* rule under general international law.[15]

In the same vein, decisions of arbitral tribunals have applied some general jurisdiction-regulation principles *vis-à-vis* other international tribunals and national courts (without direct reliance on any specific provision in their constitutive instruments). For example, in *North American Dredging*, the American-Mexican Claims Commission held that a contractual Calvo Clause, which invests the domestic courts of Mexico with exclusive jurisdiction over contractual disputes between the foreign investor and Mexico, is generally enforceable.[16] Essentially, the same position was adopted in some recent ICSID cases involving jurisdictional overlap between domestic contract-based proceedings and international bilateral investment treaty (BIT)-based arbitration.[17] Another example, is the 1985 decision of

[13] Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland), 1928 P.C.I.J. (ser. A), No. 15, at 23.

[14] There is some confusion, however, with regard to the required degree of explicitness or implicitness of such forum-selection agreements. Whereas in *Chorzow Factory* (1927), the PCIJ opined that a clear exclusive jurisdictional clause would be needed to block PCIJ proceedings (*Chorzów Factory* (Germany v. Poland), 1927 P.C.I.J. (ser. A), No. 9, at 30), in the preceding *Mavrommatis* case (1924), the PCIJ held that invocation of the *lex specialis* principle might suffice to limit the jurisdiction of a general court when the parties have already consented to the jurisdiction of a more specific forum (Mavrommatis Palestine Concessions (Greece v. GB), 1924 P.C.I.J. (ser. A), No. 2, at 32.).

[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia), Judgment of Feb. 26, 2007, at ¶¶ 115-116.

[16] North American Dredging Company of Texas (U.S. v. Mexico), 4 R.I.A.A. 26, 33 (1926).

[17] *See, e.g.,* Compania de Aquas del Aconquija, S.A. v. Argentina, 40 I.L.M. 426 (2001) [hereinafter Vivendi I]; SGS Societe Generale de Surveillance S.A. v. Philippines, decision of Jan. 29, 2004, *available at* http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

the ICSID tribunal in the *Pyramids* case to stay proceedings pending the conclusion of related International Chamber of Commerce (ICC) award enforcement proceedings before a domestic French court[18]—a course of action also adopted by the more recent *SGS v. Philippines* tribunal.[19] In addition, the *res judicata* principle has been applied by numerous arbitral tribunals with relation to competing proceedings.[20]

All of these precedents lead us to the conclusion that an identifiable body of law governing jurisdictional relations among international judicial institutions has emerged. This body of law may also apply *mutatis mutandis* to the jurisdictional relations between international and national bodies (at least to the degree that international law is applicable in the proceedings in question). In all events, there is little question that the basic principles of the law of jurisdictional regulation—respect for the parties' choice of forum and control of multiple proceedings—should apply to the relations between international arbitral tribunals.

The *Lauder/CME* cases, which I discuss in the next part of this article, reveal, however, a crucial limit on the application of jurisdiction-regulating rules—the unclear scope of the ''same proceedings'' requirement, which underlies jurisdictional regulation. In fact, the *Lauder/CME* cases are indicative of a wider trend to erode or circumvent the application of jurisdiction-regulating rules through emphasizing the differences existing between related claims in a way that puts into question the very need for their regulation. This trend, which coincides with other ''disintegrative'' techniques designed to break down complex multifaceted disputes into distinct ''mini-disputes,'' has considerable theoretical and practical implications, given the ever-growing complexity of international disputes and the increased propensity to refer them to international adjudication and arbitration.

THE *LAUDER/CME* LITIGATION

Background

The *Lauder/CME* cases stemmed from a dispute over an investment made by a U.S. investor, Mr. Ron Lauder, in a Czech TV Station, TV Nova, through a

[18] Southern Pacific Properties (Middle East) Ltd. v. Egypt, 3 *ICSID Rep.* 101 (1985) (jurisdiction) [hereinafter SPP].

[19] SGS v. Philippines, *supra* note 17, at ¶ 128.

[20] *See, e.g.,* Amco Asia, Pan American Development Ltd. v. Indonesia, 1 *ICSID Rep.* 389, 549 (1983); Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1907, 1950 (1941); Waste Management Inc. v. Mexico, 41 I.L.M. 1315, 1322 (2002).

number of European companies subject to Lauder's control. Initially, the investment was structured as a capital investment, but it eventually became a joint venture between a local Czech company and a Lauder-controlled German company, whose contractual rights were subsequently assigned to CME—a Dutch company also controlled by Lauder. After changes in the composition of the Czech Media Council and in Czech law, the terms of TV Nova's operating license were altered—a decision that prompted a series of events that eventually led to the collapse of the joint venture.

Consequently, a number of legal proceedings were initiated between the foreign and local investors and between the foreign investors and the Czech government. Two of these sets of proceedings warrant particular attention: these are the United Nations Commission on International Trade Law (UNCITRAL) arbitral proceedings initiated by Lauder against the Czech government pursuant to a compromissory clause incorporated in the Czech-United States BIT[21] (i.e., the London Proceedings) and the parallel UNCITRAL proceedings initiated by CME against the Czech government pursuant to the Czech-Dutch BIT[22] (i.e., the Stockholm proceedings). In both sets of proceedings, it was alleged that the conduct of the Czech authorities violated essentially the same BIT standards—it was unfair, inequitable, and discriminatory, it fell short of the need to provide full protection and security to foreign investment, as well as other relevant international standards, and it amounted to an act of expropriation.

Clearly, the two proceedings were closely related: they involved the same respondent (the Czech Republic), and Lauder, the claimant in the London proceedings, had control over CME, the claimant in the Stockholm proceedings. The facts reviewed by the two tribunals were identical too, as they both examined the same sets of events; and the legal standards applicable in the case were very similar (though not identical).[23]

[21] Treaty Concerning the Reciprocal Encouragement and Protection of Investment (Czech-United States), Oct. 22, 1991, http://www.state.gov/documents/organization/43557.pdf [hereinafter Czech-United StatesUnited States BIT].

[22] Agreement on Encouragement and Reciprocal Protection of Investments (Czech-Netherlands), Apr. 29, 1991, http://www.unctad.org/sections/dite/iia/docs/bits/czech_netherlands.pdf [hereinafter Czech-Dutch BIT].

[23] For example, Article III(1) of the Czech-United States BIT—the non-expropriation clause—prohibited direct or indirect *expropriation* or *nationalization* (''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 accordance with due process of law; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with the general principles or treatment provided for in Article II(2).''). However, the parallel provision in the Czech-Dutch BIT—Article 5—prohibited direct or indirect *deprivation of investment* (''Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are

The Application of Jurisdiction-Regulating Rules in *Lauder/CME*

How should the relevant jurisdiction-regulating rules have applied to the parallel proceedings in the *Lauder/CME* cases? First, one may consider the effect of the *electa una via* (or ''fork in the road'') provision in the Czech-United States BIT, which barred multiple litigation of the same dispute before more than one national or international court or tribunal. The relevant part of Article VI(3)(a) of the Czech-United States BIT provided that:

> Once the national or company concerned has so consented, either party to the dispute may institute such proceeding *provided [that] the dispute has not been submitted by the national or the company for resolution in accordance with any applicable previously agreed dispute settlement procedures* [emphasis added].

However, no similar provision was inserted into the Czech-Dutch BIT (nor did that agreement contain an exclusive jurisdiction clause). The sequence of the litigation thus became of great importance—since proceedings in the *Lauder* claim were initiated before the *CME* proceedings, Article VI(3)(a) of the United States-Czech BIT remained inapplicable.

But other jurisdiction-regulating rules that purport to govern multiple proceedings could have also been made applicable. The conduct of parallel proceedings before two different tribunals appeared to conflict, *prima facie,* with the *lis alibi pendens* rule—the rule barring the simultaneous referral of the same case to more than one court or tribunal[24]—or, perhaps, if one were to reject the application of that rule as a matter of general international law, with the more general *abus de droit* principle. This latter principle, which appears to constitute a general principle of law,[25] might bar the invocation of a right to bring a claim or to proceed with an ongoing claim when a virtually identical claim is already pending elsewhere (i.e., if no legitimate interest in conducting parallel proceedings can be identified).[26] In addition, the *res judicata* rule should have arguably led the second-in-time tribunal (the Stockholm tribunal) to adopt the decision

complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; and (c) the measures are accompanied by provision for the payment of just compensation.'').

[24] For a discussion of the *lis alibi pendens* rule, see Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* 239-45 (2003).

[25] *See* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 121 (1987).

[26] For a discussion, see Shany, *supra* note 2, at 192.

reached by the first-in-time tribunal (the London tribunal). Finally, both tribunals could have strived to extend some degree of judicial comity *vis-à-vis* each other and employ their inherent powers to regulate the pace of the two proceedings[27] in order to synchronize them, as far as possible, and facilitate thereby better coordination between their respective factual and legal findings.

However, both tribunals held that the two proceedings were separate in nature: they did not involve the same parties and invited the application of different legal instruments (the Czech-United States and Czech-Dutch BITs). Furthermore, this position was also espoused by the Swedish court of appeals, which reviewed a challenge to the Stockholm award.[28] Hence, many jurisdiction-regulating rules that were designed to curb multiple proceedings over ''the same dispute'' were deemed inapplicable.

The linkage between the degree of similarity between the concurrent proceedings and the regulation of such concurrency is indeed justified by principled policy considerations. Simply put, if the parties or issues raised in the two proceedings are not the same, then each party has the *right* to institute separate proceedings. In the words of the Stockholm tribunal:

> A party may seek its legal protection under any scheme provided by the laws of the host country. The [Dutch-Czech] Treaty as well as the US Treaty are part of the laws of the Czech Republic and neither of the treaties supersedes the other. Any overlapping of the results of parallel processes must be dealt with on the level of loss and quantum but not on the level of breach of treaty.[29]

The ''abuse of rights'' argument, which has the potential to cover related proceedings that are not strictly identical in nature, also did not carry the day before any of the involved tribunals. This is because, in the words of the London tribunal:

> The Arbitral Tribunal does not see any abuse of process by the Claimant's pursuit of his claim in the present proceedings and by

[27] *See* UNCITRAL Rules, art 15(1), (G.A. Res. 31/98 (Dec. 15, 1976)), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html: ''Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.''

[28] Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919, 967 (2003).

[29] CME Czech Republic B.V. v. Czech Republic, Partial Award, at ¶¶ 419 (Sept. 13, 2001), *available at* http://www2004.mfcr.cz/static/Arbitraz/en/PartialAward.pdf.

> CME's pursuit of its claim in the parallel arbitration proceedings. As already stated (see 4.3 above), the claimants and the causes of action are not the same in the two cases. Only this Arbitral Tribunal can decide whether the Czech Republic breached the Treaty towards Mr. Lauder, and only the arbitral tribunal in the parallel Stockholm Proceedings can decide whether the Czech Republic breached the Dutch/Czech bilateral investment treaty in relation to CME.[30]

Still, in fairness, it would seem that the position of all tribunals on the applicability of the *abus de droit* principle and their reluctance to coordinate the two proceedings was influenced to some degree by the Czech Republic's opposition to consolidation of the two proceedings—a procedural avenue offered by the claimants.[31] This implied that the respondent was less than willing to work out a practical solution to the problems associated with the situation of jurisdictional overlap (other than outright dismissal of one set of parallel claims).

The allocation of blame between the parties for generating two separate, yet parallel, sets of proceedings does not, however, resolve the difficulties generated by the collective outcome of the two cases: Whereas the London tribunal rejected Lauder's claim, holding that although the Czech Republic had breached a few obligations due to Lauder, such breaches did not directly or indirectly harm the investment, the Stockholm tribunal took an opposite position. It held that the Czech Republic had breached numerous obligations due to CME, which had caused the latter significant harm (separate proceedings were then held on calculation of damages—eventually leading to an award of $270 million in favor of CME). Since jurisdiction-regulating rules were designed to prevent this very type of scenario from taking place, the question of whether they have been properly applied or, rather, excluded by the involved tribunals ought to be revisited.

THE TRADITIONAL TESTS FOR DETERMINING CLAIM SIMILARITY

Conditioning the application of jurisdiction-regulating rules on a sufficient level of similarity between the parallel procedures derives from the main rationales for introducing such rules in the first place: It is redundant to litigate the *same* dispute in more than one set of proceedings (mainly for reasons of inconvenience to the parties and judicial economy); and it is

[30] Lauder v. Czech Republic, Award, at ¶ 177 (Sept. 3, 2001), *available at* http://www2004.mfcr.cz/static/Arbitraz/en/FinalAward.pdf.

[31] *See* CME, *supra* note 29, at ¶ 412; Lauder, *supra* note 30, at ¶ 178.

undesirable that parties to a *single* dispute, through their own conduct, would generate inconsistent legal determinations of their rights and obligations. While jurisdictional interactions can take place outside these constraints (e.g., in related proceedings involving the same issue but different parties or the same parties and different issues), the policy considerations supporting regulation of such interactions are less compelling. The right of access to court, applied as a human right[32] and a general principle of justice,[33] also militates against excessive restriction of party autonomy, that is, on the parties' freedom to control the conduct of litigation whenever there are genuine distinctions between the related procedures.[34] The involvement of different sets of parties and the invocation of substantively different issues in the course of litigation may, in effect, remove many of the objections to the conduct of multiple proceedings.[35]

The balance between the conflicting factors underlying the application of jurisdiction-regulating norms is reflected in international law's definition of competing proceedings that distinguish between similar legal proceedings, which are generally subject to strict regulation, and dissimilar legal

[32] *See, e.g.,* ECHR, art. 6; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, 999 U.N.T.S. 171.

[33] *See, e.g.,* Azinian v. Mexico, 39 I.L.M. 537, 552 (2000) (''A denial of justice could be pleaded if the relevant courts refuse to entertain a suit''); *Restatement (Third) of the Foreign Relations Law* § 711, cmt. a (1987) (''More commonly the phrase 'denial of justice' is used narrowly, to refer only to injury consisting of, or resulting from, denial of access to court, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civi''); National Iranian Oil Co. (NIOC) v. Israel, decision of Feb. 1, 2005 (Cour de Cassation, France), excerpts *available at* http://www.kluwerarbitration.com (''the impossibility for a party to access the court (or arbitral tribunal) entrusted with the settlement of that party's claim to the exclusion of all other State jurisdictions, and thus to exercise a right pertaining to international public policy, established by the principles of international arbitration and Art. 6(1) of the European Convention on Human Rights, is a denial of justice'').

[34] *See* Christoph C. Schreuer, *Decisions of International Institutions before Domestic Courts* (1981) 329. *See also* Christoph H. Schreuer, ''Concurrent Jurisdiction of National and International Tribunals,'' 13 *Hous. L. Rev.* 508, 526 (1975-1976).

[35] In the same vein, the application of forum selection rules—such as choice of forum or exclusive jurisdiction clauses that direct a specific dispute to a designated judicial forum—also depends largely on sufficient similarity between the competing procedures. A forum selection clause (or exclusive jurisdiction treaty provision), designating a specific dispute to the exclusive competence of a particular national or international court, would block the exercise of jurisdiction by courts other than those selected only if the two cases were effectively identical. Although the policy considerations involved here may be somewhat different—the principle of *pacta sunt servanda* governs obligations falling within the scope of forum selection clauses but not matters falling beyond the scope of such clauses—the relevance of the ''sameness'' criteria may be similar.

proceedings, which generally escape significant regulation. Two tests have traditionally been offered in this regard in various international instruments and in the jurisprudence of national and international courts—the ''same parties'' and the ''same issues'' tests.[36] Policy choices regarding the application of jurisdiction-regulating rules often boil down to a more or less flexible reading of these two ''sameness'' criteria.

Same Parties

Some international law authorities may be cited in favor of a flexible or informal approach to asserting similarities between parties involved in multifora litigation. For example, some international courts and tribunals have embraced ''essentially the same parties'' or ''*alter ego*'' tests of similarity, thereby rejecting more formal formulations of party identity.[37] Flexible standards, implying a high degree of convergence of legal interests, have also been adopted by a few jurisdiction-creating instruments, especially in the field of international investment protection.[38]

[36] Certain German Interests in Polish Upper Silesia (Germany v. Poland), 1925 P.C.I.J. (ser. A) No. 6, at 20; Benvenuti and Bonfat Srl. v. Congo, 1 *ICSID Rep.* 330, 340 (1980); Amco Asia, *supra* note 20, at 409; China Navigation Co. Ltd. (U.K.) v. U.S. (The ''Newchwang''), 6 R.I.A.A. 64, 65 (1921); Cases 172, 228/83 Hoogovens Greop v. Commission, [1985] E.C.R. 2831, 2846; Waste Management,*supra* note 20, at 1322; Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 27, 29 I.L.M. 1413 (1990), as updated by Council Regulation 44/2001 of Dec. 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels Judgments Convention]; *Restatement of the Law (Second), Judgments* §§ 17, 24.

[37] *See, e.g.,* Case 16358/90 Martin v. Spain, Eur, Comm'n H.R. Decision of Oct. 12, 1992 (adopting an ''essentially the same parties'' standard *vis-à-vis* competing International Labor Organization (ILO) Committee on Freedom of Association proceedings brought by the labor union to which the applicants in the Strasbourg proceedings belonged); Comm. 75/80 Fanali v. Italy, U.N. Doc. CCPR/C/18/D/75/1980, at ¶ 7.2 (Mar. 31, 1983) (an *electa una via* rule covers claims by the same individual ''or someone else who has the standing to act on his behalf''); Drouot assurances SA v. Consolidated Metallurgical Industries, 1998 ECR I-3075, at ¶ 23 (suggesting that the claim in question would have been blocked had the litigating interests of the related parties had been identical and indissociable). *See also* August Reinisch, ''The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes,'' 3 *Law & Prac. Int'l Courts and Tribunals* 37, 57-60 (2004) (arguing that the ''economic approach'' to investment disputes, which focuses on the economic realities and not on the formal identities of the parties, supports a flexible approach to the ''same parties'' test).

[38] *See, e.g.,* Canadian Model BIT 2004, art. 26(1)(e), *available at* http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf (''the investor and, where

Still, other authorities point to the opposite direction and embrace a more formal ''identity of parties'' test.[39] Furthermore, it has even been suggested in one recent ICSID case that a distinction should be made even between two cases involving identical parties when at least one of these parties is acting in the two cases in different capacities (e.g., if the State acts in one case in its sovereign or *jure imperii* capacity and in the other case in its ''merchant'' or *jure gestionis* capacity).[40] This holding amounts to the *de facto* adding of an additional similarity criteria—identical capacities—to the same parties test. In all events, it is seems safe to assert that *lex lata* on the application of the ''same parties'' test remains unsettled.

In light of the uncertainty of existing law on the matter, it looks as if courts and other competent adjudicative bodies are ultimately faced with a policy choice: They can either stress the distinctions between the two parallel proceedings—thereby evading the need for applying jurisdiction-regulation rules, such as *lis alibi pendens* or *res judicata*—or emphasize the common aspects of the two proceedings and facilitate the regulation of their parallel conduct. While the first option has the benefit of doctrinal clarity and ease of application (it is simpler to refrain from coordinating than to coordinate), the second option improves the involved fora's ability to fully address the complexity of the legal situation at hand and engage in pragmatic problem solving; but this may come at the price of increased judicial discretion and reduced legal certainty.

the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 22''). *See also* the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA), Aug. 5, 2004, art. 10.18(2)(b), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

[39] *See, e.g.,* Azurix Corp. v. Mexico, 43 I.L.M. 262, 280 (2004). *See also* Comm. R.13/56, Casariego v. Uruguay, U.N. GAOR, 37th Sess., Supp. 40, at 185, 187 (Report of the HRC, 1981); Comm. R.2/10, Altesor v. Uruguay, U.N. GAOR, 37th Sess., Supp. 40, at 122, 125 (Report of the HRC, 1982); Comm. 74/1980, Estrella v. Uruguay, U.N. GAOR, 38th Sess., Supp. 40, at 150, 156 (Report of the HRC, 1983)(in all three cases, the committee held that parallel proceedings alleging violations of the applicants' rights cannot be blocked by a *lis alibi pendens* rule since they were filed by unrelated third parties).

[40] *See* El Paso Energy International Co. v. Argentina, Decision on jurisdiction, Apr. 27, 2006, at ¶¶ 79-81, *available at* http://www.investmentclaims.com/decisions/El_Paso_Energy-Argentina-Jurisdictional_Decision.pdf; ILA International Commercial Arbitration Committee, Report on Res Judicata and Arbitration, at ¶ 46 (2006) (copy with author) (it is unclear whether the ''same parties'' test contains a requirement that the parties act in the same capacity in two arbitration proceedings).

To my mind, excessive insistence on formal identity between the parties is unwarranted, in most circumstances, as this stance precludes the application of jurisdiction-regulating rules in many multiple litigation contexts involving international arbitration proceedings. Yet the tendency to preclude regulation may undermine the main policy goals that jurisdiction-regulating rules were designed to serve in the first place—procedural justice, efficiency, and legal coherence. Overreliance on formal criteria may also invite their abuse through deliberate recourse to multiple litigation by closely related entities. Such manipulation is particularly feasible in economic disputes, which tend to involve complex corporate structures and numerous potential litigants (e.g., parent companies, subsidiaries, shareholders, indirect investors, etc.).[41] The *Lauder/CME* cases, which involve disputes arising from the involvement of closely related economic entities in the same transactions, illustrate this possibility.

Hence, I believe that the common law's ''privity of interests'' test, which marks preference for substantive over formal identity, is more suitable for governing cases of jurisdictional competition between international arbitration tribunals.[42] This standard of ''sameness'' would be met whenever the

[41] *See* Reinisch, *supra* note 37, at 56-57. This problem might be compounded by the multiple citizenships of the corporation and its shareholders. *Cf.* Olguín v. Paraguay, Award, at ¶¶ 60-62 (July 26, 2001), *available at* http://www.worldbank.org/icsid/cases/Olgun-award-en.pdf.

[42] Gleeson v. J Wippel & Co. Ltd., [1977] 3 All E.R. 54, 60 (Ch. Div.) (''I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a *sufficient degree of identification* between the two to make it *just* to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest' '') (emphasis added); Carl Zeiss Stiftung v. Rayner & Keeler Ltd., [1967] 1 A.C. 853 (H.L.) (''There does, however, seem to me to be a possible extension of the doctrine of privity as commonly understood. A party against whom a previous decision was pronounced may employ a servant or engage a third party to do something which infringes the right established in the earlier litigation and so raise the whole matter again in his interest. Then, if the other party to the earlier litigation brings an action against the servant or agent, the real defendant could be said to be the employer, who alone has the real interest, and it might well be thought unjust if he could vex his opponent by relitigating the original question by means of the device of putting forward his servant.''). *See also Restatement of the Law (Second), Judgments* § 39 (''A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party'');*id.* at § 41 (illustration no. 2) (assignor and assignee are normally viewed as the same party in litigation with the other contractual party). For additional support for the suitability of the ''privity of interests' standard, see Joost Pauwelyn, ''How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?,'' 37 *J. World Trade* 997, 1018 (2003).

parties are formally identical or so closely related as to represent virtually identical sets of interests.[43] However, excessive flexibility in identifying ''sameness'' is also undesirable, as it may result in oppressive incursions on party autonomy and could unduly restrict access to court of parties with divergent sets of interests.[44] Here, as in other cases where discretionary standards are employed, a fine line needs to be drawn between excessive rigidity and excessive flexibility.

Same Issues

Even more difficult questions of law and policy are presented by the second preliminary test underlying jurisdictional competition—the ''same issues'' test. This test can be broken down into sub-tests: the same fact pattern and the same legal claims (or ''same object'' (*petitum*), ''same legal grounds'' (*causa petendi*), and ''same remedies''[45] criteria).[46] Here too, considerations of party autonomy militate against extending the preclusive effect of jurisdictional agreements and multiple proceedings beyond the scope of issues actually regulated or litigated. Moreover, here too, the case law is also far from settled: While a number of international judicial bodies have expressed preference for a flexible approach toward the issue—an ''essentially the same issue'' standard[47]—other authorities pointing to a formal ''identity of issues'' test—exists as well.[48]

[43] Arguably, this standard is not met in cases involving concurrent claims by corporations and their shareholders where the two entities have divergent interests (e.g., if the corporation needs to accommodate the interests of other shareholders as well). *See, e.g.,* Genin v. Estonia, Award, at ¶ 332 (June 25, 2001), *available at* http://www.worldbank.org/icsid/cases/genin.pdf (majority shareholder investor's claim is not the same as the owned corporation's claim); Enron Corp. v. Argentina, Decision on jurisdiction, at ¶ 98 (Jan. 14, 2004), *available at* http://www.asil.org/ilib/Enron.pdf (ICSID).

[44] *See, e.g.,* National Grid Plc. v. Argentina, Decision of June 20, 2006, at ¶ 169, *available at* http://ita.law.uvic.ca/documents/NationalGrid-Jurisdiction-En.pdf (UNCITRAL) (''The Tribunal recalls the fact that National Grid is not a party to the Concession Contracts, in which the Concessionaires agreed to the exclusive jurisdiction of the federal courts in Argentina's federal capital.'').

[45] *See, e.g.,* Factory at Chorzów (Poland v. Germany), 1927 P.C.I.J. (ser. A) No. 9, at 29-30 (jurisdiction).

[46] *See, e.g.,* Trail Smelter, *supra* note 20, at 1952; A v. B, excerpts in Collection of ICC Arbitral Awards 1974-1985, at 11, 13 (1990).

[47] *See, e.g.,* Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 45-46; Case 144/86, Gubisch Maschinenfabrik v. Palumbo, [1987] E.C.J. 4861, 4876 (competing claims need not be entirely identical); Delgado (U.S. v. Spain), 3 *International Arbitrations to Which the United States Has Been a Part* 2196, 2199 (John Bassett Moore ed., 1881); Empresas Luchetti S.A. v. Peru, Award, at ¶ 53 (Feb. 7, 2005), *available at* http://www.worldbank.org/icsid/cases/lucchetti-award.pdf (two

The conflicting positions of the two *Vivendi* arbitral tribunals on whether related contract and treaty claims can be deemed the same claims for jurisdictional regulation purposes are indicative of this state of uncertainty:[49] In *Vivendi I*, an ICSID tribunal held that an exclusive jurisdiction clause found in a contract concluded between a foreign investor and a Provincial government may also bar proceedings between the foreign investor and the host State—Argentina—on the basis of the parallel intergovernmental BIT:

> [B]ecause of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucuman and have been denied their rights, either procedurally or substantively.[50]

disputes that have the same source or origin are to be regarded as the same dispute); App. 16717/90, Pauger v. Austria, 80 D&R 24 (1995); Comm. 452/1991, Glaziou v. France, UNGAOR, 51st Sess., Supp. 40(II), at 277, 281 (adopting a ''substantially the same issues'' standard); Methanex Corp. v. U.S., Determination of June 30, 2000, Doc. A/14/SEM/99-001/06/14 (3), at5-7 (CEC Secretariat), *available at* http://www.cec.org/files/pdf/sem/99-1-DET-E1.pdf; SGS v. Philippines, *supra* note 17, at ¶ 128. *Cf.* Fisheries Jurisdiction (Spain v. Canada), 1998 I.C.J. 437, 467 (Canada's reservation with relation to disputes over conservation measures cannot be bypassed by way of presenting the dispute as a dispute over enforcement measures); Commission v. Ireland, [2006] E.C.R. I-4635, at ¶ 120 (''the Convention provisions on the prevention of marine pollution relied on by Ireland, which clearly cover a *significant part of the dispute* relating to the MOX plant, come within the scope of Community competence which the Community has elected to exercise by becoming a party to the Convention'' (emphasis added)). *Restatement of the Law (Second), Judgments* § 24 (''What factual grouping constitutes a 'transaction', and what groupings constitute a 'series' [covered by the *res judicata* rule], are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.''). *See also* Reinisch, *supra* note 37, at 62-63 (arguing that there are strong policy arguments objecting to ''claim splitting''); Pauwelyn, *supra* note 42, at 1017.

[48] *See, e.g.,* Cesar Fierro v. United States, Report No. 99/03, Inter-Am. C.H.R., OEA/Ser./L/V/II.114 Doc. 70 rev. 1 at 769, at ¶ 57 (2003) (a claim under the Vienna Convention on Consular Relations is distinct from a claim under human rights instruments).

[49] Vivendi I, *supra* note 17; Compania de Aquas del Aconquija, S.A. v. Argentina, 41 I.L.M. 1135 (2002) [hereinafter Vivendi II].

[50] Vivendi I, *supra* note 17, at 443.

Hence, the tribunal adopted a flexible approach that led it to view the parties to the contract and the BIT as the same (Argentina and the Provincial government) and to regard two separate instruments—a contract and a BIT—as ''crucially connected,'' that is, raising the same investment-protection issues.

However, the *Vivendi I* award was eventually nullified by an *ad hoc* committee, *inter alia,* because of the first-in-time tribunal's assimilation of contractual and treaty claims, which the committee deemed improper:

> [W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucuman.[51]

Analogous tensions to the ones illustrated by the conflicting authorities on whether related parties are the ''same parties'' and whether separate yet virtually identical instruments raise the ''same issues'' have arisen in recent years in legal contexts other than investment law. For example, in the *Bluefin Tuna* and *MOX* cases, conflicting decisions were rendered on whether disputes arising under UNCLOS and regional instruments are the ''same dispute'' for the purpose of applying jurisdiction-regulating rules.[52]

Integrationism v. Disintegrationism

The question of whether to apply flexible or inflexible criteria in ascertaining the degree of similarity or difference between the parties and issues that would permit or bar the application of jurisdiction-regulating norms, may be related to a more general theme—that is, the role of dispute settlement bodies. An emphasis on the problem-solving role of international courts and tribunals may encourage them to attempt to reach a comprehensive settlement of the dispute at hand. This is because a partial solution of some claims only, in isolation of the other pending claims, might be

[51] Vivendi II, *supra* note 49, at 1154.

[52] Southern Bluefin Tuna (Australia and New Zealand v. Japan), 38 I.L.M. 1624, 1632 (1999); Southern Bluefin Tuna (Australia and N.Z. v. Japan), 39 I.L.M. 1359, 1388 (2000); MOX Plant (Ireland v. U.K.), 41 I.L.M. 405, 413 (2002); MOX Plant (Ireland v. U.K.), 42 I.L.M. 1187 (2003); Case C-459/03, *supra* note 6; Access to Information under Article 9 of the OSPAR Convention (Ireland v. U.K), 42 I.L.M. 1118, 1136 (2003).

ineffective and create as many problems as it purports to resolve (e.g., incompatible awards, inability to enforce decisions, etc.). By declining to consider the ''bigger picture'' and addressing one particular aspect of the relations between the parties, the adjudicative process might also interfere with the balance of business opportunities and risks that underlay the original transaction between the parties. Hence, courts and tribunals may be justified, under this view, in adopting a flexible test of similarity of proceedings—a point underscored by the *SGS v. Philippines* ICSID tribunal:

> Drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty[53]

The same pragmatic considerations also support the *SGS v. Philippines* tribunal's conclusions pertaining to the broad scope of its jurisdiction (it held that it is competent to review both contractual and treaty claims) and the broad interpretation it gave to the ''umbrella clause'' in the Philippine-Swiss BIT (Article X(2), under which the host State undertook to ''observe any obligation it has assumed with regard to specific investments''). Both interpretive moves invested the tribunal with the potential power of settling all of the parties' outstanding claims—that is, integrate all claims before one jurisdiction.[54]

At the same time, a competing vision of the function of adjudicative bodies may emphasize the norm-applying role of international courts and tribunals—that is, their role in implementing the substantive norms governing a specific instrument. Under this view, complex disputes can be disintegrated into specific disputes under distinct legal instruments (or treaty regimes), which different courts or tribunals should strive to apply regardless of the effect this might have on aspects of the transaction not covered by the said instruments.

This position can be supported by a number of policy considerations: Courts and tribunals should be wary of resolving aspects of the dispute or applying legal norms, which they were not explicitly authorized to apply. By adopting an overly broad construction of their scope of jurisdiction and applicable law, judicial bodies might exceed their mandate and overstep the boundaries of their legitimacy and professional expertise. Furthermore, disintegration—that is, addressing one distinct aspect of a complex dispute under one specific instrument—simplifies the work of courts and tribunals.

[53] SGS v. Philippines, *supra* note 17, at ¶ 128.

[54] It may be noted, however, that the tribunal declined, eventually, to exercise jurisdiction over contractual claims by virtue of the parties' contractual choice of forum clause which referred disputes to the local courts in the Philippines.

Arguably, any problem of coordination between different claims arising from the same transaction should be handled at the law-making level (by the transacting parties or the respective treaty regime legislators) and not by courts or tribunals who often lack an overall perspective regarding the overarching commercial relationship.

A disintegrationist approach would thus support not only a narrow construction of the ''same parties'' and ''same issues'' tests but also, at times, a narrow reading of the relevant tribunal's jurisdiction and the applicable law before it. The *SGS v. Pakistan* ICSID tribunal's refusal to accept jurisdiction over contractual claims and the narrow reading it gave to the relevant ''umbrella clause'' (requiring the host State to ''constantly guarantee the observance of the commitments it has entered into with respect to the investments'') is thus illustrative of such an approach,[55] which is radically different from the approach taken by the *SGS v. Philippines* tribunal to comparable BIT provisions (a difference in outcome that cannot be attributed to the minor differences in the wording of the respective instruments).[56]

CONCLUSION

Back to *Lauder/CME*

In light of the foregoing discussion, it seems as if the decisions of the London and Stockholm *Lauder/CME* tribunals to adopt a narrow test for identifying similarity of parties and issues did not violate existing international law norms. This is because international law on this point is unsettled. The decisions do represent, however, a controversial policy choice, preferring adherence to formal identity over similarity in substance: they highlighted formal differences between parties and instruments, yet underprotected the respondent's interest in not being subjected to piecemeal (or disintegrated) litigation relating to the same transaction.

Two factors render this decision particularly problematic, in my view: First, the structure of modern international investment and commercial transaction often entails a myriad of entities linked to one another through shareholding, right-assignment agreements, voting rights, etc. (the *Lau-*

[55] Societe Generale de Sureveillance S.A..(SGS) v. Pakistan, 42 I.L.M. 1290 (2003).

[56] Other ICSID tribunals have also adopted *SGS v. Pakistan's* disintegrative approach. *See, e.g.,* El Paso, *supra* note 40; Pan American Energy LLC v. Argentina, Decision on preliminary objections (July 27, 2006), *available at* http://ita.law.uvic.ca/documents/PanAmericanBPJurisdiction-eng.pdf.

der/CME case itself involves all of these links). Strict adherence to formal identity of parties in the context of such disputes renders jurisdiction-regulating rules largely obsolete; consequently, the balance of procedural rights and obligations might shift to the detriment of some of the parties to economic transactions (typically, in investment cases, the State, who is more likely to be subject to a multiplicity of legal regimes).

Second, the ''center of gravity'' of *ad hoc* arbitral tribunals, such as ICSID or UNCITRAL tribunals, appears to hold in the field of dispute settlement; at the same time, permanent courts and tribunals operating within the framework of institutionalized legal regimes, designed to promote particular policy goals, seem to play a more pronounced norm-applying function. Indeed, courts and tribunals, such as the ECJ or WTO panels, serve not only as dispute settlers, but, perhaps, primarily as norm appliers, advancing through their work the purposes of the treaty regime in which they function. Since the UNCITRAL arbitrators involved in the *Lauder/CME* cases operate outside such specific regimes, their reluctance to serve as more effective problem-solvers may be open to criticism.

The Need to Exercise Judicial Comity

So, in the end, what should the *Lauder/CME* tribunals have done? Given the indeterminacy of the law governing the required conditions of similarity between competing cases that would trigger the application of jurisdiction-regulating rules, their conclusion appears feasible (though, probably, somewhat timid). Similarly, the tribunals' reluctance to apply the ''abuse of right'' principle can be defended in light of the Czech Republic's objection to consolidation of the proceedings (a solution that would remove many of the objections to the conduct of parallel proceedings)—which may appear, in hindsight, to have been a miscalculation.[57]

Still, a more promising road could have been taken perhaps—resort to judicial comity. According to the principle of judicial comity, courts and tribunals should defer, where appropriate, to other courts and treat the procedures and decisions of their counterparts with courtesy and respect. The principle is accepted in the practice of many national courts and applied *vis-à-vis* both foreign courts and international courts,[58] and it is

[57] Nonetheless, the position on this matter that was adopted by the tribunals—that parties who insist on their right to bring proceedings under the treaty cannot be deemed to have engaged in an abuse of right (Lauder, *supra* note 29, at ¶ 174; CME, *supra* note 30, at ¶ 412)—smacks of illogical circularity: the ''abuse of right'' principle is only applicable when a right *is* available.

[58] *See, e.g.,* Hilton, *supra* note 4, at 163-64; Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815); Dallal, [1986] 1 Q.B. at 461-62; Anne-Marie Slaughter, ''A Global Community of Courts,''44 *Harv. Int'l L.J.* 191, 206-10 (2003).

increasingly applied by international courts to regulate jurisdictional relations between their own jurisdictions and those of other courts—national and international.[59] Significantly, judicial comity can be extended *vis-à-vis* related proceedings, even if they fail to meet the strict conditions of similarity introduced by the traditional jurisdiction regulating rules.

Specifically, the principle of judicial comity encourages courts and tribunals to consider staying their proceedings in the face of an alternative set of proceedings relating to the same issues and to consider following the conclusions of law and fact reached by that alternative jurisdiction. In other words, the principle may be applied in circumstances roughly comparable to those in which the *forum non conveniens, lis alibi pendens,* and *res judicata* rules are applied—the crucial difference being, however, that application of comity cannot normally justify total abdication of jurisdiction by the comity-affording court (such an act may, in fact, exceed that court's scope of authority).[60]

The *SGS v. Philippines* award illustrates the method of operation of judicial comity—after finding that contractual claims were inadmissible before the tribunal by virtue of the contractual choice of forum clause—the tribunal decided to stay proceedings on the admissible BIT claims until the decision of domestic courts on the related contract claims would be rendered:

> [F]or the Tribunal to decide on the [BIT] claim in isolation from a decision by the chosen forum under the CISS agreement is *inappropriate and premature.*[61]

For a comprehensive survey of domestic cases that discussed the status and application of the principle of *comitas gentium,* see Lambertus Erades, *Interactions Between International and Municipal Law: A Comparative Case Law Study* 17-40 (Malgosia Fitzmaurice & Cees Flinterman eds., 1993).

[59] *See, e.g.*, SPP, *supra* note 18, at 129; SGS v. Philippines, *supra* note 17, at ¶¶ 162, 175; Brussels Judgments Convention, *supra* note 36, art. 28; Allan Rosas, ''With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts,'' 5 *The Global Community: Yearbook of International Law and Jurisprudence* 203, 230 (2005); Robert B. Ahdieh, ''Between Dialogue and Decree: International Review of National Courts,'' 79 *N.Y.U. L. Rev.* 2029, 2051-52 (2004). *But see* Ahlström Osakeytiön v. Commission, [1988] E.C.R 5193, 5244 (comity cannot deprive the EC of jurisdiction to apply its competition rules).

[60] *See, e.g., Mexico—Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/AB/R, at ¶¶ 44-57 (2006) (AB Report); SPP, *supra* note 18, at 128 (claimant is ''entitled'' to pursue the case if consent to jurisdiction is established); Vivendi II, *supra* note 49, at 1152 (failure on the part of an arbitral tribunal to exercise jurisdiction is ground for annulment); SGS v. Pakistan, *supra* note 55, at 1323 (''This Tribunal is *bound* to exercise its jurisdiction'' (emphasis added)).

[61] SGS v. Philippines, *supra* note 17, at ¶ 162.

As a result, the tribunal held that:

> [J]ustice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable, either by agreement by the parties or by the Philippine courts in accordance with Article 12 of the CISS Agreement.[62]

Application of the same line of reasoning in *Lauder/CME* should have encouraged one of the two tribunals—probably the later-in-time tribunal—to stay proceedings until the conclusion of the first-in-time proceedings and to consider in its final awards whether to follow the decision rendered thereby. While this ''soft harmonizing tool'' would not necessarily have led to compatible decisions, it would have reduced the logistical burden on the parties that is associated with the concurrent litigation of two arbitration proceedings from start to finish and might have somewhat improved the chances of substantive compatibility of the two awards. So, while judicial comity is hardly a magic solution to all of the difficulties associated with overlapping jurisdictions, it may provide international arbitrators with a way to break the legal deadlock that the current uncertainty surrounding the ascertaining of ''sameness'' of parties and issues entails.

[62] *Id.* at ¶ 175.

Extended Jurisdiction Under Arbitration Agreements—A Threat to Effective Dispute Resolution

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INTRODUCTION

Proper jurisdiction for the arbitrators is the foundation for every arbitral tribunal and for every arbitration award. Without proper jurisdiction, the arbitration may be a waste of time instead of an effective dispute resolution. An arbitration award derived from arbitral proceedings where the jurisdiction is lacking or flawed is subject to challenge, either separately or in connection with efforts for enforcement by the winning party. Challenge proceedings take additional time, adding to the waste of time for the proceedings that led to the potentially ineffective arbitration award, and incur cost for all involved. The disputing parties are disappointed and the arbitration institute, the arbitrators, the venue, and counsel end up—at least to an extent—tainted by the failure to produce a solid arbitration award.

SEPARABILITY/KOMPETENZ-KOMPETENZ

We all know the ''doctrine of separability.'' It has been well developed and established for decades and is basically not in question. The short definition, of course, is that the validity of an arbitration agreement is not dependent on the validity of the material agreement in which it occurs. The arbitration agreement is a separate agreement and, as such, can be enforced separately from the underlying contract.[1]

[1] *See, e.g.,* Sigvard Jarvin, ''Objections to Jurisdiction,'' *in The Leading Arbitrators Guide to International Arbitration* 85 et seq. (Lawrence W. Newman & Richard D. Hill eds., 2004).

And the principle of ''Kompetenz-Kompetenz'' is the next logical step flowing from the doctrine of separability, under which the arbitrators have jurisdiction under the arbitration agreement to decide if they have jurisdiction over the matter in dispute under the contract.[2] Without ''Kompetenz-Kompetenz'' there would be obvious problems even getting started.

This is all well and good and essentially uncontroversial. But the application of the principles in real life is not without complications.

Separate, as in the arbitration agreement being separate from the underlying contract, does not mean that there is no link between the two agreements, the underlying contract, and the arbitration agreement. Obviously there is. In the arbitration agreement, the parties have agreed to resolve by arbitration disputes arising under or out of a particular contract, nothing more nothing less. The parties have not agreed to arbitrate every conceivable dispute whether related to the subject matter of the contract or not. The powers granted to the arbitrators under the principle of ''Kompetenz-Kompetenz'' is thus not without boundaries.

NARROW OR BROAD LANGUAGE ARBITRATION CLAUSE

The basis for ''Kompetenz-Kompetenz'' is the arbitration agreement and its wording, just as any other agreement. In case the agreement is unclear or if the content is disputed, it needs interpretation and its meaning has to be established by a just decision.

In many contracts, there are still hand-crafted arbitration clauses, and the variations are endless. There are quite narrow clauses with language explicitly defining the type of dispute or providing other exact parameters for the application of the arbitration clause, or broader language clauses aiming wider.

An example of a narrow language arbitration clause is the following:

> Disputes concerning the proper performance of the process equipment to be supplied under this contract shall be decided by arbitration according to Swedish law.

As an arbitration lawyer, you will take some comfort from the fact that contracts lawyers in the last decade have become more aware of the importance of carefully drafting arbitration clauses. The arbitration agreement is no longer, or at least not as often, a clause thrown in at the eleventh

[2] *Id.*

hour in the negotiations, a bargaining chip as many other clauses, without the advice of an experienced disputes lawyer. Instead, more frequently, this is a clause given considerable attention in conjunction with an analysis of the governing law clause of the contract and its impact, and the choice of venue for the arbitration and its impact.

The institutional model clauses have grown in use and frequency, and even without reliable statistics, there are indicators that the so-called pathological clauses, being so ill drafted that they cannot be properly interpreted and thus cannot be legally enforced, are less common than they used to be.

The more frequent model clauses use a broad language approach, apparently designed to cause as little friction and ambiguity as possible, to obviate technical objections, but also, realistically, to enable institutions to embrace as many disputes as possible for the arbitration business they seek and from which they earn good profits.

The model clause of the Arbitration Institute of the Stockholm Chamber of Commerce reads as follows:

> Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

The wide-reaching coverage and applicability of this broad language clause is apparent. It is hard to construct, even in theory, a dispute that would not be covered, and courts in different jurisdictions have confirmed that a broad language arbitration clause is indeed applicable to most if not all of the plausible disputes under the contract.

U.S. courts have held that the wording ''in connection'' with ''reaches every dispute between the parties having a significant relationship and to the contract and all disputes having their origin or genesis in the contract'' and that the plaintiff's factual allegations ''need only touch matters covered by the contract.''[3]

The same or a similar test would be applied also by Swedish courts, and the outcome would be basically the same, even if the reasoning might be somewhat differently worded.

[3] Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 720-25 (9th Cir. 1999).

SEPARATE BUT RELATED

The challenge is not to define the meaning of separability and/or Kompetenz-Kompetenz, but to assess and properly decide if a dispute or a claim in a dispute is *related* to the contract in which the arbitration clause is contained. And here it can get a bit tricky. What does ''in connection,'' ''significant relationship,'' and ''matters covered by the contract'' mean and require in terms of facts and circumstances?

Whether or not a dispute is related is normally based on the doctrine of assertion. In other words, if the claimant asserts that there is a relationship, this is recognized and decisive *prima facie*. If the respondent does not object, there is no problem, and the arbitration will proceed. Many institutions allow the parties to object at an early stage or they will lose their right to rely on the underlying facts later, including for purposes of challenge.[4] But if the respondent objects, claiming there is no relationship between the dispute and/or a claim and the contract, or that there is no significant relationship and that the claims brought concern a different matter from those covered by the contract, the jurisdiction of the arbitrators is in question and the matter needs to be decided.

In some situations the facts are clear cut and the relation is more or less apparent. But in other cases, the facts are more obscure. Some claims may well be related to the contract, whereas others potentially or clearly are not. In this situation, the arbitrators are well advised to be careful. The problem is that determining whether or not a matter or a claim is related to the contract, if the circumstances are complex, will require a more or less thorough review of the facts and the evidence.

The situation is not made easier by the fact that there is some confusion as to who has the burden to prove the relevant relationship. Some courts have held that, based on the presumption of arbitrability, the party opposing arbitration has the burden of demonstrating that the claims at issue are not arbitrable.[5] (''The burden is on the party resisting arbitration to demonstrate that the disputed issue is collateral.'')

More recently, however, a U.S. federal district court in Virginia has taken the position that the party seeking to compel arbitration bears the burden of proof, notwithstanding the presumption of arbitrability and the ''positive assurance'' standard.[6] (''The party requesting the stay and

[4] Rules of the Arbitration Institute of the Stockholm Chamber of Commerce art. 31.

[5] *See* Prudential Lines, Inc. v. Exxon Corp., 704 F.2d 59, 64 (2d Cir. 1983).

[6] Airlines Reporting Corp. v. McBride Tours & Travel, Inc., 2006 U.S. Dist. LEXIS 70470, at *6 (E.D. Va. July 24, 2006); Hendrick v. Brown & Root, Inc., 50 F. Supp. 2d 527, 538 (E.D. Va. 1999).

compulsory arbitration carries the burden of proving that the claim is 'referable to arbitration under the contract.' '')

The district court's reasoning in these cases is in line with the principle that an arbitration provision should be interpreted in accordance with common law contract doctrines, and, therefore, the presumption of arbitrability cannot be the sole basis for a determination of whether the parties agreed to arbitrate a particular claim.[7] (''When deciding whether the parties agreed to arbitrate a certain matter . . ., courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.'') The purpose of the Federal Arbitration Act (FAA)[8] ''was to make arbitration agreements as enforceable as other contracts, but not more so.''[9]

In Sweden, the party asserting an arbitration agreement would normally have the burden of proof to establish, when disputed, that an arbitration agreement extending to the dispute in question has been reached. In practice, however, the threshold is low.

When reviewing the principle of ''Kompetenz-Kompetenz'' and its application, it is important to bear in mind that the decision by the arbitrators to assume jurisdiction is provisional and in most developed jurisdictions subject to review by the competent courts, either separately or in conjunction with a challenge of the award on the basis of lack of jurisdiction.[10]

PRACTICAL PROBLEMS

Case Study 1

Two shareholders controlled a joint venture company. The cooperation went well for a number of years, but then there developed growing animosity and dissent. Five years or so into the relationship, communications broke down and large-scale legal warfare ensued.

The contractual relationship between the shareholders was a bit complex. Before they entered into a shareholders agreement a few years into the relationship, they had agreed on a matter-by- matter basis by various interim contracts for designated purposes. Once the shareholders agreement was concluded, the habit of entering designated contracts for various

[7] *Cf.* First Options v. Kaplan, 514 U.S. 938, 944 (1995).
[8] 9 U.S.C. §§ 1-14, 43 Stat. 883 (Feb. 12, 1925).
[9] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).
[10] 2 § Swedish Arbitration Act (1999:116).

matters continued. Different dispute resolution clauses were used in different contracts, and there was no common denominator.

The shareholders agreement was of standard type, dealing with the matters in the average shareholders agreement drafted by a professional. It did not, for instance, incorporate or embrace any of the successive undertakings having been made previously pursuant to prior contracts.

When shareholder A filed its request for arbitration, it indicated that the relief sought would be a broad array of remedies for everything and anything that had, one way or another, been agreed between the shareholders in relation to the joint venture since its inception. This was detailed further in the statement of claim, where more than 20 requests for relief and claims were made, ranging between everything from specific performance to moral damages for alleged disloyalty.

One particular claim was interesting. Prior to the shareholders agreement, the shareholders had debated and negotiated their respective contribution to the joint venture. This matter was finally settled; contracts were drawn up and executed prior to the execution of the shareholders agreement. Notwithstanding, shareholder A wanted to revisit the matter of the past contributions and alleged that it had suffered damages as a result of the delay caused. The shareholders agreement contained no language indicating that any such past events had survived, much less any obligations in relation thereto. Instead the shareholders agreement contained an entire agreement clause making it clear that the shareholders agreement was the entire agreement and contained all rights and obligations of the shareholders as such.

The shareholders agreement contained an arbitration agreement that was the basis for shareholder A's request for arbitration. Shareholder B, respondent, objected to the jurisdiction of the arbitrators and argued that the matter of prior contributions was not a matter under the shareholders agreement, but, rather, it was a matter that had been effectively dealt with and concluded under other agreements, with no arbitration agreement. If indeed there was a basis for this claim, it would not be based on the shareholders agreement but on some other contract for which arbitration was not agreed.

The initial objection from shareholder A was disregarded by the arbitrators, and the case proceeded. When shareholder A developed this claim and the legal basis for it, it became even more clear that this claim was not based on the shareholders agreement but instead on several other contracts of earlier dates with no arbitration agreement in any of them. Still, shareholder A, by clever drafting and persistence, managed to create an impression with the arbitrators that the alleged non-performance by shareholder B in some mysterious way was still related to the shareholders agreement, and hence the case proceeded to final hearing and award.

The award came down and the claim was rejected, not dismissed for lack of jurisdiction, but rejected on the merits. Shareholder B had no reason to object to this outcome, since the matter was finally decided. But what if the claim had been granted? This would no doubt have caused extended and costly challenge proceedings with the very likely result of an annulment of the award.

And what if the arbitrators, upon close review of the facts and the alleged relation between this claim and the shareholders agreement had come to the conclusion, as they rightly should have in my opinion, that the claim was unrelated to the shareholders agreement and hence they lacked jurisdiction? After two years of preparation and quite substantial costs in relation to this very claim, they would have dismissed the claim for lack of jurisdiction. Shareholder A would have fought in vain, having had to wait until the award came down to learn that this claim would have to be brought elsewhere, and shareholder B would also have spent substantial efforts fighting a claim it should not have had to fight, at least not in this arbitration.

Conclusion. Shareholder A wanted to inflate its case as much as possible to create a deterrent and an uphill battle for shareholder B by the number of claims and amounts involved. In doing so, it scraped the barrel for anything contentious during the prior ten years and succeeded in creating a sufficient purported relationship rather than a real relationship between all these bits and pieces and the shareholders agreement. The arbitrators were either misled or misguided.

Case Study 2

Companies A and B entered into a cooperation agreement for the joint development and manufacturing and sale by A and purchase by B of a particular technical device. The development was unsuccessful and B, who desperately needed the functionality envisaged by the device, began its own development from scratch. Almost ten years passed and A filed a request for arbitration claiming damages for non-performance, that is, no purchases by B, but also transfer of title to all the patents and patent applications registered and/or produced by B in the meantime. The alleged legal basis for the claim for transfer of title remains unclear.

B objected and argued that the cooperation did not extend to any of the patents in question and, hence, that matters pertaining to their ownership was not a subject matter of the contract. Since the development of the patents was also not related to the cooperation agreement containing the arbitration clause, B further argued that the matter of title to the patents was not within the jurisdiction of the arbitrators.

The case is still pending, and no decisions have been made on the matter of jurisdiction. The central question is what the arbitrators should do.

Conclusion. In my view this is, again, a case in which the claimant for tactical reasons has tried to develop a claim that is as ominous looking as possible but, for large parts of it, without the necessary factual and legal foundation. If the arbitrators decide to handle the case as the arbitrators did in case 1 above, the entire claim will go to final hearing and award and will either be accepted or dismissed. But is this the proper approach? I would argue not.

In a situation where the objections are not apparently without merit, I believe the arbitrators are under an obligation to carefully investigate the matter of jurisdiction, even if this entails a thorough review of the relevant facts. Only by looking closely at the facts can the arbitrators determine whether the allegation on which the claim is based, that is, the relationship between the alleged misappropriated information under the contract and the basis for the patents and the patent applications *prima facie* unrelated to the contract, is correct. If there is no relationship, the claim is flawed and the arbitrators lack jurisdiction.

Case Study 3

In this case, A and B owned a joint venture. A alleged that B had damaged the joint venture by certain acts and omissions and sought damages from B, the major part to be paid to the joint venture as reparation. The claims were substantial, approximately U.S.$100 million.

B objected and asked the arbitrators to dismiss the claim to be paid to the joint venture since, *inter alia,* the joint venture was not a party to the arbitration. The arbitrators disregarded the objection and went ahead to final hearing and award. In the award, the arbitrators dismissed the claims for damages sought by A payable to the joint venture, since the joint venture was not party to the arbitration.

Conclusion. The arbitrators spent two years of valuable time to come to the conclusion that they lacked jurisdiction, a decision they should have reached much sooner in an interim award or decision.

Case Study 4

A repeatedly sent notices to B of a significant monetary claim but never made the threats of legal action real. After two years, B grew tired and filed for a negative declaration that it did not owe A any money, a remedy available in Swedish courts.

Shortly thereafter A filed a request for arbitration with a foreign arbitration institution, with reference to a contract under which the parties had cooperated many years back, and claimed payment of the amount B had sought protection from. The arbitration agreement in that contract was strange and ambiguous. One thing was clear, however. It did not provide for arbitration as the exclusive remedy for dispute resolution. In other words, the parties were free to seek justice in the courts. The problem was that the contract was governed by foreign law, a fact that put the Swedish court at a disadvantage.

B argued *lis pendens* in the arbitration and asked that the arbitration proceedings be suspended. The sole arbitrator, set on showing determination in this, his first international arbitration as sole arbitrator, decided to proceed with the arbitration despite the ongoing trial in Sweden. B also argued that since the arbitration agreement did not provide for arbitration as the exclusive means of dispute resolution, the arbitrator lacked jurisdiction since litigation proceedings were already under way in another forum. The arbitrator took no notice of this objection either and advised that he would deal with his jurisdiction in the award.

Meanwhile, the Swedish court decided to suspend the court case awaiting the arbitrator's ruling. The case went to final hearing, and A received an award. By some strange logic, the arbitrator found jurisdiction for himself, despite *lis pendens* and despite the non-exclusive arbitration agreement. B was advised by local counsel that the chances of success in challenge proceedings were remote, and B was forced to settle. The court case in Sweden was subsequently withdrawn.

Conclusion. By the combination of an overzealous arbitrator and an overanxious judge, the matter of jurisdiction was never properly addressed. B, in consequence, was in reality deprived of its right to seek protection in court.

This case study list could go on.

IS THERE A REMEDY AND WHO STANDS TO GAIN?

Arbitrators have agreed, under a contract of sorts with the parties, to deal effectively with the dispute. Their activities are governed by institutional rules and the law of the venue. A great deal of trust is placed in them, and the arbitrators are normally handsomely paid for their efforts. Many lawyers devote their careers to appointments as arbitrator and depend on them for their livelihood.

The same could be said for the institutions. They are also under a contract of sorts with the parties to make sure that orderly justice is dispensed under their auspices. They compete with other institutions, they

charge fees, and they run a professional business aimed at making profit depending on cases coming their way.

The powers granted to arbitrators under the principle of Kompetenz-Kompetenz must be carefully used and not abused. Disregarding a well-founded objection for two years and allowing the case to go to trial, only to determine that jurisdiction is lacking, is abuse in my view. If the arbitrators had taken the matter of jurisdiction more seriously in Case 2 above, they would have investigated the matter and reached a conclusion in a few months time rather than the two years or more they actually required. By this inactivity, the arbitrators wasted valuable time and incurred substantial costs for the parties.

This is a clear-cut example. Many other examples are not as clear cut and hence not as easy to comment upon. Parties and counsel also have responsibilities. Oversmart lawyering, delaying tactics, preemptive claims, inflating claims, and flooding the proceedings to obscure the pertinent issues are quite common since they are believed to be part of the game.

I believe there is a trend in the world of arbitration that the arbitration industry and legislators are well advised to examine and respond to. If legislators, institutions, arbitrators, and counsel would act in concert for the end goal of swift and resolute dispute resolution rather than not at all or for the promotion of a separate interest, arbitration would gain in efficiency and in reputation. From this, all involved would stand to gain.

BUSINESS REASONS AND TACTICS OFTEN DICTATE LEGAL DECISIONS; ALSO THE PARTIES ARE TO BLAME

Arbitration is no longer the instrument it was initially intended to be, that is, swift and informal dispute resolution under a contract aimed at resolving disputes effectively and efficiently so that the commercial relationship could remain intact and proceed. Swift resolution is less often the common goal of both parties.

Nowadays, instead, arbitration is quite often not aimed at only resolving a single pertinent matter under a contract, but sometimes a method of legal warfare trying to remedy every single actual or imagined wrongdoing. Hence, in many large international arbitration cases, there are broad frontal attacks from both sides, using every weapon imaginable for preemption, for deterrence, for success at any cost, or at least for reaching a more favorable settlement than would otherwise have been the case. These, at least, seem to be the tactics.

WHAT IS THE REMEDY?

Complexity and Mass Obscures the Right Focus

In the long run, it is in no one's interest to see the arbitration cases getting bigger and bigger and more and more complex. In the end, the cases will be so complex and consuming that it is more or less impossible to embrace them and to find the core. There are already arbitration cases out there having lasted for seven to ten years. This is an abomination and a sign that something is wrong. This is also a threat to the administration of justice and hence to the reputation of arbitration as a mode for effective dispute resolution.

Parties and counsel will have to show some self-restraint, and the arbitrators need to make sure that every trick in the book is used to avoid having cases literally explode in mass and complexity. The International Chamber of Commerce (ICC) has taken a welcome initiative in this regard.[11] The report contains various proposals to be implemented by arbitrators at various stages of the proceedings to enhance efficiency and avoid delays. It now remains to be seen if the proposals will be adopted, if other institutions will follow, and the result, if any.

Taking a harder and closer look at relevance at the beginning of the arbitration and having the parties agree at the outset to a limited number of submissions, or a clear and narrow definition of the matters in dispute, may reduce the number of cases with no visible end. This includes relevance of facts, arguments, and evidence when relation for the purpose of deciding on jurisdiction is not an issue.

No party would admit, at the outset, that it wants an arbitration for a decade and that it intends to make life a hell for all concerned by every means possible. Instead, both parties will likely have difficulty in resisting measures proposed or put in place to ensure that the case can be effectively moved to an award without undue delay. This would include trying to carve out or do away with claims where jurisdiction is a real or potential problem.

Consensual Dispute Resolution Is Not Always the Best Option

Arbitrators generally lack some of the tools that courts or judges have for keeping the parties in line, for setting firm dates not to be extended, for refusing new claims, dismissing evidence, etc. If the parties and the

[11] ICC Commission on Arbitration Task Force, *Techniques for Controlling Time and Cost in Arbitration* (2007).

arbitrators were to recognize that certain cases are not suitable for arbitration and look at the alternatives, I believe this would be refreshing and effective and could result in procedural agreements and arrangements that would prevent some cases from derailing.

ARE THE FEE SCHEDULES THE RIGHT INCENTIVE?

There is something fundamentally wrong with the fee schedules adopted by several of the more renowned institutions. The larger the amount in dispute, the larger the fees to the arbitrators. Straightforward and uncomplicated declaratory awards can get excessively expensive because the underlying interest is worth billions. Complex issues worth significantly less in monetary terms, but still potentially crucial to the litigants, risk being summarily dealt with because of what is viewed as limited fees. Where is the logic in this?

In my view, this system creates a difficult conflict of interest for the arbitrators when a large chunk of the claim on which the fees are based has a dubious or potentially weak relationship to the contract forming the basis for their jurisdiction. By reviewing, upon objection, the matter of jurisdiction and seeing that jurisdiction is lacking for U.S.$ 90 million out of the U.S.$ 100 million in dispute, and by dismissing that part of the claim *ab initio,* the fees to the arbitrators will likely shrink substantially.

I believe the arbitrators should have their fees based on the work expended, based on an hourly rate, rather than on the fictitious premise that a U.S.$ 100-million claim is more difficult and/or will require more work than a U.S.$25-million claim.

INSTITUTIONS, HOSTING STATES, AND ARBITRATORS HAVE TO EARN A REPUTATION

Pro-active arbitrators, acting under rules or governing laws promoting or at least allowing active measures to secure a reasonably swift proceeding, would earn the appreciation of the majority of litigants from which all concerned would likely benefit, at least long term.

It is in the interest of the arbitrators to decide the scope of the arbitration early on, so as to make the dispute resolution efficient in the eyes of the parties. The arbitrators who manage this well will add to their chances of handing down an award acceptable to all, will earn respect, and will get repeat business. The arbitrators who are unable to run a tight ship will not. To a party, having paid substantial amounts in fees for arbitration, believed to be swifter than courts, almost nothing could be worse than finding out

that time and good money has been wasted because matters were dealt with inefficiently and/or in backward sequence.

For the survival of arbitration as the preferred mode of dispute resolution for commercial disputes, I believe the institutions should require the arbitrators to address any objection to jurisdiction immediately and should prohibit the case from going forward until jurisdiction decisions are made.

EFFECTIVE COURT INTERVENTION IS REQUIRED

On the other side of the fence, we have the courts. We all know that courts are universally flooded with work, that judges have large discretion as to what cases they handle swiftly and diligently and what cases they do not put their hearts and minds into.

However, to put requisite pressure on the institutions and arbitrators to perform, well-functioning and fast court decisions are key. As matters now stand, the arbitration is over for a year or more and forgotten by the time a court has rendered a final decision. Then the damage is already done.

In the perfect world, the court will assume jurisdiction when the arbitrators decide they lack jurisdiction. Eventually, and in the end, this is also often the case. The problem is the timing. U.S. courts are known to be quite pro-arbitration, and not much is required in terms of creative drafting to cause the average judge to decline jurisdiction on the basis of the existence of an arbitration clause. The same is the case in Sweden and in large parts of continental Europe.

The arbitrators' decision on jurisdiction is preliminary and subject to court review, either while the arbitration is pending or through challenge proceedings. However, the way in which the pro-arbitration attitude has developed, the odds are against finding a judge who will effectively deal with a request to find against jurisdiction for the arbitrators. Judges are likely to take the expedient position that this is first and foremost a matter for the arbitrators.

The combination of this approach and the relaxed attitude of some arbitrators to objections to jurisdiction, deferring the decision on jurisdiction to the final award and in some cases taking jurisdiction when no jurisdiction can be found, rejecting the claim instead of dismissing it on the likely calculation that the respondent who made the objection to jurisdiction at the outset will not be inclined to challenge an award if he ends up winning on the merits instead of having to fight the battle in a court, is adding to the detriment for parties who do not want to be dragged into arbitration without proper foundation.

In my view there is also need for legislative changes requiring courts to provide expedited support to arbitrations on matters of jurisdiction. The reason for such extended support is three-fold.

First, it is in the interest of every State to have complex commercial disputes resolved by arbitration, since this eases the burden for the court system significantly and saves taxpayers' money. Let the commercial parties pay for their own disputes.

Second, by a fast and prudent initial review of objections to jurisdiction, the arbitration could proceed on safer ground. The risk of a challenge, to hit the court as a potentially larger and more complex matter later on, is reduced. This also seems cost effective for the State administration.

Third, in recognizing arbitration as an acceptable mode for dispute resolution and allowing awards to be enforced through the assistance of government agencies, the State has an obligation to make sure that proper protection is in place against any kind of abuse or misuse. From the perspective of a State, miscarriage of justice in arbitration is as grave as miscarriage of justice in any of its courts.

SUMMARY

Broad language arbitration agreements cause difficulties in drawing the line between what is arbitrable and what is not under a particular contract. Litigants are known to take the chance of including too much in their cases and claims, to gain mass or some other supposed benefit. Arbitrators are not always motivated at the outset to take a hard look at what is related to the contract in dispute and what is not. The current fee system can be suspected of working as a disincentive to dismissing large monetary claims for lack of jurisdiction. At the same time the court systems and judges are too relaxed and too slow in responding to the needs of parties in a presumably much more expedited arbitration.

Part III

Remedies and Defenses

When Should International Arbitrators Award Punitive Damages?

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INTRODUCTION

When should international arbitrators award punitive damages? This question presupposes that international arbitrators generally have the power to award such damages. However, the existence of this power is uncertain. What is the source of the power to award punitive damages? Is it inherent in the power of an international arbitrator, or is the power dependent on the law or rules applicable? Or is there something inherently objectionable to the arbitral tribunal awarding punitive damages in an international dispute? It should be noted that although punitive damages have been awarded by arbitral tribunals, in particular in the United States, the issue of punitive damages in international arbitration is controversial.[1]

In litigation, although the concept of punitive damages in private actions is well established in common law countries, it is not universally accepted and disapproved in many countries. The concept is virtually unknown in civil law countries.

In international arbitration, the issue of punitive damages raises many legal and public policy questions. This paper focuses primarily on two fundamental but general questions. First, do international arbitrators have the power to award punitive damages? Second, if they do, are there situations in which arbitrators should refrain from exercising this power?

The aim of the present article is to answer these questions and, in particular, to determine when international arbitrators should award

[1] On the subject of punitive damages in international arbitration, see, e.g., John Y. Gotanda, ''Damages in Private International Law,'' 326 *Recueil des Cours* 73-407 (2007); E. Allan Farnsworth, ''Punitive Damages in Arbitration,'' 7(1) *Arb. Int'l* 3 (1991); M. Scott Donahey, ''Punitive Damages in International Commercial Arbitration'' 10(3) *J. Int'l Arb.* 67 (1993).

punitive damages. Before answering these questions, however, the notion and purpose of punitive damages must be clarified.

WHAT ARE PUNITIVE DAMAGES, AND WHAT IS THEIR PURPOSE?

Punitive damages, which are called ''exemplary damages'' in England, can generally be defined as ''damages awarded . . . as a deterrent or punishment to redress an egregious wrong perpetrated by the defendant''[2] or ''damages which are awarded to punish the defendant and vindicate the strength of the law.''[3]

Punitive damages are awarded in addition to compensatory damages. Thus, their aim is not to compensate the plaintiff for the loss suffered as a result of the actions of the other party, but rather to punish the defendant and to deter him and others from engaging in the same conduct in the future. Besides these two principal purposes, punitive damages also seek to show the court's disapproval of the wrongful act,[4] discourage self-help remedies, express the indignation of the victim, and compensate the latter from otherwise uncompensable losses.[5]

In civil law countries, punitive damages in private actions are generally not available. In these countries, damages in private actions are limited to fully compensate the parties, that is, restoring them to the position they would have been in had the wrongful act not occurred. In some civil law countries, such as Germany[6] and Switzerland,[7] punitive damages are considered to be contrary to public policy.

In common law countries, even if the concept of punitive damages is well known, the practice regarding these damages may vary considerably from one jurisdiction to the other, for example, with respect to the purposes of punitive damages, the actions in which punitive damages are available, or the determination of the amount of punitive damages.[8]

[2] Definition found on the Web at http://www.answers.com.

[3] Rookes v. Barnard, [1964] A.C. 1129, 1221, [1964] 1 All E.R. 367, 407, HL, per Lord Devlin; Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027, 1077, [1972] 1 All E.R. 801, 829, HL, per Lord Hailsham LC.

[4] Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763).

[5] Gotanda, *supra* note 1.

[6] BGH, IX ZR 149/91, NJW 92, 3096.

[7] DTF 122 III 463, 467; DTF 116 II 376, 378; Andreas Bucher & Andrea Bonomi, *Droit international privé* ¶ 1101 (2d ed. 2004).

[8] On punitive damages in comparative law, see in particular Gotanda, *supra* note 1.

In general, in common law countries, punitive damages may be awarded in a variety of tort actions where the conduct of the defendant was exceptionally objectionable. They are generally not available in breach of contract cases, except in the United States and Canada.

It is in the United States that punitive damages are most widely used. The United States also has the largest punitive damages awards, with awards exceeding U.S.$ 100 million.[9] Punitive damages are governed by both federal and state law. To date, if the law of most states allows punitive damages, there may be important differences among the state laws on punitive damages. In England, the use of punitive damages is more restricted than in other common law countries.[10] Unlike American and Canadian law, English law does not allow punitive damages in breach of contract cases. Punitive damages may only be awarded in three categories of cases, namely in those involving (1) oppressive, arbitrary, or unconstitutional actions by government servants in exercise of their government power, (2) conduct calculated to result in profit that may well exceed the compensation available, and (3) cases expressly authorized by statute.[11]

PUNITIVE DAMAGES IN INTERNATIONAL ARBITRATION

International arbitral tribunals may award a wide variety of remedies, including monetary compensation, specific performance of a contract, restitution, rectification, injunctions, declaratory relief, adaptation of

[9] *See* R.L. Blatt et al., *Punitive Damages: A State-by-State Guide to Law and Practice* 12 (2003): in 2001, there were 16 awards of punitive damages in excess of U.S.$100 million. See, in particular, In re *Exxon Valdez* case (U.S. Supreme Court Docket No 07-219) where U.S.$5 billion were awarded in punitive damages (the award was later vacated by the Court of Appeal for the Ninth Circuit for being excessive (490 F.3d 1066 (9th Cir. 2007)). However in *Williams v Philip Morris Inc.* (127 S. Ct. 1057 (2007)), the U.S. Supreme Court was asked to rule that a U.S.$79 million punitive damages award was excessive and violated the U.S. Constitution (U.S.$500,000 was awarded as economic damages). *Compare*, in April 2006, the Ontario Court of Appeals vacated a punitive damages award of CAN$2.5 million in *Pereira v. Hamilton Township Farmers' Mutual Fire Company*, Docket C49457 (Apr. 19, 2006), 2006 Can. Legal Info. Inst. 12284 (On. C.A.). In New Zealand, the country with the smallest punitive damages awards, the average punitive damages award amounts to NZ$31,000, which corresponds to U.S.$18,000.

[10] On punitive damages in England, see, in particular, Harvey McGregor, *McGregor on Damages* 365 et seq., ¶ 11-001 et seq. (7th ed. 2003).

[11] Rookes v. Barnard, [1964] A.C. 1129, 1226, [1964] 1 All E.R. 367, 410, HL, per Lord Devlin. The categories are also explained in Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027, [1972] 1 All E.R. 801, HL; *see also* Halsbury's Laws of England on exemplary damages, ¶ 1115; McGregor, *supra* note 10, at 373 et seq., ¶ 11-017 et seq.

contracts and gap-filling, interest, and costs.[12] Most often, international arbitral tribunals award monetary compensation, that is, ''money due under a contract (debt) or compensation (damages) for loss suffered, or both.''[13] The awarding of punitive damages by international arbitrators in addition to monetary compensation happens only rarely—there are few known examples. This is presumably because of the uncertainty as to the circumstances in which such damages can be awarded.

CAN ARBITRATORS AWARD PUNITIVE DAMAGES?

It is the prevailing view that every remedy available in litigation should also be available in international arbitration.[14] However, punitive damages are not a generally accepted principle in international arbitration.[15] The fundamental principle on damages reflected in international arbitration law and practice is for full compensation for the losses suffered or incurred. Therefore, arbitral tribunals are reluctant to award punitive damages even in cases where they have been authorised to do so by the parties.

Several arguments can be raised against the availability of punitive damages in international arbitration. First, arbitrators should not award punitive damages since most arbitrations concern breach of contract cases where punitive damages are generally not available. Second, the role of international arbitrators is purely private, owing duties to the parties alone. They should determine the parties' respective rights and obligations and fix the remedy to rectify the situation as far as possible. Third, international arbitrators, acting as a non-national or international jurisdiction, should not have the power to award penal sanctions, as these sanctions are instruments of the State and reflect national public policy. Fourth, as arbitral awards are not published, punitive damages awards can have no deterrent effect. As other parties in similar situations will not know of the award, there is little possibility of arbitrators in another arbitration following the earlier case. Every arbitration is separate and distinct, and subject to its own privity; there

[12] On remedies available in international arbitration, see generally Julian D.M. Lew, Loukas A. Mistrelis & Stefan Kröll, *Comparative International Commercial Arbitration* 649 et seq., ¶ 24-70 et seq. (2003); Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 356 et seq., ¶ 8-09 et seq. (4th ed. 2004).

[13] Redfern & Hunter, *supra* note 12, at 356, ¶ 8-09.

[14] Lew, Mistrelis & Kröll, *supra* note 12, at 649, ¶ 24-70; *see also* Peter Schlosser, ''Right and Remedy in Common Law Arbitration and in German Arbitration Law,'' 4(1) *J. Int'l Arb.* 27 (1987).

[15] Philippe Fouchard, Emmanuel Gaillard & Berthold Goldman, *International Commercial Arbitration* 833, ¶ 1493 (1999).

is no precedent from one arbitration to another. Fifth, parties in an international arbitration invariably come from different legal systems with conflicting views on punitive damages. It is rare that both parties will have anticipated the possibility of punitive damages. Sixth, the limited possibility of reviewing arbitral awards may raise doubts as to the fairness of punitive damages awards. Seventh, the availability of punitive damages in international arbitration may have an undesirable impact on the selection of arbitrators.

Despite the above arguments, there are reasons why, in some cases, international arbitrators should have the power to award punitive damages. First, following the principle of party autonomy, paramount in international arbitration, if the parties have agreed to, or expect the application of, or subjected themselves in the contract to a law that provides for punitive damages, the arbitrators should have the power to award punitive damages. Second, prohibiting punitive damages in international arbitration in cases where they would be available before a national court might result in ''forum shopping'' and parallel proceedings, with ordinary damages being sought in arbitration and punitive damages from an appropriate national court. It might also result in the loss of a substantive right if the separate claim is rejected by the court. Third, granting arbitrators the power to award punitive damages recognizes the value and efficiency of international arbitration and gives the arbitrators the necessary flexibility in fashioning relief.[16] Fourth, international arbitrators are considered competent to apply the law, regardless of whether it be the law they know or some other law, to determine difficult factual and technical questions, and grant the appropriate relief. Why should they not be equally capable of determining and awarding punitive damages when appropriate?

It is suggested that, in practice, international arbitrators should have the power to award punitive damages if this is agreed by the parties, if the applicable law allows it, and if the enforceability of the arbitral award is not put at risk by a punitive damages award. Whether, when, and how they use this power is a separate question.

PARTY AGREEMENT

The arbitrators' power to award punitive damages may flow directly from the arbitration agreement, if the agreement contains an express clause allowing punitive damages. It is extremely rare to find this type of provision

[16] On arguments for and against punitive damages in international arbitration, see Farnsworth, *supra* note 1, at 10. For arguments for and against punitive damages in general, see McGregor, *supra* note 10, at 365 et seq., ¶ 11-001.

but, where this is clearly stated, the parties will clearly have anticipated possible punitive damages in the relevant circumstances.

The arbitration agreement can also contain an indirect authorization to award punitive damages, for example, by making reference to institutional rules that give arbitrators broad powers as regards remedies. In *Mastrobuono v. Shearson Lehman Hutton Inc.*,[17] a contract was concluded between Antonio and Diana Mastrobuono and Shearson Lehman Hutton, Inc. for the opening of a securities trading account. The contract contained an arbitration clause providing for arbitration in accordance with the rules of the National Association of Securities Dealers (NASD), or the Boards of Directors of the New York Stock Exchange, and/or the American Stock Exchange. The arbitration clause did not make an express reference to punitive damages. However, the NASD's Code of Arbitration Procedure provided that arbitrators may award ''damages and other relief.'' The U.S. Supreme Court held that this provision was broad enough to encompass punitive damages and that, therefore, the arbitrators were authorized to award punitive damages.

If the parties can authorize the arbitrators to award punitive damages, they can also prohibit them from doing so, for example, by expressly stating in the arbitration agreement that punitive damages shall be excluded from the issues to be arbitrated. In this case, the arbitrators will not be allowed to award punitive damages even if they would otherwise have that power.[18] To avoid unexpected surprises in some types of contracts, parties should expressly exclude punitive damages as a possible remedy.

In most cases, the arbitration agreement and institutional rules are silent as regards punitive damages. In the absence of an express agreement, the arbitrators may look for an implied agreement of the parties including punitive damages. In ascertaining the parties' intent, the arbitrators may consider whether the parties have chosen an applicable law allowing punitive damages, whether punitive damages are customary in the particular trade, or whether the power to award punitive damages can be based on other provisions in the contract.[19]

APPLICABLE LAW

After concluding that the parties have agreed to allow punitive damages, the arbitrators have to verify whether the agreement is valid under the law

[17] Mastrobuono v. Shearson Lehman Hutton Inc., 115 S. Ct. 1212 (1995), *reprinted in* 21 *Y.B. Comm. Arb.* 181 (1996).

[18] Farnsworth, *supra* note 1, at 13.

[19] Gotanda, *supra* note 1.

governing the arbitration. It is arguable whether arbitrators have the power to award punitive damages simply because the parties' agreement provides for this remedy. The parties' choice is not absolute, but is limited at least to the extent that the law governing the arbitration does not preclude the right to award punitive damages. Since the issue of punitive damages is of substantive nature, the arbitrators must examine the validity of the party agreement not only according to the law of the place of arbitration, but also according to the law applicable to the substance of the dispute. This means that the arbitrators may only award punitive damages if, and to the extent that, neither the law of the place of arbitration nor the law governing the merits of the dispute do not preclude them from doing so.

If the seat of the arbitration is in a civil law country, the arbitrators will generally not be allowed to award punitive damages. This might be the case even if the arbitrators were authorized to award punitive damages by the parties or by the applicable substantive law, as punitive damages are considered to violate public policy in some civil law countries.

In an International Chamber of Commerce (ICC) arbitration with a seat in Geneva, the arbitral tribunal refused to award punitive damages, holding that

> damages that go beyond compensatory damages to constitute a punishment of the wrongdoer (punitive or exemplary damages) are considered contrary to Swiss public policy, which must be respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a dispute according to a law that may allow punitive or exemplary damages as such (see Art. 135 (2) Swiss Private International Law Statute, which refuses to allow enforcement of a judgment awarding damages that cannot be awarded in Switzerland).[20]

Even in common law countries where punitive damages are generally available, the power to award punitive damages can sometimes be reserved to the courts.[21]

Arbitral tribunals with a seat in England seem to have the power to award punitive damages under the same conditions and within the same restrictions as English courts, if the arbitration agreement is sufficiently wide to encompass this relief.[22]

[20] ICC Case No. 5946 (1991), *reprinted in* A.J. van den Berg ed., 16 *Y.B. Comm. Arb.* 97, 113 (1991).

[21] Gotanda, *supra* note 1.

[22] Redfern & Hunter, *supra* note 12, at 422 et seq., ¶ 8-11.

In the United States, there would appear to be three views as to whether arbitrators have the power to award punitive damages.[23] According to the first view, known as the ''*Garrity* rule,'' arbitrators do not have the power to award punitive damages, even if agreed upon by the parties, because punitive damages are a socially exemplary remedy that can only be imposed by a state authority.[24] In *Garrity v. Lyle Stuart, Inc.,* the New York Court of Appeals was asked to confirm an arbitral award granting U.S.$45,000 in compensatory damages and U.S.$7,500 in punitive damages. It decided that the arbitration award should be modified to vacate the award of punitive damages. According to the court

> an arbitrator has no power to award punitive damages. Such an award is violative of public policy, which reserves to the State the imposition of punitive sanctions on wrongdoers, and which is of such magnitude as to call for judicial intrusion to prevent its contravention. And, since the law does not permit private persons to submit themselves to punitive sanctions of the order reserved to the State, the limitations on privately assessed punitive damages cannot be waived.[25]

It would seem that the *Garrity* rule is no longer viable, as it is an expression of the now outdated judicial hostility towards arbitration.

According to the second view, arbitrators have no power to award punitive damages unless the arbitration agreement expressly provides for this power. The rationale is that because punitive damages are an extraordinary remedy, the arbitrators' power to award punitive damages cannot be implied but must result from an express provision in the arbitration agreement.[26]

Finally, according to the third view, arbitrators have the power to award punitive damages, unless the arbitration agreement expressly excludes this power.[27] The 1995 decision of the U.S. Supreme Court in the *Mastrobuono*

[23] *See* Gotanda, *supra* note 1.

[24] *Id.*

[25] Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

[26] *See, e.g.,* Baltimore Regional Joint Bd., Amalgamated Clothing Workers v. Webster Clothes, 596 F.2d 95, 98 (4th Cir. 1979); Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers, Local Union 34 v. General Pipe Covering, W. Insulation Servs., Inc., Thermal Insulation Supply Corp., Donna M. Dingley and Sheldon L. Dingley, 792 F.2d 96, 100 (8th Cir. 1986); Belko v. AVX Corp, 251 Cal. Rptr. 557, 561 et seq. (Cal. App. 1988); College Hall Fashions v. Philadelphia Joint Bd, Amalgamated Clothing Workers, 408 F. Supp. 722, 727 et seq. (E.D. Pa. 1976).

[27] *See, e.g.,* Bonar v. Dean Wittner Reynolds Inc., 835 F.2d 1378, 1386 et seq. (11th Cir. 1988); Raytheon Co v. Automated Business Sys., 882 F.2d 6, 12 (1st Cir. 1991); Todd Shipyards Corp v. Cunard Line, Ltd., 943 F.2d 1056, 1063 (9th Cir. 1991).

case seems to express this third view on punitive damages in international arbitration. In this case, the Supreme Court held that

> if the contract says ''no punitive damages,'' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration. . . . On the other hand, we think our decisions in *Allied-Bruce*, *Southland*, and *Perry* make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced to its terms even if a rule of state law would otherwise exclude such claims from arbitration.[28]

The Supreme Court decided that even if, in the case at hand, the contract was ambiguous regarding punitive damages, the arbitrators should still have the power to award punitive damages. It held that

> when a court interprets such provisions in an agreement covered by the FAA, ''due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.''[29]

The *Mastrobuono* decision suggests that there is a presumption that arbitration agreements generally allow punitive damages, unless the parties have expressly agreed otherwise by excluding the power of the arbitral tribunal to award punitive damages.[30]

ENFORCEABILITY?

Where arbitrators have the power to award punitive damages (by agreement of the parties, under the law of the place of arbitration and the law governing the merits of the dispute), the question is when they should exercise this power and whether there are situations in which an award of punitive damages would be inappropriate.

[28] Mastrobuono v. Shearson Lehman Hutton Inc., 115 S. Ct. 1212 (1995), *reprinted in* 21 *Y.B. Comm. Arb.* 181, 183 et seq. (1996).

[29] *Id.* at 187.

[30] Edward R. Leahy & Carlos J. Bianchi, ''The Changing Face of International Arbitration,'' 17(4) *J. Int'l Arb.* 48 (2000).

Arbitral tribunals have an obligation to the parties to render an enforceable award.[31] Therefore, it could be inappropriate for international arbitrators to award punitive damages if their award then risks set aside or non-enforcement because of the punitive damages. This risk is serious since there are strong public policies restricting the arbitrators' power to award punitive damages.[32] The enforcing State could refuse enforcement on the grounds that an award of punitive damages violates its public policy pursuant to Article V(2)(b) of the New York Convention.[33]

There is no consensus among national laws on whether a court seized to enforce a foreign arbitral award containing punitive damages must do so.[34] In the United States, since the *Mastrobuono* decision, it would appear that courts may no longer refuse to enforce foreign arbitral awards on the ground that such awards are contrary to U.S. public policy.[35]

In Germany,[36] Switzerland,[37] and The Netherlands,[38] courts have refused to enforce foreign court judgments containing punitive damages for public policy reasons. There is a strong possibility that foreign arbitral awards providing for punitive damages would also be refused enforcement in these countries. Even in England, where the concept of punitive damages is well established, it is unclear whether foreign judgments or arbitral awards of punitive damages will be enforced.[39]

In general, foreign arbitral awards are more readily enforced than foreign court judgments. The public policy exception of Article V(2)(b) New York Convention is very narrowly construed. It only covers the enforcement State's international public policy and is only available ''where the enforcement would violate the forum state's most basic notions of morality and justice.''[40] The New York Convention does not define the

[31] *See, e.g.,* Article 35 of the ICC Arbitration Rules according to which ''[i]n all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.''

[32] Lew, Mistrelis & Kröll, *supra* note 12, at 651, ¶ 24-75; Garrity v. Lyle Stuart, Inc., *supra* note 25.

[33] 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 [hereinafter New York Convention].

[34] Gotanda, *supra* note 1

[35] This is supported by *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) where the Supreme Court indirectly upheld the authority of an arbitral tribunal with seat in Japan to award treble damages.

[36] *See supra* note 6.

[37] *See supra* note 7.

[38] District Court of Rotterdam, Feb. 17, 1995, 1996 N.I.P.R., at 205 et seq.

[39] On this issue, see Gotanda, *supra* note 1.

[40] *See, e.g.,* Parsons and Whittemore Overseas Co, Inc v. Société générale de l'industrie du papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974); Hwang & Chan, ''Enforcement and Setting Aside of International Arbitral Awards—The Perspective of Common Law Countries'' ICCA Congress Series No. 10, 145, 156.

specific content of international public policy. According to the report of the International Law Association on public policy, as a bar to enforcement of international arbitral awards, the exception covers both procedural and substantive international public policy. According to the report, substantive international public policy includes mandatory laws/*lois de police*, fundamental principles of law, public order and good morals, and national interests and foreign relations.[41]

It could be argued that an award of punitive damages does not *per se* violate international public policy in the sense of Article V(2)(b) of the New York Convention, unless it is manifestly excessive in size. This would reflect the right of the tribunal to fashion the appropriate remedy according to the circumstances of the case.

Nevertheless, international arbitrators should be hesitant when awarding punitive damages even if the parties and the applicable law empower them to do so. If the arbitrators decide to award punitive damages, they should take into account the risk of non-enforcement by treating the award of punitive damages as a separate claim. This will ensure that in the event of a successful challenge of the punitive damages award in the courts at the place of enforcement, the punitive damages award will be severable and will not endanger the enforcement of an award of compensatory damages.

WHEN MAY/SHOULD INTERNATIONAL ARBITRATORS AWARD PUNITIVE DAMAGES?

As noted, the idea of giving arbitrators the power to punish a party for a certain behavior by awarding punitive damages is not widely accepted in international arbitration law and practice. Arbitrators are not objective policemen to impose penalties for objectively bad behavior. Rather, they determine the rights of the parties and grant damages to reflect the circumstances between the parties. It is nevertheless suggested that there is no reason why punitive damages should not be available in international arbitration if certain conditions are met.

International arbitrators should have the power to award punitive damages only if this remedy is provided for by a party agreement, the law of the place of arbitration, and the law governing the substance of the dispute.

Further, before awarding punitive damages, arbitrators should examine carefully whether there is a risk that the award will not be enforced on the ground that punitive damages violate important international public policies of the enforcement State. In order to avoid this risk, arbitrators should clearly distinguish in the award punitive and compensatory damages.

[41] *Available at* http://www.ila-hq.org.

Non-Pecuniary Remedies: The Practices of Declaratory Relief and Specific Performance in International Commercial Arbitration

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Under most developed national arbitration regimes, arbitrators have broad discretion in fashioning relief.[1] Although the type of award most often made by an international arbitral tribunal is one that grants monetary compensation, non-monetary remedies that comprise specific performance, of which an important sub-group is *restitutio in integrum*, and declaratory relief are also awarded when requested by the parties. Yet, some commentators consider that specific performance as such is rarely used to finally settle the dispute between the parties.[2] It still has a marginal status even if it may prove useful.[3] Recently, however, an arbitral tribunal found that there is ample practice to the contrary. Specific performance is ordinarily granted in cases where remedy in the form of money damages is inappropriate because it is either inadequate or impractical. Several elements may be taken into account to find a satisfactory substitute to monetary compensation: the difficulty of proving damages and the difficulty of collecting damages.

A declaratory award has a different purpose. It establishes the legal position of the parties definitively and has binding effect as between the parties. It may be a useful device especially where the parties have a

[1] *See* Gary B. Born, *International Commercial Arbitration* 813 (2d ed. 2001).

[2] An arbitral tribunal pointed out, in an award rendered in 1973, that specific performance ''is a concept which has hardly ever been used in international law.'' *See* British Petroleum Company (Libya) Ltd. v. The Government of the Libyan Arab Republic, Award on the Merits (Oct. 10, 1973), *reprinted in* P. Sanders ed., *Y.B. Comm. Arb.* 143 (1980). In that case, the arbitrator held that ''*restitutio in integrum* and specific performance refer to the same problem.''

[3] *See* Troye E. Elder, ''The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes,'' 13(1) *Arb. Int'l* 1 (1997): ''Despite conventional wisdom about its marginal status, specific or enforced performance of contractual obligations remains a healthy remedial device in present-day commercial relations.'' *Contra* Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/01/3 (Jan. 14, 2004).

continuing relationship and want to resolve the dispute between them without the risk of damaging their relationship. Declaratory relief is a remedy often used if there is nothing to be actively enforced,[4] but it is often granted with monetary compensation or other kind of remedies such as, for example, specific performance.

The main issue arising in respect of non-monetary remedies such as declaratory relief and specific performance is that of appropriateness. This issue involves examination of factual elements but also legal factors that include the question of recognition and enforcement.

SPECIFIC PERFORMANCE AND DECLARATORY RELIEF IN ARBITRAL PRACTICE

Orders for specific performance may cover different kinds of obligations, depending on the parties' contractual obligations: transfer of a patent, production of documentation contractually required, payment of commissions, replacement of defective goods, taking delivery of goods, delivery of goods, drawing on proceeds of letter of credit, payment of security for costs.[5]

Arbitral tribunals may award specific performance as a preliminary or provisional measure, for example, to secure the claim which is examined[6] or to finally resolve the dispute.[7] An award requiring a party to pay security for the costs of the arbitration may also be considered as an order of specific performance. Thus, such decision may have a definite or a provisional binding effect.

The obligation to submit to arbitration disputes covered by the arbitration agreement is itself capable of specific performance.[8] Indeed, as pointed out by Messrs. Fouchard, Gaillard, and Goldman, ''if the only remedy for a party's refusal to perform an arbitration agreement were an award of damages, that arbitration agreement would be of little value.'' Most

[4] *See* Peter F. Schlosser, ''Right and Remedy in Common Law Arbitration and in German Arbitration Law,'' 4(1) *J. Int'l Arb.* 27 (1987).

[5] *See* Born, *supra* note 1, at 813.

[6] *See* Rules of the Arbitration Institute of the Stockolm Chamber of Commerce, adopted by the Stockholm Chamber of Commerce and in force as of Apr. 1, 1999, art. 1, *available at* http://www.chamber.se.

[7] A party may, for example, request from an arbitral tribunal an award requiring the other party to continue performance of the contract until the dispute is finally settled. See the example cited by Alan Scott Rau in ''Provisional Relief in Arbitration: How Things Stand in the United States,'' 22(1) *J. Int'l Arb.* 1 (2005).

[8] *See* Philippe Fouchard, Emmanuel Gaillard & Berthold Goldman, *On International Commercial Arbitration* § 631 (E. Gaillard & J. Savage eds., 1999).

of the arbitration legislation provides for specific mechanisms to ensure specific performance of the arbitration agreement by allowing the arbitrator appointed by the claimant to act as sole arbitrator[9] or overcoming a party's refusal to appoint an arbitrator by providing for a designating authority to replace the defaulting party.[10]

Declaratory relief often aims at asserting the validity or invalidity of a contract, but it may also relate to the termination of a contract, of letters of credit, or of the arbitration clause.

ICC PRACTICE

In the final award rendered in International Chamber of Commerce (ICC) Case No. 7453 of 1994 regarding commission payments,[11] claimant—a U.S. sales agent—requested orders enjoining defendant—a German supplier of automobile parts—from failing to provide claimant with copies of purchase orders and other documentation as required under the contract and from making unjustified deductions from commissions due in the future. The arbitral tribunal considered in this case that damages alone would not be appropriate, as claimant would have had to resort again to arbitration to obtain its due under the contract and preferred equitable relief. After examining the documentary evidence, the arbitrator ordered defendant to

[9] *See, e.g.,* English Arbitration Act of 1996 Section 17, *cited in* Robert Merkin, *Arbitration Act 1996, An Annotated Guide* 77 (1996), which provides that:

> (1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (''the party in default'') refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.
>
> (2) If the party in default does not within 7 clear days of that notice being given
>
> (a) make the required appointment, and
>
> (b) notify the other party that he has done so,
>
> the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

[10] French New Code of Civil Procedure art. 1493, § 2 reads: ''Si pour les arbitrages se déroulant en France ou pour ceux à l'égard desquels les parties ont prévu l'application de la loi de procédure française, la constitution du tribunal arbitral se heurte à une difficulté, la partie la plus diligente peut, sauf clause contraire, saisir le président du tribunal de grande instance de Paris selon les modalités de l'article 1457.''

[11] Case No. 7453, Final Award (1994), 22 *Y.B. Com. Arb.* 107 (A.J. van den Berg ed., 1997).

provide claimant with the documents required under the contract and pay all commissions due to claimant without offset of any kind.

In the final award rendered in ICC Case No. 8528 of 1996[12]—a dispute between American and Turkish construction companies over the accounts of their joint venture—claimant requested a *specific performance order to readjust a joint venture contract accounting in light of benefits earned on the basis of a Turkish export incentive certificate*. The arbitral tribunal granted such request and ordered defendant to make an appropriate accounting by an independent auditing firm.

In the final award rendered in ICC Case No. 6955 of 1993 in a sale of goods contract,[13] the arbitral tribunal found that the defendant had breached the contract concluded with claimant by supplying goods that were non-conforming in that the goods had an excessive number of corroded units. It then considered a remedy in the form of *specific replacement of the defective goods*, which might have been granted under general law and particularly under the Uniform Commercial Code adopted by the state of Illinois.

In a recent ICC case, No. 11663, rendered in 2003 (not published), the parties had concluded an agreement for joint exploration, development, and production of crude oil in Yemen. After a dispute had arisen, and an ICC arbitration was started, the claimant in the arbitration requested that the respondent ''be ordered to . . . *assign its participating interests*'' in the joint venture to the claimant. The arbitrators first considered what kind of relief this was. They held:

> This is a request for equitable relief; this is not a request for the Tribunal to act as *amiable compositeur* or *ex aequo et bono*.

Then, the tribunal went on to consider whether specific performance was an adequate remedy:

> One test for granting specific performance of a contractual obligation is whether damages are an adequate remedy. Here they are not, because an award of damages alone would leave Respondent as a partner in what is essentially a joint venture in which all the parties must be able to work harmoniously together, which, from Claimants' standpoint, is obviously not the case. In this case, we have a situation in which, to use Lord Wilberforce's language in *Shiloh Spinners v. Harding*

[12] Case No. 8528, Final Award (1996), 25 Y.*B. Com. Arb.* 11 (A.J. van den Berg ed., 2000).

[13] Case No. 6955, Final Award (1993), 24a *Y.B. Com. Arb.* 107 (A.J. van den Berg ed., 1999).

> . . . , Claimants' should not be compelled to remain in a relation of neighborhood with a person in deliberate breach of his obligations'. [Respondent] has, in the past, consistently failed to fulfill its obligations under the agreements, and its ability to do so in the future is uncertain. [Respondent's] defaults have imposed additional burdens on the Claimants to maintain the project. The Arbitral Tribunal, consequently, is prepared to exercise its discretion in granting specific performance.

THE IRAN-UNITED STATES CLAIMS TRIBUNAL

There are numerous examples of cases where the Iran-United States Claims Tribunal had to examine requests for specific performance or declaratory relief.

In Case No. 370,[14] a contract had been concluded between an American company and the Islamic Republic of Iran for the purpose of modernizing and expanding Iran's military electronic intelligence gathering system. A dispute arose between the parties, and claimants obtained from a U.S. district court a preliminary injunction to enjoin the Bank Saderat Iran to pay under the bank guarantees and the standby letters of credit. Shortly thereafter, Iran called the good performance bank guarantees issued by the bank for its benefit, and the bank called the standby letters of credit issued by another bank. Before the arbitral tribunal, claimants requested *a declaratory relief canceling the bank guarantees and the related standby letters of credit.*

After deciding that the contract concluded between the parties had ''come to an end'' and that consequently claimants did not owe Iran payment in connection with this contract, the arbitral tribunal held that the performance guarantees and corresponding standby letters of credit had no further purpose and decided that Iran was obliged to withdraw its demands for payments of these guarantees and to refrain from making any further demands thereon.

In Case No. 353,[15] the Ministry of National Defense of The Islamic Republic of Iran requested, as a counterclaim, *specific performance and a declaration of the validity of the letters of credit issued under the contract concluded between the parties.* The arbitral tribunal rejected part of the counterclaim but ordered, as requested by the Ministry, the claimant, a Delaware corporation, to ''make available for return to the Respondent, Ministry of National Defence of The Islamic Republic of Iran'' radios loaned to the claimant.

[14] Case No. 370 (429-370-1), Award (July 28, 1989), 15 *Y.B. Com. Arb.* 220 (A.J. van den Berg ed., 1990).

[15] Case No. 353, Chamber Two Award No. 292-353-2 (Feb. 12, 1987), 4(2) *J. Int'l Arb.* 147 (1987).

The arbitral tribunal also ordered the Ministry, upon request of claimant, to ''make no further effort to call or collect'' the standby letters of credit that had been issued but had no further purpose as the payments had been made.

ICSID AND OTHER INVESTMENT ARBITRATIONS[16]

International Centre for the Settlement of Investment Disputes (ICSID) tribunals most often grant relief in the form of pecuniary damages and not specific performance, as investors almost always seem to frame their claims in terms of monetary damages.

The tribunal's decision in *Goetz v. Burundi*[17] is often perceived as an example of specific performance.[18] In this case, the claimant owned a company incorporated in Burundi, which had been granted a certificate of free zone that conferred tax and customs exemptions. After the withdrawal of the certificate, the company instituted ICSID arbitration and requested the annulment of the decision withdrawing the free zone certificate and, as a subsidiary claim, that Burundi be ordered to pay damages. After finding that the withdrawal of the certificate constituted a measure tantamount to an expropriation under the investment treaty concluded between Burundi and Belgium, the tribunal gave Burundi a choice of giving an effective and adequate indemnity or revoking the decision that had withdrawn the certificate.[19]

In practice, there are different kinds of obligations that arbitral awards might impose on the investor or on the host State[20]: restitution of seized property,[21] return of a license or the non-collection of unreasonable taxes,

[16] *See* Christoph Schreuer, ''Non-Pecuniary Remedies in ICSID Arbitration,'' 20(4) *Arb. Int'l* 325 (2004).

[17] Antoine Goetz et consorts c. République du Burundi, Award, Affaire CIRDI ARB/95/3 (Feb. 10, 1999).

[18] *See* Enron v. Argentina, *supra* note 3.

[19] ''Il incombe à la République du Burundi, en vue d'établir la licéité internationale de la décision litigieuse de retrait de l'agrément, d'accorder aux requérants l'indemnité adéquate et effective prévue à l'article 4 de la Convention belgo-burundaise de protection des investissements, à moins qu'elle ne préfère leur restituer le bénéfice du régime de la zone franche. Le choix relève de la décision souveraine du Gouvernement burundais. Faute de prendre dans un délai raisonnable aucune de ces deux mesures, la République du Burundi commettrait un acte internationalement illicite dont il appartiendrait au Tribunal de tirer les conséquences appropriées.''

[20] *See* Schreuer, *supra* note 16.

[21] North American Free Trade Agreement (NAFTA) Article 1135 provides that a tribunal may award only monetary damages or the restitution of property, ''in

granting of a permission to transfer currency, discontinuance of harassment of the investor's personnel, employment of local personnel, reinstatement of wrongfully discharged personnel, or compliance with legally imposed performance requirements.

AD HOC PROCEEDINGS

In the Aramco arbitration,[22] the parties sought only a *declaratory relief*. The arbitration related to the *interpretation of a concession agreement* granted by Saudia Arabia to Aramco in 1933. Saudi Arabia had subsequently granted Aristotle Onassis's company, Saudi Arabian Maritime Tankers, Ltd., in 1954 the exclusive right to transport oil; Aramco disagreed. The *ad hoc* tribunal ruled in favor of Aramco, stating that the government was bound by its agreement with Aramco.[23] The tribunal discussed whether it could render a declaratory award, in the following terms:

> It is appropriate to note that neither of the Parties claims damages for an alleged injury. The dispute is clearly limited to legal questions; it relates to the meaning of the 1933 Concession, to its interpretation and not to its validity. The question to be decided is whether, through an interpretation of the 1933 Concession Agreement, Aramco itself, or its parent companies or buyers, can be compelled to use for the transportation of oil and oil products on the high seas tankers which they have not freely chosen, and whether the rights granted to Aramco under its Concession Agreement authorize the Company lawfully to resist the implementation of Article IV of the Onassis Agreement, ratified by Royal decree No. 5737. The Parties are seeking an exact determination of their respective rights and obligations in order to be able to do what is right and just in the matter and to resume their traditional friendly relations.
>
> The Arbitration Tribunal is thus called upon, according to its understanding of the Arbitration Agreement, to give a declaratory award.

which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution''. North American Free Trade Agreement, Dec. 8-14, 1992, 32 I.L.M. 289 (1993).

[22] Saudi Arabia v. Arabian American Oil Company (Aramco), 27 I.L.R. 117, 145 (1958).

[23] M. Coale, ''Stabilization Clauses in International Petroleum Transactions'' (Aug. 19, 2003), *available at.* http://www.law.du.edu/ilj/online_issues_folder/Coale.final.9.5.pdf.

In one of the Liamco arbitrations,[24] Liamco had requested a *declaratory award* to assert the *invalidity of Libya's title to Liamco's nationalized rights.*[25] The arbitral tribunal rejected Liamco's request ''in accordance with prevalent international practice'' on the main ground that such award would be ''practically unenforceable.''

In another of the Libyan arbitrations,[26] the arbitrator found that in a nationalization situation *specific performance was not an available remedy*:

> when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalisation of the enterprise and its assets in a manner which implies finality, the concessionnaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages.

[24] *See* Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, Award (Apr. 12, 1977), 6 *Y.B. Com. Arb.* 89 (P. Sanders ed., 1981).

[25] Liamco requested that the arbitral tribunal:

> (i) Declare that the nationalization measures of Laws No. 66 of 1973 and No. 10 of 1974 purporting unilaterally to terminate the LIAMCO concessions violated the express terms and guarantees offered by the Government of Libya in the LIAMCO concession agreements of December 12, 1955, as modified and reaffirmed by the Amendatory Agreement of January 20, ''91''1966, and constituted a fundamental breach by the Government of Libya of the concession agreements and a violation of the law applicable thereto.
>
> (ii) Declare that the unilateral acts of the Government of Libya purporting to arrogate to the National Oil Company of Libya the exclusive concession rights of LIAMCO to explore for and extract petroleum in concession areas 16, 17 and 20 in contravention of LIAMCO's concession agreements, and contrary to the principles of the law of Libya common to the principles of international law, and contrary to general principles of law, was ineffective to transfer such rights to either the Government of Libya or the National Oil Company of Libya; and that neither the transfer by the Government of Libya of such contract and property rights, nor the title to petroleum extracted by, or in behalf of the National Oil Company of Libya, purportedly in the exercise of such rights, is entitled to international recognition.
>
> (iii) Declare that in the event that LIAMCO shall not be effectively restored to its concession rights, and shall not fully obtain title to, or the proceeds of, petroleum extracted by or on behalf of the National Oil Company of Libya in pursuance of such concession rights, then it shall be entitled to damages for wrongful breach of the concession agreements in the amount of two hundred and fifty million dollars ($ 250,000,000) or such other amounts as may be proved in the arbitration proceedings.

[26] British Petroleum Company (Libya) Ltd. v. The Government of the Libyan Arab Republic, Award (Oct. 10, 1973), 5 *Y.B. Com. Arb.* 143, 155 (1980).

THE ARBITRATORS' POWER TO AWARD NON-MONETARY RELIEF

Many authors point out the opposition existing between common law and civil law systems with regard to the granting of specific performance.[27] In common law systems, specific performance is considered to be an exceptional remedy and is thus rarely granted, whereas in civil law systems, there is ordinarily an opposite premise according to which specific performance is the principal remedy for breach of contract. In each category, the principle suffers many exceptions.

Some authors[28] consider that the arbitral tribunal is empowered to grant declaratory relief even when there is no express provision providing for the granting of such remedy as ''requests for contractual damages [are] often coupled with a request for a declaration that there has been a breach of contract.'' English arbitration law contains an express provision for the granting of declaratory relief.[29]

In ICC Case No. 7453, referred to above, the arbitrator asked himself whether he had jurisdiction to grant the relief requested. He did so in the following terms:

> [T]he contract states that: ''All disputes arising in connection with the present contract shall be finally settled . . . by one . . . arbitrator. There is, unquestionably, a dispute as to the payment of commission and as to the items on which the commission is payable. I have awarded damages to claimant in respect of first defendant's breach of contract computed until the latest periods covered by claimant's [document], but, under the contract, the obligation to pay commission will continue beyond that date and into the future. First defendant has denied that it is bound to perform that obligation in full on several grounds both as to the past and as to the future. I find therefore that the arbitration clause requires that I consider what relief may be appropriate for the future as well as granting damages in respect of the past and I find that the clause empowers me to do so: otherwise I would not be 'finally settling all disputes'.''

[27] *See, e.g.,* Elder, *supra* note 3.

[28] *See* Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 361 (4th ed. 2004).

[29] English Arbitration Act 1996 Section 48(3), *supra* note 9, provides that ''unless otherwise agreed by the parties . . . the tribunal may make a declaration as to any matter to be determined in the proceedings.''

According to Christoph Schreuer, arbitral tribunals[30] have the power to order a party to perform a specific act or to desist from a particular course of action. This power is ''inherent'' in a tribunal's jurisdiction. Yet, in practice, arbitral tribunals base their power to order specific performance on the applicable law, on general principles of law, or the arbitration clause.[31] Clarifications are however necessary in respect of specific performance against the State, an issue that ordinarily arises in investment arbitrations. More on this below.

Today, as pointed out by Alan Redfern and Martin Hunter, the question of whether an arbitral tribunal is empowered to order specific performance is rarely an issue in international arbitration as most domestic laws empower an arbitral tribunal to award specific performance.[32]

English law empowers an arbitral tribunal sitting in England to order specific performance of a contract.[33] U.S. courts have upheld arbitration awards that require injunctive or equitable relief, provided that the parties' agreement or the institutional rules that it incorporates supply some basis for inferring such authority.[34]

The International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts, newly edited in 2004, confirm that specific performance may be granted both for monetary[35] and non-monetary obligations.[36]

[30] Schreuer, *supra* note 16, at 330. The author referred to ICSID tribunals, but his analysis in this respect may be considered to apply to international arbitration in general.

[31] Troye E. Elder, who is against the use of specific performance as a remedy in international arbitration argues that, in most situations, ''parties to an international contract should not have the option to provide that an eventual dispute should be finally settled by an arbitral award of specific performance of the contract and even where parties specify that the substantive and/or procedural law of a certain state is to govern their dispute, such an election should not necessarily be construed to include acquiescence to a final remedy of specific performance, it should not be applied.'' *See supra* note 3, at 20.

[32] Redfern & Hunter, *supra* note 28.

[33] Under English Arbitration Act 1996 Section 48(5)(b), *supra* note 9, and unless otherwise agreed by the parties, ''the tribunal has the same powers as the court . . . to order specific performance of a contract (other than a contract relating to land).''

[34] *See* Stalinski v. Pyramid Elec. Co., 160 N.E.2d 78, 79 (N.Y. 1959), *quoted by* Born, *supra* note 1, at 813.

[35] Unidroit Principles of International Commercial Contracts 2004, Black Letter Rules, Article 7.2.1, *available at* http://www.unidroit.org (Performance of monetary obligation) reads: ''where a party who is obliged to pay money does not do so, the other party may require payment.''

[36] UNIDROIT Principles, *supra* note 35, Article 7.2.2 (Performance of non-monetary obligation) provides that, with some exceptions, ''where a party who owes

THE RULES OF ARBITRAL INSTITUTIONS

Most of the rules elaborated and adopted by arbitration institutions do not address directly the question of remedies and, consequently, do not deal with remedies such as declaratory relief and specific performance. As to declaratory relief, it is often perceived as an inherent power of the arbitral tribunal and there is, accordingly, no provision on the issue in institutional rules.

One of the major exceptions is the American Arbitration Association (AAA) Rules, which expressly empower the arbitral tribunal to order specific performance. Under Rule 43(a), ''The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.''

Some of the institutional rules, such as the rules of the London Court of International Arbitration (LCIA) Article 22, grant the arbitral tribunal additional powers that may be considered as powers to order specific performance, even if such powers do not aim at finally settling the dispute but rather facilitating the conduct of the arbitral proceedings.

Apart from the LCIA Rules, one can identify various rules that empower the arbitral tribunal to order specific performance as an interim measure. Awarding this type of measure is thus part of the arbitral tribunal's general powers to grant interim and conservatory measures.[37]

A recent ICSID case is of interest because of its definition of the arbitrators' powers. In the decision on jurisdiction rendered in *Enron v. Argentina,*[38] the ICSID tribunal decided that it had the power to order injunctive relief.[39] The arbitral tribunal held that ''in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts.''[40]

In *Enron v. Argentina*, the claimant requested that taxes assessed by Argentina be declared expropriatory and in breach of the treaty and unlawful, and that they be annulled and their collection permanently enjoined. The respondent argued that the tribunal lacked the power to

an obligation other than one to pay money does not perform, the other party may require performance.'' A party may invoke other remedies when specific performance was required but not received (*Id.* art. 7.2.5).

[37] *See, e.g.,* LCIA Rules art. 25; ICC Rules art. 23; AAA Rules Rule 34.

[38] Enron v. Argentina, *supra* note 3.

[39] ''An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available.'' *Id.* at 34.

[40] *Id.* at 33.

order injunctive relief under the ICSID Convention[41] and the treaty. It could merely determine the payment of compensation. The arbitral tribunal found that there is no doubt that specific performance in an available remedy, referring to ample practice:

> An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available. The Claimants have convincingly invoked the authority of the *Rainbow Warrior*, where it was held:
>
> > The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.
>
> The same holds true under the ICSID Convention.[42]

RECOGNITION AND ENFORCEABILITY OF AWARDS ORDERING SPECIFIC PERFORMANCE AND DECLARATORY RELIEF—IN PARTICULAR WHERE STATES ARE INVOLVED

Declaratory Awards

A declaratory award is capable of recognition but it is not itself capable of enforcement, as it does not involve an obligation to pay compensation or to take or refrain from taking a particular course of action.

Under the ICSID Convention, the obligation to enforce an award only covers pecuniary obligations. Article 54(1) of the Convention provides that: ''each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in

[41] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which entered into force on October 14, 1966 when it had been ratified by 20 countries. By June 30, 2007, 156 countries had signed the convention and 144 had ratified it.

[42] Enron v. Argentina, *supra* note 3, at 33.

that State.'' Yet, Cristoph Schreuer asserts that ''the deliberations during the drafting of the Convention show clearly that the restriction in Article 54 to pecuniary obligations was based on doubts concerning the feasibility of an enforcement of non-pecuniary obligations and not on a desire to prohibit tribunals from imposing such obligations.''[43]

In this context, it is appropriate to recall every arbitrator's *memento mori*: the relief ordered by an arbitrator may be challenged on the grounds that it exceeds the arbitrator's authority.[44]

AWARDS ORDERING SPECIFIC PERFORMANCE

In *British Petroleum Company (Libya) Ltd. v. The Government of the Libyan Arab Republic,*[45] the arbitral tribunal examined whether it was empowered to order specific performance against the State. After examining applicable law (Libyan law and general principles of international law) and relevant cases on this subject, the arbitral tribunal found that domestic laws differed on this question. The tribunal stated that ''in English an United States law, damages is the rule and specific performance the exception'' whereas ''in German and Danish law the situation is reversed: the normal remedy is specific performance and damages are awarded only when specific performance is not possible or the claim is for damages rather than specific relief.''

The tribunal further stated that two additional aspects might be noted: ''first the principles under which specific performance is possible are principles of ordinary commercial law for contracts of a limited duration . . . Secondly, a survey of the municipal laws of England, France and the

[43] Schreuer, *supra* note 16, at 325.

[44] *See* United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration,* adopted June 21, 1985,, U.N. Doc. A/40/17, at art. 36(1)(a)(iii) (1985); U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention], June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, art. V(1)(c): ''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 . . . 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 be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.''

[45] British Petroleum Company (Libya) Ltd. v. The Government of the Libyan Arab Republic, Award on the Merits (Oct. 10, 1973), 5 *Y.B. Com. Arb.* 143 (P. Sanders ed., 1980).

United States makes clear that the *remedies of specific performance and restitution in kind normally are unavailable against governmental authorities under public contracts.*'' The arbitral tribunal rejected accordingly claimant's request on the ground that there is ''no uniform general principle of law pursuant to which specific performance is a remedy available at the option of an innocent party, especially not a private party acting under a contract with a Government.''[46]

Yet, a few years later, an opposite decision was rendered in the *Topco* case.[47] In this case, which opposed two American oil companies to Libya, the sole arbitrator appointed by the president of the International Court of Justice (ICJ) pursuant to the arbitral clause, held that Libya had breached its obligations under the concession agreements concluded with the companies and that it was legally bound to perform so as to give them full force and effect. The arbitrator asserted that *restitutio in integrum* was the normal sanction for non-performance of contractual obligations and was inapplicable only to the extent that restoration of the *status quo ante* is impossible. This decision was recognized as the first decision awarding private parties a remedy of specific performance against a sovereign.

Yet, it is to be noted that specific performance against the State also poses the problem of the enforcement of arbitral awards against the State. This element was taken into consideration by the sole arbitrator in the *BP Exploration* case and justified, in his opinion, that specific performance be not granted, as the defendant was a governmental authority and would accordingly be immune to coercion.[48]

One major drawback of specific performance as a remedy in international arbitration is that such relief may imply extended and continuous scrutiny by the courts in cases where performance is incomplete or defective. This element is taken into consideration by arbitral tribunals and sometimes justifies that monetary compensation be awarded instead of specific performance. Such was the case in *Liamco*.[49] In this case, which

[46] *Id.* The arbitral tribunal specified that ''the principal remedy under public international law in regard of matters of essentially economic significance is damages . . . the arbitrator also observed that in most cases of international tribunals, the limited jurisdiction and powers of *ad hoc* tribunals, resting as they mostly do on carefully circumscribed compromis, would not permit the arbitrators to take any such further step.''

[47] Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 17 I.L.M. 1 (1978). *See* Elder, *supra* note 3.

[48] *See* BP Exploration Co. v. Libyan Arab Republic (1979) 53 I.L.R. 297 (1979), *reported by* Elder, *supra* note 3.

[49] Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, *supra* note 24. By an order of January 18, 1980, the District Court for the District of Columbia refused to enforce the award because of the Act of State doctrine. *See* United States District Court, District of Columbia, January 18, 1980, 6

concerned concessions to an American oil company, the company asserted that Libya had breached the concession agreements and requested *restitutio in integrum* and, more precisely, restoration of its concession rights, transfer of the benefits of the exercise of its concession rights and, alternatively, payment of damages. The arbitral tribunal quoted Libyan law according to which obligations are to be performed principally in kind if such performance is possible and stated that this general principle was also common to international law. Yet, the arbitral tribunal rejected Liamco's request for *restitutio in integrum* on the ground that this kind of remedy is considered to be against the respect due for the sovereignty of the nationalizing State and that such measure would be unenforceable.[50] Accordingly, the arbitral tribunal decided that performance in kind was not possible and awarded Liamco monetary compensation.

LIMITS OF SPECIFIC PERFORMANCE AND DECLARATORY RELIEF

The UNIDROIT principles (Article 7.2.2) specify when specific performance of non-monetary obligation may not be required:

(i) performance is impossible in law or in fact

(ii) performance is unreasonably burdensome or expensive

(iii) the party entitled to performance may reasonably obtain performance from another source

(iv) performance is of an exclusively personal character

Y.B. Com. Arb. 248 (P. Sanders ed., 1981) . By an order *per curiam* of May 6, 1981, the Court of Appeals for the District of Columbia granted the motions of the *Amici Curiae* and vacated the order of the district court. *See* United States Court of Appeals, District of Columbia, May 6, 1981, 7 *Y.B. Com. Arb.* 381 (P. Sanders ed., 1982).

[50] Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, *supra* note 24. The arbitral tribunal concluded as following:

> Whereas, *restitutio in integrum* claimed as a principal remedy by LIAMCO as well as the remedy of a Declaratory Award declaring the invalidity of Libya's title to LIAMCO's nationalized rights, are to be rejected in accordance with prevalent international practice, and because they are practically incapable of compulsory execution.
>
> Whereas, moreover, the said remedies are liable to encroach upon the principle of the sovereignty of States and the indisputable and unappealable character of all ''Acts of State,'' including in particular those connected with nationalization measures.

(v) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.[51]

Enforcement of the award ordering specific performance is also an element that is taken into account by arbitral tribunals. In the award rendered in Case No. 273/95 of May 31, 1996,[52] the arbitral tribunal held that specific performance was not an appropriate remedy in this case as ''[claimants] can hardly expect to be able, under the New York Convention or otherwise, to have an award enforced in Russia providing that respondent must specifically perform its obligations under the various contracts for the next eight or ten years, producing the material and delivering it to claimants.'' Accordingly, the arbitral tribunal decided to grant claimants ''alternative request for relief in the form of damages.''

Specific performance may prove to be impossible, in fact, where the cooperation of the other party is necessary but may not be obtained. Such was the case in the final award rendered in ICC Case No. 8032 of 1995.[53] In this case, the parties had concluded a contract for the supply and transfer of property rights for a computer system designed for the creation of a sports lottery game. Prior to the implementation of the plan agreed by the parties, they had to collaborate to produce a requirements handbook that would adapt the software to the specific needs of the lottery organization in a particular country. The arbitral tribunal held that though under French law specific performance may in principle be ordered by a court, specific performance was impossible in this case as ''it appears that the aim of the Contract cannot be achieved as long as the requirements handbook remains unwritten and this would require the cooperation of both parties; but it is practically impossible to force defendant to cooperate in the preparation of the handbook.''

CONCLUSIONS

Under most developed national arbitration regimes, arbitrators have broad discretion in fashioning relief. Yet, it may be considered, in view of the decisions rendered on this subject, that specific performance as such is rarely used to finally settle the dispute between the parties. It still has a marginal status even if it may prove useful.

[51] *Supra* note 35.

[52] Case No. 273/95, Award (May 31, 1996), 23 *Y.B. Com. Arb.* 128 (A.J. van den Berg ed., 1998).

[53] Case No. 8032, Final Award (1995), 21 *Y.B. Com. Arb.* 113 (A.J. van den Berg ed., 1996).

Declaratory relief often aims at asserting the validity or invalidity of a contract, but it may also relate to the termination of a contract, letters of credit, or the arbitration clause.

In common law systems, specific performance is considered to be an exceptional remedy and is thus rarely granted, whereas in civil law systems, there is ordinarily an opposite premise according to which specific performance is the principal remedy for breach of contract. In each category, the principle suffers many exceptions.

The question of whether an arbitral tribunal is empowered to order specific performance is rarely an issue in international arbitration, as most domestic laws empower an arbitral tribunal to award specific performance. Most of the rules elaborated and adopted by arbitration institutions do not address directly the question of remedies and, consequently, do not deal with remedies such as declaratory relief and specific performance. As to declaratory relief, it is often perceived as an inherent power of the arbitral tribunal.

One major drawback of specific performance as a remedy in international arbitration is that such relief may imply extended and continuous scrutiny by the courts in cases where performance is incomplete or defective. This kind of remedy is considered to be against the respect due for the sovereignty of the State and therefore unenforceable.

Injunctions

Justice Richard M. Mosk
Associate Justice, California Court of Appeal
Los Angeles, California, USA

INTRODUCTION

When I first began practicing law with what was then considered a large Los Angeles law firm, I worked on many entertainment (now called intellectual property) and commercial cases. In those cases, one party or another sought injunctions to prevent such activities as ''unfair competition'' or ''unfair business practices;'' the wrongful use of confidential information; the exhibition of motion pictures or sale of goods in violation of copyright, trademark, or contractual rights; or other tortious acts; or to enforce a personal service contract.

At that time, most applications in a State court in Los Angeles County (in the Central District) for a preliminary injunction or temporary restraining order went to just one judge, who presided over what was called the ''Writs and Receivers Department.'' That one judge could, in effect, by issuing or not issuing injunctive relief, have a tremendous effect upon a business, an employee, a development, an exhibition or a production, and even the public welfare. Often, the preliminary injunction was so significant and had such consequences that the trial itself would be rendered meaningless. I thought that this one judge, with this power over such a large metropolitan area, was the most powerful judge in the country. I only refer to this experience in my early career to emphasize how significant injunctive relief can be. My brief overview of injunctions is intended to be in conjunction with the presentations of other panelists on the subject of remedies and to induce further discussion on the subject.

GENERAL PRINCIPLES

In the common law, injunctive relief is a permanent remedy, often in connection with torts or wrongful acts. Such injunctive relief may, however, be a remedy for breaches of certain contracts when damages are not adequate—for example, violations of confidentiality agreements or coven-

ants not to compete; breaches of agreements involving intellectual property such as licenses; and breaches of unique personal services contracts. Statutes may provide for injunctive relief as a remedy for a violation—for example, unfair competition, trademark, copyright, patent, and anti-trust statutes.

Permanent injunctions may be an appropriate remedy in arbitration. Injunctive relief is also one form of interim relief or a provisional remedy and may also be available in connection with arbitration—either by an arbitrator or by a court.

There are different types of injunctions. A preventive injunction is to stop a discrete event or act. A mandatory injunction is to compel a certain act. Injunctions may be used by private parties or the state to prevent violations of certain statutes. These include injunctions that are probably not relevant here. For example, there are regulatory injunctions by which a court uses a general prohibition in an injunction to regulate a party's behavior over a long period of time—for example, certain anti-trust injunctions—and a structural decree by which the court uses the injunction as a device for altering or reorganizing some institutional arrangement—for example, desegregation decrees.

In common law jurisdictions, injunctions are classified as an equitable remedy. Equity developed in the English Court of Chancery to provide a remedy when there was no adequate remedy available in the law courts. In the United States, there are no courts of equity; law and equity are united in one forum.

Injunctions can also be used to prevent a multiplicity of actions, to protect priority of jurisdiction, or to maintain the status quo. In addition, in order to obtain injunctive relief, it is necessary that the dispute be ripe and that without such relief, irreparable injury would result.

An injunction may be denied if it is not capable of being judicially supervised. In addition, the court has discretion whether or not to grant injunctive relief—an application for an injunction is an appeal to the ''Chancellor's conscience.'' Thus, the court considers various equitable principles. These include the concept that in order to obtain relief, a party must have ''clean hands.'' Another is that the court must balance the equities—that is, in connection with whether to grant injunctive relief, weigh the benefits to the applicant against the burdens to the one against whom relief is sought.

There are other factors to consider in connection with injunctive relief. Injunctive relief is not available if the acts in question can no longer be prevented by the court; if the challenged course of conduct has been abandoned before entry of the decree; if the injunction may be contrary to the public interest or public policy; if the injunction would violate some legal right, such as being a prior restraint on free speech or an infringement of labor activities; if the injunction would ignore comity or lack of

jurisdiction; or if the injunction is to prevent criminal conduct. Laches or undue delay may also preclude injunctive relief.

As injunctions are an element of equity in common law countries, a jury trial is not required to determine if injunctive relief should be granted. An injunction is, however, a remedy; thus the underlying cause of action or claim may be subject to a jury trial. The failure to comply with an injunction can result in civil or criminal contempt.

It is difficult to generalize about civil law jurisdictions because their systems vary. At least in some civil law jurisdictions, orders to cease doing an act that is actionable are available. Indeed, in the civil law, ordering an act or to forbear from an act, unlike the common law, is not a matter of discretion or based on inadequacy of another remedy.

Preliminary injunctions and temporary restraining orders are a form of interim measures for relief.[1] Generally, these can be granted after less than a full trial and exist until a final judgment is granted, unless dissolved earlier. A court may grant a preliminary injunction if some irreparable damage may occur pending the ultimate determination of the dispute. A temporary restraining order can sometimes be granted on an *ex parte* application and last until a hearing can be held. A court issues temporary restraining orders to avoid damage that might occur before a hearing on a preliminary injunction can take place. To obtain interim relief, in addition to the general equitable factors, there also has to be some showing of probability of succeeding at trial—as well as jurisdiction over the party to be enjoined. Any such provisional relief may be subject to posting a bond to cover the damages from the order should the defendant ultimately prevail. To what extent there can be appellate review of a preliminary injunction or temporary restraining order depends upon the jurisdiction.

The American Law Institute/International Institute for the Unification of Private Law (ALI/UNIDROIT) Principles and Rules of Transnational Civil Procedure, which meld common law and civil law principles, provide for ''Provisional and Protective Measures'' as follows:

> 17.1 The court may issue an injunction to restrain or require conduct of a person when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. The grant or extent of the remedy is governed by the principle of proportionality. An injunction may require the disclosure of assets wherever located.

[1] A ''Mareva'' injunction—named for a British case—is the freezing of the assets of a defendant.

17.2 The injunction may be issued before the opposing party has an opportunity to respond only upon proof of urgent necessity and preponderance of considerations of fairness. The applicant must fully disclose facts and circumstances of which the court properly should be aware.

17.3 A person against whom an ex parte application is directed must have an opportunity at the earliest practicable time to respond concerning the appropriateness of the injunction.

17.4 The court may, after hearing those interested, issue, dissolve, renew, or modify an injunction.

17.5 An application for an injunction is liable for compensation of a person against whom an injunction is issued if, upon subsequent reconsideration, the court determines that the relief should not have been granted.

17.5.1 The court may require the applicant for provisional relief to post a bond or formally to assume a duty of indemnification.

17.6 The granting or denial of a provisional or conservatory measure is subject to immediate appellate review.[2]

Anti-suit injunctions are those that enjoin other proceedings. As litigation has become more international in nature, courts are more apt to consider anti-suit injunctions issued to enjoin foreign proceedings. There are, however, different views on when such injunctions are appropriate. Courts profess to have the power to enjoin those subject to their personal jurisdiction from pursuing litigation before foreign tribunals, but such power is tempered by principles of comity, the recognition of concurrent jurisdiction, and the allowance of parallel proceedings. In the United States, some courts consider anti-suit injunctions appropriate whenever the parties and issues are the same and when other proceedings would frustrate the prompt and efficient determination of the case.

Other courts will issue such an injunction only if the proceeding somehow imperils the jurisdiction of the forum court or threatens a significant national policy. And yet other courts, while recognizing all the factors, employ a balancing test.[3] Whether courts of one jurisdiction will

[2] ALI/UNIDROIT, *Principles of Transnational Civil Procedure* 120-21 (2006).

[3] See discussion in *Canon Latin America, Inc. v. Lantech (CR), S.A.,* 453 F. Supp. 2d 1357, 1357-61 (S.D. Fla. 2006).

issue interim orders in support of proceedings in another jurisdiction is unsettled. It may depend upon the type of relief sought and the applicable law.

ARBITRATION

Generally, arbitral panels may grant injunctive relief unless such relief is precluded by the arbitration agreement. In the past, there was some question as to whether permanent injunctive or other equitable relief could be provided by an arbitrator without authorization in the arbitration agreement, but today, express authorization does not seem to be required. There may still be some question as to whether an arbitrator can issue a permanent injunction because the arbitrator has no power to modify or dissolve the injunction after the award.[4]

Injunctive relief that affects one not a party to the arbitration agreement, however, is likely not to be enforceable, at least as to the non-party. Moreover, courts have held that under certain regulatory statutes, damages might be arbitrable, but claims for injunctive relief are not. This is because the claimant, when seeking injunctive relief, is functioning as a private attorney-general to prevent future violations on behalf of the general public, and thus arbitration is not a suitable forum.[5] A court has noted that in such cases, the judicial forum has advantages over an arbitral forum in enforcing an injunction.[6]

Many institutional arbitration rules and some arbitration statutes provide for interim relief by the arbitral tribunal and provide that an agreement to arbitrate does not limit the jurisdiction of a national court to make orders for interim relief, such as injunctions. In some jurisdictions, however, mandatory norms of national law may provide that the power to order interim relief belongs exclusively to domestic courts.

In arbitration, an interim measure of protection or interim relief is one rendered prior to the issuance of an award fully deciding the dispute and is to maintain or restore the *status quo* pending determination of the dispute in order to prevent action that would cause irreparable injury or threaten the effectiveness of a final award. The arbitral tribunal, as the courts of equity in common law countries, must weigh whether the threatened injury

[4] Broughton v. Cigna Healthplans, 21 Cal. 4th 1066, 1079 (1999) (not deciding issue).

[5] *See id.* at 1066 (court noted at 1075-76 that *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985) allowing international arbitration of an anti-trust claim dealt with damage remedies).

[6] *Id.* at 1078-79.

is irreparable, the likelihood of success on the merits, and the balancing of hardships. In addition, the party obtaining the relief may be required to post security as a condition of the relief. In some instances, temporary relief may be obtained without notice for a period until a hearing can be held.

Permanent injunctions that are issued by an arbitral tribunal can effectively be enforced only by obtaining confirmation of the award in a judicial proceeding. And, because arbitrators lose the power to modify or dissolve an injunction after the award, arbitrators may be reluctant to issue permanent injunctions, even if they could. Arbitral tribunals cannot enforce interim injunctions, other than to impose sanctions within the arbitral process itself. Thus, a party seeking to enforce an arbitral interim order must apply to a court.

Although there are variations among jurisdictions, generally courts may order interim measures in aid of arbitration. There is, however, a split of authority in the United States on whether the New York Convention[7] precludes judicial interim measures in international arbitration cases. The trend seems to favor the availability of such interim relief.

There may be difficulties with cross-border enforcement of an interim measure ordered by an arbitration tribunal or a court against a party located in a different jurisdiction. Cross-border enforcement of interim measures ordered by a court in support of the arbitral process has been recognized in certain instances, but there is no uniform treatment of such matters.[8]

Courts in the United States have enjoined foreign litigation that interfered with an arbitration or enforcement of an arbitration award in the United States.[9] And courts have enforced such injunctions with civil contempt sanctions.[10] Theoretically, an arbitral tribunal could, as an interim measure of relief, order a party to refrain from litigating elsewhere, although judicial relief would probably be necessary. The Iran-United States Claims Tribunal stated it had ''an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that [its] jurisdiction and authority are made fully effective'' and invited or requested[11] Iran to stay proceedings in Iran.[12] Another problem

[7] 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.

[8] *But see* European Communities Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters (Regulation), July 28, 1990, arts. 24, 25, 29 I.C.M. 1413; ''Lugano'' Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done in Lugano on Sept. 16, 1988.

[9] *See* Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111 (2d Cir. 2007).

[10] *See* Paramedics Electromedina Commercial, LTDA v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645 (2d Cir. 2004).

[11] The International Centre for the Settlement of Investment Disputes (ICSID) Rules (http://icsid.worldbank.org/ICSID/Index.jsp) limit the power of arbitral

has emerged when a national court enjoins an international arbitration—so called ''anti arbitration'' injunctions. There are instances when the arbitral tribunal proceeded in the face of such an injunction.[13]

PRACTICALITIES

In most jurisdictions, courts may order various interim measures of relief. And, as noted, many jurisdictions and international arbitration rules provide that interim relief may be granted by arbitral tribunals. But in some instances, an arbitral tribunal's ability to grant interim measures may be limited by law or the rules, and courts may refuse to grant interim measures requested on the theory that such relief is incompatible with the arbitration agreement or that it is not desirable to interfere with the arbitration process. For example, a court may conclude that to weigh the chances for success will interfere with the arbitration or that preliminary relief may, in effect, determine the matter without the agreed-upon arbitration. In some jurisdictions, no provisional remedy is available from a state court in an international arbitration unless expressly provided for in the arbitration agreement. Seeking provisional judicial relief in some places may be a waiver of the right to arbitrate.

Often interim measures may urgently be required before the arbitral tribunal is established. Some, but not all, courts will grant relief in these circumstances. Arbitrators are often averse to granting interim measures, and such orders may be difficult to enforce. If third parties are involved, arbitrators have no power to impose any orders upon them. Only a court may enjoin a third party.

The governing law of the arbitration generally determines the division of authority between arbitral tribunals and courts of powers to grant interim measures, and the power of arbitrators in this regard may vary substantially from one country to another. Thus, the availability of interim measures in international arbitration is subject to varying treatment under different national laws.

tribunals to ''recommending'' interim measures, presumably so as to not allow a private tribunal the power to compel a State to do something or not to do something on a provisional basis.

[12] E Systems, Inc. v. Iran, 2 *Iran-U.S. Cl. Trib. Rep.* 51, 57 (1983); see also concurring opinion of Judges Holtzmann and Mosk, *id.* at 57 discussing the issue and the power of an international tribunal to order a party to halt proceedings in a national court.

[13] *See* Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 344-48 (4th ed. 2004).

Even within the judicial system of one country, injunctive relief poses significant problems. An injunction, whether temporary, preliminary, or permanent, is a serious and difficult remedy. A mandatory injunction requires a party to do something and is considered more difficult to obtain. As noted, there are a number of factors to consider when faced with an application for injunctive relief, and ultimately an element of discretion may control. Injunctions may also be difficult to enforce. Procedures vary as to obtaining injunctive relief. Hearings may or may not involve live testimony.

In international arbitration, when applying for injunctive relief, permanent or interim, a party is faced with the usual problems encountered in a domestic court, but many more. There are multiple jurisdictions involved and arbitrators from different legal regimes. Thus, there is uncertainty as to the right and ability to obtain injunctive relief.

Although it may seem to be heresy to say at an international arbitration conference, it might be that a contracting party that foresees the possibility of a need for interim relief, such as an injunction, would be advised not to agree to arbitration. It is true that courts are not always reliable, but it must be recognized that arbitrators are not always satisfactory. And often, even if there is an arbitration clause, recourse to courts to obtain interim relief or enforce an arbitral decision will be necessary.

Injunctive relief, interim or permanent, may be available in certain circumstances in connection with international arbitration, but obtaining that relief is dependent on a number of factors and laws, rendering the remedy unpredictable. Perhaps the United Nations Commission on International Trade Law (UNCITRAL) Working Group on Arbitration dealing with interim measures ultimately will produce a product that will help in this regard.[14]

[14] *See* Donald Francis 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 International Commercial Arbitration; Contemporary Questions,* ICCA Congress Services, No. 11, at 82-149 (2002); Donald Francis Donovan, ''The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal,'' ICCA Congress Series No. 12, at 203-41 (2004).

Defenses to the Enforcement of an International Arbitration Award Based Upon Non-Arbitrability or a Set-Aside of the Award Where It Was Made

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THE DEFENSE OF NON-ARBITRABILITY TO THE ENFORCEMENT OF AN INTERNATIONAL ARBITRATION AWARD

There have been a number of U.S. court decision from the Supreme Court, as well as the lower courts, on arbitrability, a label that generally refers to two concepts. The first concerns the identity of the correct decision maker; that is, should a court or an arbitrator decide, for example, whether a particular party must arbitrate at all or whether a particular claim or cause of action is subject to arbitration? A second class of arbitrability cases involves the question of what the decision maker should decide about the proper scope of arbitration, that is, whether a particular dispute is subject to arbitration in the first place under the language of the parties' arbitration agreement, for example, can a party arbitrate a Racketeer Influenced and Corrupt Organizations Act (RICO) claim or a statutory claim under state law, or whether unjust enrichment or quasi-contractual claims are arbitrable under the wording of a particular arbitration clause?

The most recent Supreme Court pronouncement on the issue is the case of *Buckeye Check Cashing v. Cardegna*.[1] *Buckeye* is a good case to examine because a footnote in the opinion zeroed in on the topic as it relates to defenses to the enforceability of awards. In *Buckeye* a number of borrowers commenced a class action in a Florida court against a lender who engaged in so-called deferred payment transactions. In those transactions, a borrower will post-date a check for, say, $120 a month from now and, in return, get $100 today. When the borrower enters into such a transaction, he or she signs an agreement with an arbitration clause. These transactions, as you

[1] Buckeye Check Cashing v. Cardegna, 126 S. Ct. 1204 (2006).

can imagine, result in huge interest rate charges (if one characterizes the difference between the amount of the post-dated check and the amount of cash received as ''interest''). In addition, the customers who seek these deferred payment transactions largely consist of lower-income individuals.

Buckeye Check Cashing, when faced with a class action brought against it in the Florida court, moved to arbitrate in accordance with the arbitration clauses contained in the agreements with its borrowers. The borrowers resisted the application to send the cases to arbitration on the ground that the contracts were usurious under Florida law and therefore void. As void agreements, the plaintiffs reasoned that their contracts—including the arbitration clauses—were a nullity.

The Supreme Court of Florida agreed with the borrowers and declared the contracts illegal and therefore void under Florida law. As a result, the Florida court held that the arbitration clauses disappeared with the underlying loan agreements.

The U.S. Supreme Court reversed the Florida Supreme Court. In doing so the U.S. Supreme Court explained that whether the contracts were void or not was an issue for an arbitrator to decide, and not a Florida court. Because the Federal Arbitration Act (FAA) applied, the Florida state courts should have applied federal substantive arbitration law.[2] That federal substantive law includes the doctrine of severability first enunciated in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[3] According to that doctrine, an arbitration clause is deemed to be severable from the contract in which it is embedded. Because there was no independent challenge launched against the arbitration clauses in the deferred payment agreements, the clauses were valid and it was up to an arbitrator to decide whether the contracts were enforceable in the face of defenses such as illegality or the like. In other words, the Florida court erred by applying state law to determine that the contracts were void *ab initio* rather than applying federal substantive law to determine that the arbitrator was the correct decision maker to make that threshold determination.

Buckeye Check Cashing is particularly interesting, not because of the holding, but because of a footnote in the opinion. That footnote said that the issue of a contract's validity (which was at issue in the *Buckeye* case) was different from the issue of whether a contract between two parties was ever made at all. The Supreme Court was careful to point out that its opinion in *Buckeye* did not deal with the latter situation in which a court—and not an arbitrator—is deemed by most of the lower courts to have the power to determine issues of contract formation.

[2] *See* Southland Corp. v. Keating, 465 U.S. 1 (1984).
[3] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

The issue is well-framed by a Third Circuit case, *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*[4] In that case, Chi Mei argued before the arbitrator that its signature on the underlying agreement was a forgery. Chi Mei objected to the arbitration going forward, but participated in the arbitration nonetheless. The arbitrator ultimately determined that Chi Mei, contrary to its contention that its signature on the contract was a forgery, did not demonstrate that it had not executed the contract. In the alternative, the arbitrator found that Chi Mei was bound to the agreement based on other legal doctrines. When Minmetals moved in the district court to recognize and enforce the award against Chi Mei, Chi Mei opposed the motion arguing that—notwithstanding the arbitrator's determination—it was entitled to a jury trial in the district court on whether or not its signature on the contract was a forgery. The district court agreed and the Third Circuit affirmed. Chi Mei got a second bite of the apple. In deciding as it did, the Third Circuit set the rule that it is up to a court and not an arbitrator to decide whether a contract was formed at all and, therefore, whether an arbitration agreement ever existed.

The *Buckeye* footnote—while not approving of these cases specifically—went to pains to distinguish them from the situation in *Buckeye*. The footnote cited to several contract formation cases and stated that the *Buckeye* holding was not intended to change the result in those cases. In the contract formation cases cited by the Supreme Court, a lower court had decided that it was up to it—and not to an arbitrator—to determine, for example, whether an agent acted with authority so as to bind his principal to a contract with an arbitration clause or whether a contracting party had the mental capacity to form a contract at all.

There are serious implications to this line of cases. What if, for example, you as a litigator have a colorable argument that your client's agent who signed the agreement with the arbitration clause was not authorized to do so or whether one of the parties never agreed to arbitrate at all? If you preserve your rights in the arbitration (and that, it seems, takes relatively little effort—nothing more than a protest that the arbitrator should not be deciding the issue), you may well be entitled to a second bite of the apple at the enforcement stage by arguing that a court must determine whether your client agreed to arbitrate in the first place.

This defense also exists in cases where an arbitrator purports to order a non-signatory to arbitrate or allows an arbitration to proceed at the behest of a non-signatory.

These are situations that have the potential for delays that arbitration was supposed to avoid. For example, when faced with a respondent's

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

statement to the arbitrator that no contract was ever formed and, therefore, the respondent objects to the arbitrator's jurisdiction, perhaps the best response is to put a hold on the arbitration while the claimant moves in court to compel the respondent to arbitrate. In that way, an arbitrator will take care of the threshold arbitrability issue but at the expense of a considerable increase to the parties in time and expense.

So, beware of arbitrability defenses. They might presage multiple proceedings at the enforcement stage.

A DEFENSE TO ENFORCEMENT BASED ON A SET-ASIDE OF THE AWARD WHERE IT WAS MADE

Article V(e) of the New York Convention[5] states that recognition and enforcement of an award may be refused if ''The award . . . 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.''

Two U.S. cases have set the boundaries of this defense to recognition and enforcement. In the 1996 case of *Chromalloy Aeroservices v. The Republic of Egypt,*[6] the D.C. District Court granted recognition and enforcement to an Egyptian arbitration award despite the fact that the award had been set aside by a court in Egypt. The court in *Chromalloy* reasoned that Article V's language was permissive (it uses the word ''may'' and not ''shall'') and that a denial of enforcement rights in that case would violate the clear U.S. public policy in favor of the arbitration of commercial disputes.

The case involved a military procurement contract between Chromalloy, a U.S. company, and the Egyptian Air Force. Chromalloy agreed to supply parts, maintenance, and repair services for helicopters. A dispute arose, and the Air Force terminated the contract and commenced arbitration on the basis of the arbitration clause in the parties' contract. The Air Force then drew down on some $11 million in letters of guarantee posted by Chromalloy to guarantee its performance under the contract.

In the arbitration, which took place in Egypt under the laws of Egypt, Chromalloy prevailed and then sought to enforce the award in the United States. The Air Force then sought to nullify the award in Egypt. Ultimately, Egypt's court of appeals issued an order nullifying the award. The focus then shifted to the United States.

After noting that Article V provides for a discretionary standard (i.e., a district court ''may'' deny recognition and enforcement to an award that

[5] 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.

[6] Chromalloy Aeroservices v. The Republic of Egypt, 939 F. Supp. 907 (1996).

has been set aside), the court cited Article VII of the New York Convention. That article states that ''The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the count[r]y where such award is sought to be relied upon.'' ''In other words'' said the *Chromalloy* court, ''[u]nder the Convention, CAS maintain[ed] all right to the enforcement of [the] Award that it would have in the absence of the Convention.''[7] Because the award could have been enforced under the FAA, the court reasoned, the award was similarly enforceable in the United States under the Convention.

It was also the case that the arbitration agreement in *Chromalloy* provided that ''The decision of the [arbitral tribunal] shall be final and binding and cannot be made subject to any appeal or other recourse.''[8] Thus, the Egyptian court arguably violated the parties' agreement by entertaining the Air Force's set-aside application.

Chromalloy got its award recognized and enforced in the United States.

By contrast, a subsequent Second Circuit decision, *Baker Marine v. Chevron,*[9] came to an opposite conclusion. In *Baker Marine*, two Nigerian companies combined forces to bid for supply barge services to Chevron in Nigeria. Two bidders received the contracts and performance began. A dispute arose when one of the bidders (Baker Marine) accused the other bidder and Chevron of violating the contracts. The contracts were all governed by Nigerian law and called for arbitration in Nigeria. Two arbitration proceedings were commenced. Baker Marine won them both.

Baker Marine then sought to enforce the awards in Nigeria. The Nigerian court set aside both arbitration awards. The grounds were that ''the arbitrators had improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole (sic) evidence, and made inconsistent awards, among other things.''[10]

Baker Marine then sought to enforce the awards in the United States. Here, the Second Circuit (by Judge Leval) denied recognition and enforcement based on the fact that the awards had been set aside in Nigeria. In doing so, it rejected Baker Marine's reliance on Article VII of the New York Convention (the same article that supported the opposite result in *Chromalloy).*

Baker had itself, said the Second Circuit, sought to arbitrate in Nigeria under its laws. If a party whose award was denied enforcement at the place of the arbitration could automatically obtain enforcement under the

[7] *Id.* at 910.
[8] *Id.* at 912.
[9] Baker Marine v. Chevron, 191 F.3d 194 (2d Cir. 1999).
[10] *Id.* at 196.

domestic laws of other nations, it would incentivize a losing party simply to apply again and again to courts of various nations until one decided to grant enforcement.

The Second Circuit also emphasized that—unlike in *Chromalloy*—the arbitration clauses did not state that the awards were final. Moreover, Baker Marine in this case was not a U.S. citizen and had itself commenced the Nigerian enforcement proceedings that it now sought to avoid. Moreover, Baker Marine had shown no adequate reason to avoid the consequences of the set-asides in Nigeria. Baker Marine, for example, never contended that the Nigerian courts acted contrary to Nigerian law in setting aside the awards.

A recent case out of a French court embraced the *Chromalloy* result. In a September 2005 decision the Paris Court of Appeal, *La Direction Générale de l'Aviation Civile de l'Émirat de Dubai v. Société International Bechtel Co.*,[11] gave effect to an award rendered in Dubai that had been annulled by a Dubai court. The award had been annulled on the ground that the tribunal failed to comply with a seemingly mandatory rule requiring the swearing of witnesses. In granting recognition to the award despite the set-aside, the Paris court reasoned that annulment decisions have no international effect, as they are confined to the legal systems in which they are made. There was apparently no discussion of the impact of Article VII of the New York Convention or of the policy considerations that underlay the rationale of the Second Circuit in *Baker Marine*. This decision reaffirms the French view that has led, as a general rule, to the enforcement of awards annulled in the place of arbitration.

[11] La Direction Générale de l'Aviation Civile de l'Émirat de Dubai v. Société International Bechtel Co., Paris Court of Appeal, Chamber 1C, Sept. 27, 2005.

Part IV

Ethics Issues in International Arbitration

Recent Developments in Arbitrator Disclosure Law and Practice

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Two developments during 2007 in the law and practice of arbitrator disclosure show that the rules remain far from settled. The first development is the Fifth Circuit Court of Appeals' *en banc* decision in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*[1] The U.S. Supreme Court declined to grant a writ of *certiorari* to review this important decision,[2] leaving a split in the U.S. circuits on legal standards for arbitrator disclosure. Some courts, in principle, will set aside arbitral awards if an arbitrator has failed to disclose anything that might create an impression of bias, while others impose a higher standard for disclosure failures sufficient to vacate an award.

The second significant recent development is the publication by the London-based Chartered Institute of Arbitrators of its Practice Guideline 16, entitled ''The Interviewing of Prospective Arbitrators,''[3] which addresses, among other things, best procedures for eliciting proper disclosures. These guidelines raise interesting questions, including some likely to be novel to American practitioners. Does international arbitrator disclosure practice require, for example, maintenance by counsel and disclosure to an adversary of formal written records of interviews with candidates?

U.S. LAW ON ARBITRATOR DISCLOSURE

In the United States, the Federal Arbitration Act (FAA) provides that an arbitral award may be vacated ''where there was evident partiality or

[1] Positive Software Solutions, Inc. v. New Century Mortgage Corp, 476 F.3d 278 (5th Cir. 2007) (*en banc*), reversing a panel decision reported at 436 F.3d 495 (5th Cir. 2006).

[2] Positive Software Solutions, Inc. v. New Century Mortgage Corp., 127 S. Ct. 2943 (2007).

[3] Chartered Institute of Arbitrators Guideline 16: The Interviewing of Prospective Arbitrators (May 2007). The Guideline is reproduced as an Appendix to this article.

corruption'' of an arbitrator.[4] This has been interpreted to cover failure to make proper disclosures about relationships with parties and others that could bear on partiality.

The leading case on arbitrator disclosure is *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[5] involving an arbitrator's failure to disclose prior business dealings with a party. But that case left open the question whether ''evident partiality'' is satisfied by an ''appearance of bias'' to a reasonable person, even in the absence of proof of actual bias. Justice Black, writing for a plurality of four members of the Court, so determined: ''any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the *appearance* of bias''; arbitrators must ''disclose to the parties *any dealings* that might create an *impression* of possible bias.''[6]

Justice White joined that opinion but wrote separately (for himself and Justice Marshall), stating that an arbitrator ''cannot be expected to provide the parties with his complete and unexpurgated business biography'' or disclose ''trivial'' matters.[7]

Is Justice Black's opinion, in which Justice White said he joined, binding precedent rather than merely a plurality opinion? U.S. courts differ in their answers to this question, as highlighted in the majority opinion in *Positive Software*.[8] Some circuits have answered ''no'' and have gone on to state that ''evident partiality'' requires something more than a mere ''appearance'' of bias, such as evidence of bias that is ''clear'' or ''direct, definite and capable of demonstration, rather than remote, uncertain or speculative.'' Among these are the Second, Fourth, Sixth, Seventh, and Tenth Circuits.[9] Other circuits have answered ''yes,'' vacating awards based on an ''appearance of bias.'' These include the Fifth, Ninth, and Eleventh Circuits. The Fourth Circuit has held that, since the FAA does not list non-disclosure as a ground for *vacatur*, non-disclosure alone does not justify it, even in a case where the non-disclosure violated an applicable arbitration rule.[10]

[4] 9 U.S.C. § 10(a)(2).

[5] Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968).

[6] *Id.* at 148-49 (emphasis added).

[7] *Id.* at 151.

[8] Positive Software Solutions, Inc. v. New Century Mortgage Corp, *supra* note 1, at 282.

[9] *E.g.*, Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 677 (7th Cir. 1983) (rejecting ''disclosure of every former social or financial relationship with a party or a party's principals'').

[10] ANR Coal Co., Inc. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir.), *cert. denied,* 528 U.S. 877 (1999).

State arbitration statutes use language similar to that of the FAA, treating failure to disclose as itself a type of ''partiality'' or ''misconduct.''[11] State courts also are divided concerning whether an ''appearance'' of bias alone is sufficient to vacate an award.[12]

The *Positive Software* case involved a former co-counsel relationship with a sole arbitrator's prior law firm more than ten years previously. The Fifth Circuit held (by vote of 11-5) that the arbitrator failed to disclose ''trivial'' or ''insubstantial'' relationships, but that this was not a sufficient basis to vacate the award. Rather, the matter not disclosed must involve a ''significant compromising connection'' to a party. The minority would require disclosure of ''every conceivable relationship with a party or counsel, however slight'' and would vacate an award to enforce this standard. The minority stated that Ninth Circuit precedent agrees with the ''every conceivable relationship'' standard.[13]

Somewhat surprisingly, in view of its recent interest in arbitration issues, the Supreme Court declined to review the case to resolve this persisting doctrinal conflict arising from the Court's own somewhat ambiguous precedent.

So, the debate over ''trivial'' and ''insubstantial'' disclosure questions will continue.[14] But are these verbal distinctions really meaningful, even as directional guidance? Or, does the disclosure issue turn instead on what the undisclosed relationship was rather than how it is characterized? A reasonable person presumably would not be troubled by failures to disclose matters considered ''remote,'' and such non-disclosure thus would create no ''appearance'' of bias. But what is or is not ''remote''?

The Fourth Circuit, in its *ANR Coal* decision,[15] cited four factors relevant to review of specific relationships that might escape initial arbitral disclosure:

(a) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding;

(b) the directness of the relationship between the arbitrator and the party he is alleged to favor;

(c) the connection of that factor to the arbitration; and

[11] *E.g.*, New York Civil Practice Law & Rules § 7511(b).

[12] Kinn v. Alaska Sales & Serv., Inc., 144 P.3d 474, 485 (Alaska 2006); Burlington N. R.R. Co. v. TUCO Inc., 960 S.W.2d 629, 634-35 (Tex. 1997).

[13] Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994).

[14] Waiver also remains an important variable. The original *Positive Software* panel noted that a disclosure failure may be waived if the party had actual knowledge of the facts not disclosed, 436 F.3d 495, 504-05 (5th Cir. 2006). Some courts use a lower ''notice'' standard for waiver.

[15] *Supra* note 10.

(d) the proximity in time between the relationship and the arbitration proceeding.

One may wonder, however, whether this really takes the analysis much further. What is the ''character'' of an interest that makes it ''remote''? A systematic analysis of specific fact patterns would be more useful. In *ANR Coal*, for example, an arbitrator's law firm had represented a party in the past not just once (as disclosed), but twice. This non-disclosure was held not probative evidence of actual bias; but its significance probably lies more in the fact pattern with which it dealt. Perhaps the case stands for the proposition that disclosure that is adequate in kind, although not in degree, may cause the undisclosed detail to be more likely to be considered ''remote'' than ''significant.''

One of the big questions in arbitration is the extent to which openness and flexibility in rules and governing law, as opposed to more detailed guidance,[16] is important to the arbitral process. In the case of arbitrator disclosure, it seems that the doctrinal debate over concepts such as ''directness'' or ''connection'' will not take matters much further. Rather, this is an area in which analysis of what courts actually do with typical fact patterns would be most helpful.

The collection of cases in the *Positive Software* opinions points the way toward such a study of, for example, the specific data not disclosed.[17] In one case cited, the arbitrator did not disclose that his former employee had been represented extensively by the law firm now representing a party in the arbitration. The court found no evident partiality primarily due to lack of temporal proximity: ''most significantly, the relationship . . . ended five years prior to the arbitration.''[18] Perhaps the temporal proximity issue is worthy of further systematic study.

In another case, the arbitrator listed prior National Association of Securities Dealers (NASD) awards he had made, but he failed to note that one had later been vacated by a court; this was found to provide no basis for a reasonable impression of partiality or bias.[19] Perhaps there is a line of

[16] *See* William W. Park, ''Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion,'' 19(3) *Arb. Int'l* 279 (2003).

[17] California is something of a special case, because its ''Ethics Standards for Neutral Arbitrators in Contractual Arbitration'' impose uniquely extensive disclosures required for arbitrations in that State. According to a California appeals court, FAA Section 10(a)(2) does not preempt these rules; Ovitz v. Schulman, 35 Cal. Rptr. 17 (Cal. App. 2d 2005). *See* Scott M. Donahey, ''California and Arbitrator Failure to Disclose: The Long and Winding Road to Award and Enforcement in International Arbitration,'' 24(4) *J. Int'l Arb.* 389 (2007).

[18] Montez v. Prudential Sec., Inc., 260 F.3d 980 (8th Cir. 2001).

[19] Richard Dale Relyea Ltd. P'ship et al. v. Pershing, LLC et al., 2006 U.S. Dist. LEXIS 10580 (S.D. Tex. 2006). For a non-judicial effort to provide examples of what is ''remote,'' see the IBA Guidelines discussed below.

cases dealing with details about disclosed information that are themselves a matter of public record into which parties might have a duty to inquire.

Still another aspect of the arbitrator disclosure issue ripe for further factual investigation is the situation in which the award was unanimous, and only one arbitrator on a three-member panel failed to make disclosures. Does it make sense to vacate an award under these circumstances? The majority view, based on *Commonwealth Coatings*, is that this non-disclosure is fatal, although Justice Fortas, dissenting, would have held otherwise.[20]

A further candidate for fact-specific research is the situation in which a party-appointed arbitrator on a three-member panel failed to make disclosures. There is continuing confusion in the United States over the status of ''nonneutrals,'' despite recent changes in the American Arbitration Association/American Bar Association (AAA/ABA) Code of Ethics for Arbitrators in Commercial Disputes[21] to clarify that ''nonneutrals'' are exceptions to the norm of neutral party-appointed arbitrators but must make the same disclosures as other arbitrators. As a practical matter, case law generally has held ''nonneutrals'' to lower disclosure standards.[22] What types of fact patterns lead to vacating of awards if the party-appointed arbitrator is not expressly ''nonneutral''?

One more question that arises in connection with arbitrator disclosure is how these U.S. tests square, if they do, with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[23] which also contains provisions potentially relevant to arbitrator disclosure and the consequences of non-disclosure. Article V(1)(d) permits a court to refuse enforcement if ''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.''[24] Failures to disclose have been cited (without much success in practice) as violations of this standard governing the constituting of the tribunal. Some courts seem to assume that the U.S. standards for vacating awards should

[20] Commonwealth Coatings Corp. v. Continental Cas. Co., *supra* note 5, 153. *But see* Merit Ins. Co. v. Leatherby Ins. Co., *supra* note 9, and Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981) (*contra*).

[21] Code of Ethics for Arbitrators in Commercial Disputes (2004), *available at* http://www.adr.org. Ethical Codes are not binding on courts but often are cited as ''highly significant.'' Positive Software Solutions, Inc. v. New Century Mortgage Corp, *supra* note 1, at n.43.

[22] *E.g.*, Delta Mine Holding Co. v. AFC Coal Props., 280 F.3d 815 (8th Cir. 2001), *cert. denied,* 537 U.S. 817 (2002).

[23] 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.

[24] *E.g.*, Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334 (5th Cir. 1976).

apply here. However, the Second Circuit has questioned whether arbitrator bias can be read into the convention as a basis for refusing enforcement.[25]

Article V(2)(b) of the New York Convention permits a refusal to enforce if doing so would violate the public policy of the enforcing state. This provision also has been invoked in a U.S. court in a case of non-disclosure (unsuccessfully).[26]

Case law and the New York Convention are not the only texts relevant to arbitrator disclosure. Arbitration institutions' rules and practices also help define disclosure standards, but they tend to speak in broad generalizations rather than provide specific guidance. For example, the AAA's Commercial Rule 16 requires disclosure by all arbitrators of ''any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.''[27] However, such disclosure is ''not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.'' This tracks case law language but adds little.

Similarly, AAA Commercial Rule 17 states that an arbitrator may be disqualified for ''partiality or lack of independence''; but that standard is not precisely defined. Significantly, parties may agree in writing that arbitrators directly appointed by a party ''shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.'' ''Nonneutrals'' still make full disclosures under AAA rules.

International rules are equally general. Article 7 of The AAA/ICDR (International Centre for Dispute Resolution) International Rules[28] states that all arbitrators shall disclose ''any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.'' Article 8 adds that disqualification may be based on circumstances ''that give rise to justifiable doubts as to the arbitrator's impartiality or independence.''

[25] Andros Compania Maritima, SA v. Marc Rich & Co., 579 F.2d 691 (2d Cir. 1978);*see* Donahey, *supra* note 17, at 396-99.

[26] Fertilizer Corp. of India v. IDI Mgmt. Inc., *supra* note 20 (arbitrator had served as counsel for a party). *See also* Transmarine Seaways Corp. v. Marc Rich & Co., 480 F. Supp. 352 (S.D.N.Y. 1979) (treating *Commonwealth Coatings* as ''a declaration of U.S. public policy'' on arbitrator disclosure).

[27] Commercial Arbitration Rules, R-16, *available at* http://www.adr.org. The AAA provides arbitrators with checklists of specific questions that may prompt disclosure.

[28] *See* http://www.adr.org.

The ICC Court of International Arbitration's Rules, Article 7, requires disclosure of ''any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.'' Article 11 provides for a challenge based on ''an alleged lack of independence or otherwise.''[29]

The AAA/ABA Code of Ethics[30] provides a greater level of concrete guidance, but its principles remain rather general. The Code deals with disclosure primarily in Canon II, which provides that ''an arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.'' These include: (1) ''any known direct or indirect financial or personal interest in the outcome of the arbitration;'' (2) ''any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties'' (disclosable relationships include those ''with any party or its lawyer, with any co-arbitrator, or with any individual whom [the arbitrators] have been told will be a witness,'' and disclosure extends to any such relationships ''involving their families or household members or their current employers, partners or professional or business associates that can be ascertained by reasonable efforts);'' (3) ''the nature and extent of any prior knowledge they may have of the dispute;'' and (4) ''any other matters, relationships or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution or applicable law regulating arbitrator disclosure.'' The Code adds that ''Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.''

Canon IX of the Code governs ''Arbitrators Appointed By One Party,'' who have a duty to determine and disclose their status and to comply with the Code, ''except as exempted by Canon X.'' Party-appointed arbitrators are presumptively neutral, unless the parties intend otherwise, in which case they become ''Canon X arbitrators'' who are not subject to rules of neutrality. These arbitrators have the same disclosure obligations as neutrals (see Canon II), because ''Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist.'' But Canon X arbitrators are not obliged to withdraw if requested to do so only by the party who did not appoint them.

[29] International Chamber of Commerce (ICC) forms distributed to prospective arbitrators require either a ''statement of independence without qualification'' (i.e., nothing to disclose) or a ''qualified statement of independence'' (i.e., whatever the arbitrator decides to disclose). No suggested questions or areas on which to focus for disclosure are listed.

[30] *Supra* note 21.

The other leading compilation of ethical norms, the International Bar Association (IBA) Rules of Ethics for International Arbitrators,[31] also take a rather general approach to disclosure, although these rules tend to use terms that suggest a more forgiving attitude toward non-disclosure than do the AAA/ABA Code and some of the U.S. case law.[32]

The IBA Rules call for disclosure of ''all facts or circumstances that may give rise to justifiable doubts as to [an arbitrator's] impartiality or independence'' and add that ''Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.''[33] A prospective arbitrator should disclose ''any past or present business relationship, whether direct or indirect . . ., including prior appointment as arbitrator, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration.'' With regard to past relationships, the duty of disclosure applies ''only if they were of more than a trivial nature in relation to the arbitrator's professional or business affairs.'' The Rules also say that non-disclosure of an ''indirect'' relationship unknown to a prospective arbitrator will not be a ground for disqualification unless it could have been ascertained by making reasonable enquiries.

IBA disclosure covers ''substantial'' social relationships with parties or witnesses, as well as previous relationships with any fellow arbitrators

[31] Rules of Ethics for International Arbitrators, *available at* http://www.ibanet.org.

[32] The IBA Rules state:

> 3.1. The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.
>
> 3.2. Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure as described in Article 4 below.
>
> 3.4. Past business relationships will not operate as an absolute bar to acceptance of appointment, unless they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment.
>
> 3.5. Continuous and substantial social or professional relationships between a prospective arbitrator and a party, or with a person who is known to be a potentially important witness in the arbitration, will normally give rise to justifiable doubts as to the impartiality or independence of a prospective arbitrator.

[33] IBA Rules, art. 4.1, 4.2.

(including prior joint service as an arbitrator) and the extent of any prior knowledge of the dispute.

Can ethical guidelines move beyond general categories to specific fact patterns? The IBA Guidelines on Conflicts of Interest in International Arbitration[34] represent the first real attempt to be significantly more specific. They seek to address arbitrator disclosures by sorting out ''Green,'' ''Red'' and ''Orange'' lists of ''conflicts'' that (respectively) do not require disclosure, that should be disclosed but may be waived (though there are some ''nonwaiveable'' conflicts), and that require disclosure but are considered waived in the absence of prompt objections. Significantly, The IBA Guidelines state that ''lack of disclosure alone does not give rise to a presumption of bias (or lack of impartiality or independence).''

Green list examples, presumptively too trivial to require disclosure, include:

- The arbitrator has previously published a general opinion concerning an issue that also arises in the arbitration.
- The arbitrator's law firm has acted against a party or its affiliate in an unrelated matter without the involvement of the arbitrator.
- A law firm associated with the arbitrator's law firm, which does not share fees/revenues with the arbitrator's law firm, renders services to a party or its affiliate in an unrelated matter.
- The arbitrator has a relationship with another arbitrator or with a party's counsel through membership in the same professional association or social organization.
- The arbitrator and another arbitrator or a party's counsel have previously served together as arbitrators or as co-counsel.
- The arbitrator has had an initial contact with the appointing party or its affiliate (or their respective counsel) prior to appointment, if limited to proper topics.
- The arbitrator holds an insignificant amount of shares in a party or its affiliate that is publicly listed.
- The arbitrator and a manager, director or person having a similar controlling influence in a party or its affiliate have worked together in a professional capacity, including as arbitrators in the same case.

Significantly, some Orange list examples require disclosure of relationships only within a set number of years, making relationships older than that implicitly Green listed:

[34] IBA Guidelines on Conflicts of Interest in International Arbitration (2004), *available at* http://www.ibanet.org.

- Counsel for or against a party in an unrelated matter ''within the past three years.''
- Appointment as an arbitrator by a party ''within the past three years on two or more occasions.''
- Appointment as an arbitrator by the same law firm more than three times within the past three years.

The Guidelines have little track record in U.S. courts but point in the direction of a more useful focus on specific situations.[35] Their acceptance, or lack thereof, will provide a test concerning whether greater specificity is indeed useful.

CHARTERED INSTITUTE GUIDELINES FOR INTERVIEWS

The second development of interest is issuance of the Chartered Institute of Arbitrators' Practice Guideline 16 addressing the interviewing of prospective arbitrators by a party's counsel. This guideline, published in May 2007, is said ''to be considered as recommendations and do[es] not carry any implication of being mandatory.''

The Chartered Institute Guideline is devoted largely to the mechanics of what counsel and arbitrators should not say and do; but it also addresses the process of dialogue by which arbitrator disclosures can be made. Some of the salient provisions related to the process of arbitrator interviews are:

- ''In agreeing to be interviewed, the prospective arbitrator should make the basis upon which the interview is to be conducted, whether such is to be these Guidelines or otherwise, wholly clear *and in writing* to the interviewing party.
- ''The interviewee arbitrator should be permitted to be accompanied by a secretary or pupil or other assistant to *take a note of proceedings.*
- ''Either a tape recording or a detailed arbitrator's file note should be made of the interview *and the tape or the file note disclosed to the other side*

[35] For a favorable evaluation of the Chartered Institute Guideline, see Otto L.O. de Witt Wijnen, ''Two Anecdotes About Robert Briner; and Some Thoughts on Conflicts of Interest in the Light of Transparency and Predictability,''*in Global Reflections On International Law, Commerce And Dispute Resoultion, Liber Amicoram in Honour of Robert Briner* (2005). For a critical evaluation, see Markham Ball, ''Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?,'' 21(3) *Arb. Int'l* 323 (2005).

in the dispute, and to the appointing body, at the earliest available opportunity.

- ''The interview should be conducted in a professional manner in a business location, and *not over drinks or a meal.*
- ''A time limit should be agreed for the interview.''

As regards the substance of an arbitrator interview, the Chartered Institute Guideline expressly permits discussion of:

(i) the name of the parties in dispute and any third parties involved or likely to be involved;

(ii) the *general nature* of the dispute;

(iii) *sufficient detail, but no more than necessary,* of the project to enable both interviewer and interviewee to assess the latter's suitability for the appointment;

(iv) the expected timetable of the proceedings;

(v) the language, governing law, seat of and rules applicable to the proceedings if agreed, or the fact that some or all of these are not agreed; and

(vi) the interviewee's experience, expertise and availability.

Conversely, the Guideline specifies certain ''no-nos'' that may *not* be discussed, either directly or indirectly:

(i) the *specific circumstances or facts* giving rise to the dispute;

(ii) the *positions or arguments* of the parties;

(iii) the *merits* of the case.

Questions may be asked to test the candidate's knowledge and understanding of: (1) the nature and type of project in question; (2) the particular area of law applicable to the dispute; (3) arbitration law, practice, and procedure. However, ''such questions should be general in nature and neutrally put in order to test the interviewee and should not be put in order to ascertain his/her views or opinions on matters which may form part of the case.''

These guidelines provide a second example of attempts to impose greater specificity on the disclosure process, in this case by regulating the nature and extent of interaction of counsel with prospective arbitrators. They set out a number of guides for a practice that previously has been treated only by rather general guidelines in codes of ethics. For example, Canon III of the AAA/ABA Code of Ethics expressly permits *ex parte* communication with an arbitrator candidate about the identities of the parties, counsel, or witnesses and the ''general nature'' of the case. Like the Chartered Institute Guideline, the Code states that the interview should not

include discussion of ''the merits of the case'' but that the candidate may respond to inquiries from a party or its counsel ''designed to determine his or her suitability and availability for the appointment.''[36] But neither the Code nor the IBA Rules seek to prescribe detailed interview procedures.

Is the Chartered Institute Guideline, perhaps, moving rather far in the direction of process specificity? The extent of formality required by this guideline for interaction with a prospective party-appointed neutral arbitrator is, at least to an American practitioner, surprising. It is not unusual to assume that, if a candidate for sole arbitrator or chairman is interviewed, the interview will be conducted by representatives of the parties jointly. Similarly, inquiries of any arbitrator relating to his or her expertise, experience, and conflicts would be normal. Most practitioners also would be familiar with the guideline's attempt, which is shown in its juxtaposition of its Guidelines 11 and 9, to permit proper exploration and disclosures of a potential arbitrator's qualifications, while avoiding intruding too closely into the specific details of the case involved.

But a guideline providing for a tape recording or detailed arbitrator's file note to be made of an *ex parte* interview of a candidate expressly for disclosure to the other party and to any appointing body is surprising and unlikely to be followed. Such a cumbersome process is unknown in international arbitration in the United States and is unlikely to be acceptable.

SOME PREDICTIONS

It seems appropriate, in what has become an annual review of recent developments, to include predictions for what may occur in the near future concerning arbitrator disclosure law and practice. My predictions are as follows:

First, the Supreme Court, which has been taking cases raising arbitration issues relatively frequently, may soon take a case similar to *Positive Software* involving the ''evident partiality'' definition.

[36] The AAA/ABA Code also states that, in an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, ''each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator'' and even may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Canon III B(3) and (4).

Second, additional cases will raise the issue of whether a presumption of bias based on non-disclosure alone is soundly based in U.S. statutes or the New York Convention.

Third, harmonization of arbitration procedures ultimately will have an effect, with the U.S. national standards as articulated in the case law being influenced by transnational guidelines and rulings.

APPENDIX

Chartered Institute of Arbitrators Guideline 16: The Interviewing of Prospective Arbitrators

The following guidelines are to be considered as recommendations and do not carry any implication of being mandatory.

1. In agreeing to be interviewed, the prospective arbitrator should make the basis upon which the interview is to be conducted, whether such is to be these Guidelines or otherwise, wholly clear and in writing to the interviewing party, whether that be the party itself, its legal advisers, or both.

2. These Guidelines may, by agreement, serve as the basis upon which the interview is to be conducted, with such additional restraints and safeguards, whether suggested by interviewer or interviewee and as agreed between them in advance, as may be appropriate in individual circumstances.

3. It should be clearly understood that appointment as arbitrator does not carry with it any obligations to the appointing party except the generally-accepted obligations of all arbitrators of ensuring (i) that (where provided for) an appropriate chair/presiding arbitrator is selected and (ii) that the parties' cases are both understood and fully considered in the tribunal's deliberations—this is wholly different to arguing a party's case.

4. Where there is to be a sole arbitrator, he/she should not be interviewed except by the parties jointly or, if one of the parties wishes to conduct an interview and the other party does not, the interview should proceed with a representative of the latter in attendance as observer; the latter party should not unreasonably refuse to cooperate.

5. The interviewee arbitrator should be permitted to be accompanied by a secretary or pupil or other assistant to take a note of proceedings.

6. The constitution of the interviewing team should be made known to the prospective arbitrator in advance and, at the outset of the interview, it should be made clear who will lead it and how it will be conducted. The interview should normally be led by a senior representative of the interviewing party's external lawyers.

7. Either a tape recording or a detailed arbitrator's file note should be made of the interview and the tape or the file note disclosed to the other side in the dispute, and to the appointing body, at the earliest available opportunity.

8. The mere fact of there having been an interview should not, per se, be a ground for challenge.

9. The following may not be discussed either directly or indirectly:

(i) the specific circumstances or facts giving rise to the dispute;

(ii) the positions or arguments of the parties;

(iii) the merits of the case.

10. Subject always to the overriding provisions of Guideline 9, in order for the interviewee's suitability (expertise, experience, language proficiency and conflict status) to be assessed the following may be discussed:

(i) the names of the parties in dispute and any third parties involved or likely to be involved;

(ii) the general nature of the dispute;

(iii) sufficient detail, but no more than necessary, of the project to enable both interviewer and interviewee to assess the latter's suitability for the appointment;

(iv) the expected timetable of the proceedings;

(v) the language, governing law, seat of and rules applicable to the proceedings if agreed, or the fact that some or all of these are not agreed;

(vi) the interviewee's experience, expertise and availability.

11. Subject always to the overriding provisions of Guideline 9, in assessing the interviewee's experience and expertise, questions may be asked to test his/her knowledge and understanding of:

(i) the nature and type of project in question;

(ii) the particular area of law applicable to the dispute;

(iii) arbitration law, practice and procedure.

Such questions should be general in nature and neutrally put in order to test the interviewee and should not be put in order to ascertain his/her views or opinions on matters which may form part of the case. Questions concerning the interviewee's publishing history (if any) may be put subject to the same proviso.

12. The interviewee should be permitted to decline to answer any question on the grounds that it goes beyond what is categorized in Guideline 10 above, and any such declining should be accepted in good faith by the interviewer.

13. Conversely, the interviewer should equally be permitted to decline to answer any question from the prospective arbitrator on the same basis.

14. In the event that the interviewee comes to the conclusion that the interviewer is really seeking a partisan arbitrator or one who will not be impartial, he/she should terminate the interview forthwith and should not accept the appointment.

15. The interview should be conducted in a professional manner in a business location, and not over drinks or a meal.

16. A time limit should be agreed for the interview.

17. It is reasonable for the parties to interview prospective chairmen but such interviews should either be by the parties (or their legal advisers) jointly or, if by one of the parties, be conducted only with the attendance of the other's representative. The other party should not unreasonably refuse to cooperate.

18. Any failed interviewee may be reimbursed his/her reasonable travel expenses for attendance at the interview but should not be reimbursed for his/her time save in exceptional circumstances.

19. The appointee should not be reimbursed his/her travel expenses or time for attendance at the interview but, once the tribunal is constituted and arbitral proceedings under way, the appointed arbitrator should submit his/her travel expenses for reimbursement in the normal way but clearly separated an identified as relating to the interview.

Arbitrator Bias: How U.S. Courts Are Reacting to the Parties' Choice of Ethics Codes for Arbitrators and the Implications

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The standard for determining arbitrator bias as a ground for vacating an arbitration award was articulated by the U.S. Supreme Court in the 1968 case of *Commonwealth Coatings*[1] wherein a neutral arbitrator on a three-person panel failed to reveal a prior business relationship that existed between him and one of the parties. Finding that such non-disclosure amounted to ''evident partiality'' under Section 10(a)(2) of the Federal Arbitration Act (FAA),[2] the Court vacated the award. There have been no U.S. Supreme Court decisions on this particular issue in the 39 years since *Commonwealth Coatings* was decided, and the division among the circuits as to the interpretation of the standard articulated therein has grown. The hope for more clarity on this issue was recently dashed when the Supreme Court denied *certiorari* on June 12, 2007[3] in the *Positive Software* case, a Fifth Circuit decision decided *en banc* and containing the forceful dissent of five judges who chastised the circuit court for overruling a decision of the Supreme Court. In the *certiorari* petition, the appellant noted that ''[t]his disarray in the circuits casts a shadow over the entire federal arbitration system, as well as the dozens of state systems that piggyback on federal law.''[4]

Faced with the uncertainty of the ''evident partiality'' standard articulated in the FAA, arbitrators have increasingly sought to rely on the use of ethics codes to ensure compliance with disclosure standards, with mixed results. This article focuses on recent case law in which ethical codes and/or arbitration institution rules were invoked, and the courts' evaluation of the efficacy and applicability of these codes under the FAA.

[1] Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968).
[2] 9 U.S.C. § 10(a)(2).
[3] Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278 (5th Cir.), *cert. denied*, 127 S. Ct. 2943 (2007).
[4] Positive Software Solutions, Inc. v. New Century Mortgage Corp., petition for writ of *certiorari* 127 S. Ct. 2943 (2007).

HISTORY OF THE ARBITRATOR BIAS STANDARD

In *Commonwealth Coatings,* an arbitration award was set aside because a neutral arbitrator failed to disclose that his engineering firm had done business with one of the parties to the arbitration over a period of four or five years, and had been the recipient of approximately $12,000 in fees.[5] The relationship ended one year before the arbitration began and was never disclosed.[6] Justice Black, writing for a plurality of four members of the Court, delivered the opinion. Justices White and Marshall concurred, and Justices Fortas, Harlan, and Stewart dissented. In determining that *vacatur* was warranted, Justice Black wrote:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.[7]

Justice Black concluded that arbitrators must not only be unbiased, but also ''must avoid even the appearance of bias.''[8] In his concurrence, Justice White asserted that arbitrators ''are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.''[9] Justice White recognized the balance between expertise of arbitrators in their respective business fields and the inherent potential for conflicts that may arise. ''He [the arbitrator] cannot be expected to provide his complete and unexpurgated business biography.''[10] He also noted that ''arbitrators should err on the side of disclosure.''

The concurrence of Justices White and Marshall has drawn a great deal of commentary, as the vote of one of the concurring justices was required for the opinion to be a majority opinion. Indeed, some circuits have viewed

[5] Commonwealth Coatings Corp. v. Continental Cas. Co., *supra* note 1, at 146.
[6] *Id.*
[7] *Id.* at 149.
[8] *Id.* at 150.
[9] *Id.* at 150.
[10] *Id.* at 151.

Justice White's concurrence as irreconcilable with Justice Black's opinion, thereby relegating Justice Black's opinion to *dicta*, and have focused instead on the language in the concurring opinion of Justice White. This result has led to the development of various standards in the circuits and the lack of a uniform interpretation of the meaning of ''evident partiality'' under 9 U.S.C. Section 10(a)(2).[11]

THE FIFTH CIRCUIT AND THE *POSITIVE SOFTWARE* CASE

The history of the *Positive Software* case is a long and interesting one. In that case, which involved an American Arbitration Association (AAA) arbitration, the arbitrator in question stated that he had nothing to disclose regarding past relationships with either party or their counsel. After losing the arbitration, Positive Software conducted detailed investigations of the arbitrator's background and discovered that several years earlier he (the arbitrator) and his former law firm had represented the same party as New Century's counsel in a lengthy patent litigation, and one of New Century's attorneys in the arbitration had worked on the patent litigation.

The district court and a three-judge panel of the Fifth Circuit found that the arbitrator's undisclosed prior contacts with the law firm for one of the parties to the arbitration ''might have created an impression of possible partiality to a reasonable person,'' thus mandating *vacatur* of the award.[12] However, upon rehearing *en banc*, 11 judges of the Fifth Circuit found, on the very same facts, that the relationship was ''trivial'' and need not have been disclosed.[13] They decided to read Justice White's opinion ''holistically'' so that the standard is that in non-disclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceedings. The ''reasonable impression of bias'' standard articulated in *Commonwealth Coatings* is thus interpreted

[11] The Second Circuit articulated its interpretation of the *Commonwealth Coatings* explication on ''evident partiality'' in *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984). In *Morelite,* the neutral arbitrator's father was the vice-president of the international union whose local chapter was a party to the arbitration. While noting that the ''appearance of bias'' standard articulated in *Commonwealth Coatings* was too high, and the ''proof of bias'' standard was too low, the court instead established a ''reasonable person'' standard, holding that '' 'evident partiality' . . . will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.''

[12] Positive Software Solutions, Inc. v. New Century Mortgage Corp., *supra* note 3.

[13] *Id.*

practically rather than with utmost rigor. The Court noted that the AAA rules governing the proceeding required broad prophylactic disclosure of ''any circumstance likely to affect impartiality or create an appearance of partiality,'' but nevertheless remarked that whether the arbitrator's disclosure ran afoul of the AAA rules ''plays no role in applying the federal standard embodied in the FAA.''[14]

Five judges strongly dissented from the *en banc* opinion, noting in a forcefully worded manner that the Court had ignored the holding in *Commonwealth Coatings* and had ''overruled a decision of the Supreme Court.''[15] The difficulty inherent in deciding what contacts are significant enough to warrant disclosure is immediately apparent in this case. Guidance from the U.S. Supreme Court is not forthcoming, as *certiorari* was denied.[16]

In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Sanayi*,[17] a recent case from the Second Circuit, the parties signed a Submission Agreement that detailed disclosure procedures for the arbitrators. The Chairman of the tribunal submitted a disclosure statement in 2003 stating that he had no personal or business relationship with any party. In April 2005, the Chairman amended his disclosure statement to include the fact that his office was doing business with a suitor who wanted to buy the claimant. The Chairman noted that he was not involved in the negotiations and that it did not affect his ability to decide the matter.[18]

In September 2005 the panel issued an award (2-1) in favor of the claimant. The losing party investigated the relationship between the Chairman's company and the suitor, and discovered there had been an ongoing commercial relationship for over a year. The losing party asked the Chairman to resign from the panel and he declined, whereupon the losing party filed an action to remove the Chairman and vacate the award.

The lower court cited *Commonwealth Coatings* and focused on Justice White's mention of the need for full disclosure as a means of avoiding intervention or enforcement, and noted that arbitrators should err on the side of disclosure. In addition, the lower court cited to the 2004 AAA/ABA (American Bar Association) Code of Ethics for Arbitrators[19] and the 2004 International Bar Association (IBA) Guidelines on Conflict of Interest in

[14] *Id.*

[15] *Id.* at 286.

[16] *Id.*

[17] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Sanayi, 492 F.3d 132 (2d Cir. 2007)

[18] *Id.*

[19] Code of Ethics for Arbitrators in Commercial Disputes (2004), *available at* http://www.adr.org.

International Arbitration[20] as requiring disclosure at any stage of the arbitration.[21]

The court concluded that under these guidelines, the Chairman's failure to investigate and subsequent lack of knowledge did not excuse his lack of disclosure. Remarking that it is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, and emphasizing the notion of full disclosure as integral to the integrity of the panel's decision, the court concluded that the award should be vacated.[22]

The Second Circuit upheld the *vacatur* of the award. They noted that arbitrators have a duty to investigate when they have reason to believe there may be a non-trivial conflict or duty to inform parties that they intend not to investigate. Since the arbitrator in this case knew of a potential conflict and failed to investigate or disclose that he knew and intended not to investigate, his inaction amounted to ''evident partiality.'' While the circuit court mentioned the fact that the lower court had cited to the AAA/ABA Code of Ethics and the IBA Guidelines on Conflicts of Interest, the circuit court relied solely on an analysis of the *Commonwealth Coatings* case in upholding the *vacatur* of the award. Accordingly, it is difficult to say whether or not the circuit court believes that these codes play any role in the disclosure analysis under the FAA.

TWO CASES FROM CALIFORNIA STATE COURT

In *Azteca Construction v. ADR Consulting,*[23] there was a conflict between the AAA rules and the California Arbitration Act.[24] The AAA rules provided that it (AAA) would have the final decision as to whether an arbitrator should be removed, whereas the California Arbitration Act provided that if either party objected once an arbitrator had made his or her disclosures, the arbitrator would be removed.

Upon receiving the disclosure statement in this case, which revealed that the arbitrator in question had served as an arbitrator on matters in which ADR Consulting's counsel had served as counsel, plaintiff Azteca requested that the arbitrator be removed from the case. The AAA followed

[20] Rules of Ethics for International Arbitrators, *available at* http://www.ibanet.org.

[21] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Sanayi, 2006 WL 1816383 (S.D.N.Y. 2006).

[22] *Id.*

[23] Azteca Constr. v. ADR Consulting, 121 Cal. App. 4th 1156 (2004).

[24] Cal. Code Civ. Proc. § 1280 et seq.

its rules and declined to remove the arbitrator. The court in *Azteca* took the drastic remedy of vacating the award, stating that the provision for arbitrator disqualification may not be waived or superseded by a private contract such as the AAA rules. Noting that the statute contained the words ''shall vacate'' the award, the court remarked that it had the disqualification was mandatory.[25]

Similarly in *Ovitz v. Schulman,*[26] a joint venture film production company filed a petition to confirm an AAA award in its favor. The losing party filed to vacate the award based on the arbitrator's failure to comply with the California state disclosure obligation. The arbitrator had not notified the parties that he was serving as an arbitrator in another case in which counsel for claimant was the same law firm as the present case. The court vacated the award, stating that the California statute compels *vacatur* by use of the word ''shall.'' The court in *Ovitz* remarked that the FAA ''evident partiality'' standard did not preempt the California state standard for vacating an arbitral award.[27]

CONCLUSION

There is no consensus among the circuits as to what information is appropriate for arbitrators to disclose and when non-disclosure rises to ''evident partiality'' resulting in the *vacatur* of the arbitration award. The Supreme Court will eventually review a case that revisits the *Commonwealth Coatings* ''evident partiality'' holding, which hopefully will clear up the present confusion. Until there is additional guidance on this standard, it is important that the parties to an arbitration understand that any challenge to an arbitration award due to arbitrator ''evident partiality'' may be viewed differently depending on which circuit the case is venued.

Recent case law indicates that courts may look to the ABA/AAA Ethics Code and other codes for guidance to support full disclosure by an arbitrator. It is unclear however whether courts would support a ''green list'' situation as contemplated under the IBA Disclosure Guidelines, wherein an arbitrator would not be required to disclose certain conflicts that had happened three years or more prior to the arbitration. While certain courts might consider such facts ''trivial'' and not require disclosure, it appears that other courts would, in accordance with *Commonwealth Coatings*, require that they be disclosed. Finally, if the California state court cases are any

[25] Azteca Constr. v. ADR Consulting, *supra* note 23, at 1169.
[26] Ovitz v. Schulman, 133 Cal. App. 4th 830 (2005).
[27] *Id.* at 845.

guideline, state courts will apply their own disclosure rules, despite parties selection of institutional rules. Hence, parties will have to be careful to ensure that they are in compliance with the relevant standard in order to avoid the risk of *vacatur* of their award.

Claims Against Arbitrators for Breach of Ethical Duties

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INTRODUCTION

Arbitral immunity is a well-established principle in international arbitration. Excluding arbitrators from certain liabilities aims to prevent frivolous lawsuits brought by parties who are dissatisfied with the merits of the arbitral award and uphold the administration of justice. The immunity of arbitrators limits the opportunity for aggrieved parties to hold the arbitrators personally liable and claim damages against them. However, arbitral immunity is not absolute. Arbitrators have a duty to act fairly and impartially in arbitration proceedings.[1] Arbitral institutions and State courts recognize that arbitrators owe ethical duties to the parties. National arbitration laws and institutional rules contain provisions that either extend immunity to arbitrators or set out the liabilities of arbitrators.[2] The ethical duties of

[1] *See* United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration,* U.N. Doc. A/40/17 (1985), as amended in 2006 [hereinafter Model Law], *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Model Law Article 18 provides that ''The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.''

[2] American Arbitration Association/American Bar Association (AAA/ABA) Code of Ethics for Arbitrators in Commercial Disputes (2004), *available at* http://www.adr.org. *See also* the codes of ethics prescribed by the Chartered Institute

arbitrators generally include (1) a duty to act fairly and uphold the integrity of the arbitration process, (2) a duty to act impartially and disclose any conflicts of interest,[3] (3) a duty to act independently and avoid impropriety or the appearance of impropriety in communicating with parties, and (4) a duty to conduct the proceedings diligently. The arbitration rules or legislation of certain jurisdictions may have more specific duties, like conducting the proceedings or rendering an award expeditiously,[4] and not to withdraw from the arbitration except in stipulated circumstances.[5]

IMMUNITY OF ARBITRATORS: COMMON LAW JUDGE IMMUNITY ANALOGY

The common law jurisdictions adopt a functional analysis of the role of arbitrators. Under this view, arbitrators exercise judicial or quasi-judicial functions that render them comparable to judges. The English courts have consistently recognized that arbitrators are in a quasi-judicial position and enjoy immunity from negligence and mistakes in law or fact.[6] The immunity of arbitrators in the exercise of their judicial functions is an exception to the general principle that a person with professional expertise may be liable in damages for negligence if he fails to exercise due care and skill. Such

of Arbitrators (CIARB), *available at* http://www.arbitrators.org/joining/ethical_conduct.asp; Singapore International Arbitration Centre (SIAC), *available at* http://www.siac.org.sg/cop-ethics.htm; Chamber of National and International Arbitration of Milan (CNIAM), *available at* http://www.camera-arbitrale.com/show.jsp?page=169945; the IBA Guidelines for Conflicts of Interest *available at* http://www.ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf; the Cairo Regional Centre for International Commercial Arbitration, *available at* http://www.crcica.org.eg/code_ethics.html.

[3] Model Law, *supra* note 1, Article 12(1) provides that, ''When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.''

[4] Austrian Civil Procedure Code § 595(4) (Zivilprozessordung)

[5] Under English Arbitration Act 1996, Section 25, *available at* http://www.opsi.gov.uk/ACTS/acts1996/ukpga_19960023_en_1, the parties are free to agree with the arbitrator as to the consequences of resignation with regards to his entitlement to fees or expenses, and any liability thereby incurred by the arbitrator. If there is no such agreement, the arbitrator may apply to the court to grant him relief from any liability thereby incurred. The arbitrator will not be held liable if he had reasonable cause for his resignation.

[6] Lendon v. Keen, [1916] 1 K.B. 994, 999 (K.B.) per Sankey J.; Arenson v. Casson Beckman Rutley & Co., [1977] A.C. 405 (H.L.)

immunity is also ''vital to the efficient and speedy administration of justice and therefore necessary on grounds of public policy.''[7]

The Irish courts have also recognized the quasi-judicial role of arbitrators. In *Patrick Redahan v. Minister for Education and Science*,[8] the High Court of Ireland held that the defendant arbitrator was acting in a quasi-judicial capacity sufficient to attract immunity from suit at common law, save for any acts in bad faith, which was conceded not to have been the case. The Court drew support for its decision from other common law jurisdictions (e.g., England, Australia, and the United States), and stated that an arbitrator performs duties of a judicial character, and as a result, enjoys quasi-judicial status. The Irish Supreme Court has also recognized that arbitrators and judges enjoy the same immunity on the basis that they both perform an adjudicative function.[9]

In Australia, Section 51 of the Commercial Arbitration Act 1984 excludes liability for negligence but expressly imposes liability for fraud. However, there have been some strong statements from the Australian courts supporting the liability of arbitrators. In *Najjar v. Haines*,[10] Kirby P. listed four reasons why arbitrators should not ordinarily be immune at common law: (1) such immunity would be exceptional (compared to the standards to which other professionals are held), (2) parties help select the arbitrator, and hence his position is distinguishable from a judicial one, (3) the ordinary rule in society is that a person wronged should have redress, and (4) arbitrators have a financial and vested interest in conducting cases and thus should not be immune.

In *Sinclair v. Bayly*,[11] the Court held that arbitral immunity applies where an arbitrator takes into account material not in evidence, and renders the award invalid. The arbitrator is also immune from liability to pay costs. However, the Court opined that upholding the liability of arbitrators would provide parties redress and ensure a proper system of loss distribution. It also observed that, where the lapse is so gross that a lack of good faith can

[7] *Id.*

[8] Patrick Redahan v. Minister for Education and Science, [2005] I.E.H.C. 271.

[9] In *Beatty v. The Rent Tribunal*, [2005] I.E.S.C. 66, a statutory rent tribunal had determined the rent of a ''controlled dwelling,'' which was even less than the valuation of the tenant. After the landlords successfully quashed the tribunal's decision, the landlords sued tribunal for damages for loss caused by an invalid decision of the tribunal.. The Irish High Court allowed the claim and awarded damages. The Irish Supreme Court allowed the tribunal's appeal on the basis that the immunity of a statutory tribunal arises at common law. The Supreme Court also applied and approved *Arenson v. Casson Beckman Rutley & Co., supra* note 6.

[10] Najjar v. Haines (1991) 25 N.S.W.L.R. 224.

[11] Sinclair v. Bayly, unreported, Supreme Court of Victoria, Justice Nathan, Oct. 19, 1994.

be inferred, and where the lapse is not negligent but results in an award being aborted, an arbitrator may become personally liable for costs (given that the statute only excludes liability for negligence), as bad faith was not necessarily negligence.

Arbitrators and arbitral institutions in the United States enjoy the broadest degree of immunity from suit for actions taken within their duties.[12] Judgments made by arbitrators are ''functionally comparable to those of a judge,''[13] and arbitrators are granted the same immunity as courts because of the nature of their decision-making power, even though they do not hold a federal office.[14] The immunity of arbitration institutions in the United States is parasitic on the immunity of arbitrators; without the later an arbitral institution can be held liable in place of the arbitrator.[15] All circuits recognize the doctrine of arbitral immunity,[16] and most U.S. courts take the view that recourse to the Federal Arbitration Act (FAA)[17] for any breach of the duties of an arbitrator (i.e., vacatur or rehearing) should be the exclusive remedy.[18] If an arbitrator defaults on his contractual duty by

[12] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* ¶ 5-18 (4th ed. 2004) [hereinafter Redfern & Hunter].

[13] Butz v. Economou, 438 U.S. 478, 511-12 (1978) (U.S. Supreme Court), establishing the principle that the extension of judicial-like immunity to non-judicial officials is properly based on the ''functional comparability'' of the individual's acts and judgments to the acts and judgments of judges.

[14] Corey v. New York Stock Exchange (NYSE), 691 F.2d 1205, 1209 (6th Cir. 1982). *See also* Stasz v. Schwab, 121 Cal. App. 4th 420, 17 Cal. Rptr. 3d 116, 04 Cal. Daily Op. Serv. 7169; Austern v. Chicago Board of Options Exch., 898 F.2d 882, 885-86 (2d Cir. 1990); Butz v. Economou, *supra* note 13; Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987).

[15] W.C. Moffitt, ''Choice of Governing Rules of Arbitration under the Doctrine of Arbitral Immunity in Strategic Resources, Inc. v. BCS Life Insurance, Inc.,'' 5 *J. Am. Arb.* 179 (2006). In *Cort v. American Aribtration Association,* 795 F. Supp. 970 (N.D. Cal. 1992), a disgruntled party sued the AAA, alleging that the selection of arbitrators was an administrative function and not quasi-judicial in nature. The court held that the AAA was immune from suits arising from the selection of arbitrators. The U.S. District Court for the Northern District of California also held in *Alexander v. American Arbitration Association,* WL 868823 (N.D. Cal. July 27, 2001) that the AAA was immune when it uses its discretion to choose the applicable rules governing an arbitration proceeding.

[16] In a recent decision delivered on February 20, 2007, the Tenth Circuit Court of Appeals, in *Pfannenstiel v. Merill Lynch, Pierce, Fenner & Smith,* 477 F.3d 1155 (10th Cir. 2007), observed (citing cases from nine other circuits), that ''[e]very other circuit that has considered the issue of arbitral immunity recognizes the doctrine.''

[17] 9 U.S.C. §§ 1-14, 43 Stat. 883 (Feb. 12, 1925).

[18] Higdon v. Constr. Arb. Assocs., Court of Appeals of Kentucky 71 S.W.3d 131 (Ky. App. 2002) (proper remedy for any violation of terms and conditions of arbitration agreement stemming from the arbitrator's alleged entertaining of untimely counterclaim and gross underestimation of complainant's damages was an

failing to render a timely decision, he loses his claim to immunity because he loses his resemblance to a judge. In *E.C. Ernst v. Manhattan Construction Company of Texas,*[19] the court recognized the contractual duty to render a timely decision and held the arbitrator liable for damages for the loss caused by his failure to render an award. However, arbitral immunity in the United States does not appear to be broad enough to cover a withdrawal from an arbitration without reasons. The rationale appears to be that an arbitrary withdrawal would be inconsistent with ethical strictures and an arbitrator's quasi-judicial role, and amounts to a breach (or non-performance) of the arbitrator's contractual duty to conduct a binding arbitration.[20]

CIVIL LAW CONTRACTUAL ANALYSIS

The civil law jurisdictions adopt a contractual analysis of the role of arbitrators.[21] Under the contractual approach, the arbitrator performs the service of resolving a dispute for a fee. The terms of the arbitrator's contract may be set out in the submission to arbitration, the relevant rules of arbitration, the terms of reference or terms of appointment. Other terms may be imposed by operation of law, for example, the duty to act with due diligence and the duty to act judicially.[22] The immunity of an arbitrator is therefore a contractual term negotiated between the parties and the arbitrator. The extent of arbitral liability is subject to modifications but within the limits of mandatory provisions of the national law.[23] It may be worthwhile to note that the judge immunity analogy does not apply in civil law jurisdictions. Unlike common law judges who enjoy judicial immunity, civilian judges can be held liable for all culpable and wrongful acts, including adjudicatory acts. To a variable extent and under specific

action for review of the award, not damages. Such decisions were the sort of procedural and factual determinations an arbitrator is commonly called upon to make.).

[19] E.C. Ernst v. Manhattan Constr. Co. of Texas, 551 F.2d 1026 (5th Cir. 1977).

[20] In *Morgan Phillips v. JAMS/Endispute,* 140 Cal. App. 4th 795 (2006), the California Court of Appeals (Second Appellate District, Division 4) stated that arbitral immunity cannot be used to ''immunize the unprincipled abandonment and refusal to make a decision.'' *See also supra* notes 15, 16, 18, and 19.

[21] Redfern & Hunter, *supra* note 12, at ¶ 5-16.

[22] Austrian Civil Procedure Code Section 595(4) imposes liability on an arbitrator for damages for failure to act in a timely manner.

[23] C. Hausmaninger, ''Civil Liability of Arbitrators—Comparative Analysis and Proposals for Reform,'' 7(4) *J. Int'l Arb.* 7, 11 et seq., 19 (1990).

circumstances, parties to a judicial proceeding can recover damages caused by judicial wrongdoing.[24]

EXAMPLES OF STATUTES GRANTING IMMUNITY OR IMPOSING LIABILITY

The Model Law contains no provision on the liability of an arbitrator for misconduct or error, and so there is no uniform approach to immunity. It is notable that, in the drafting of the Model Law, there was general agreement among members of the Working Group on International Contract Practices that the question of the liability of an arbitrator could not appropriately be addressed in a model law on international commercial arbitration.[25] That was because the liability issue was not widely regulated and remained highly controversial. National arbitration laws therefore have different formulations either granting immunity or imposing liability on arbitrators.

Statutes that grant immunity to arbitrators include Section 25 of the Singapore International Arbitration Act (Cap. 143A) (IAA)[26] and Section 29 of the English Arbitration Act 1996,[27] Under Section 25A of the IAA, the appointing authority and arbitral institutions are only liable for acts or omissions in bad faith. In the United States, Section 14(a) of the Revised Uniform Arbitration Act 2000 is a broad provision that grants immunity to an arbitrator or arbitration organization to the same extent as a judge of a state court acting in a judicial capacity. In Hong Kong, although Section 2GM of the Hong Kong Arbitration Ordinance (Cap. 341) (1997)[28] imposes liability on arbitrators, it is in effect a blanket immunity, save for dishonesty.

Statutes that impose liability on arbitrators include Section 51 of the Australian Commercial Arbitration Act 1984,[29] which expressly imposes liability for fraud. In England, upon the removal of an arbitrator under

[24] *Id.* at 13-14.

[25] *Report of the Working Group on International Contract Practices on the Work of Its Third Session*, U.N. Doc. A/CN.9/216, at III(5), *available at* http://www.uncitral.org/uncitral/en/commission/sessions/15th.html. *See also Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration,* U.N. Doc. A/CN.9/207, ¶ 70, *available at* http://www.uncitral.org/uncitral/en/commission/sessions/14th.html).

[26] IAA Section 25, *available at* http://www.statutes.agc.gov.sg, excludes the liability of arbitrators for negligence or mistakes in law, fact or procedure.

[27] Under English Arbitration Act 1996, *supra* note 5, Section 29, an arbitrator is only liable for acts or omissions in bad faith. Under Section 25 of the same act, an arbitrator can be liable for resignation without reasonable cause (*see supra* note 3).

[28] *Available at* http://www.hklii.org/hk/legis/ord/341/.

[29] *Available at* http://www.austlii.edu.au/au/legis/vic/consol_act/caa1984219.

Section 24(4) of the English Arbitration Act 1996,[30] a court may order the arbitrator to repay any fees or expenses already paid.

EXAMPLES OF ARBITRAL RULES GRANTING IMMUNITY OR IMPOSING LIABILITY

The International Chamber of Commerce (ICC) Rules,[31] AAA Commercial Arbitration Rules and Mediation Procedures,[32] and the International Centre for the Settlement of Investment Disputes (ICSID) Rules[33] grant blanket immunity, but under the provisions of the latter, ICSID itself may waive the immunity.[34] The London Court of Arbitration (LCIA) Rules[35] and the World Intellectual Property Organization (WIPO) Arbitration Rules[36] grant immunity save for conscious and deliberate wrongdoing. The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce grant immunity save for ''wilful misconduct or gross negligence.''[37] Article 584(2) of the Stockholm Rules also imposes general liability for damages caused by an arbitrator's wrongful refusal or delay, and allows the parties to claim rescission of the arbitration agreement.[38]

[30] *Supra* note 5.

[31] *Available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf. ICC Rules Article 34 states that, ''Neither the arbitrators, nor the Court and its members, nor the ICC and its employees nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.''

[32] *Available at* http://www.adr.org/sp.asp?id=22440. Rule 48(b) states that, ''Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party to judicial proceedings relating to the arbitration.''

[33] *Available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

[34] ICSID Rules Article 20, *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp, states that: ''The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.'' *See also* Article 21(a). To date, there have been two applications to ICSID to waive immunity, but both were refused because the party in the respective cases sought annulment of the award as well.

[35] *Available at* http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf.

[36] *Available at* http://www.wipo.int/amc/en/arbitration/rules/.

[37] *Available at* http://www.sccinstitute.com/uk/About/. Stockholm Rules Article 48 states that ''neither the SCC Institute nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes wilful misconduct or gross negligence.''

[38] Stockholm Rules, *id.*, Article 584(2) states that, ''An arbitrator who does not fulfil in time or at all the obligations assumed by his acceptance of office is liable to the parties for all the loss caused by his wrongful refusal or delay, without prejudice to the parties rights to claim rescission of the arbitration agreement.''

INSTITUTIONAL POWERS OF SUPERVISION

Arbitral institutions may impose penalties for breach of the institutions' code of ethics. This shows that arbitrators do not, in practice, enjoy absolute immunity. ICSID, for example, may waive arbitral immunity if an arbitrator is found liable for wilful misconduct (e.g., actual bias or corruption). The HKIAC Court of Arbitration, a supervisory body that investigates complaints against arbitrators on its Panel of Arbitrators, has Terms of Reference that deal with complaints against members of the HKIAC Panel. The HKIAC Court reviews any decision of the HKIAC Panel Selection Committee that a complaint does not warrant an investigation by the Court, and has the discretion to override the decision of the Panel Selection Committee.

The Chamber of National and International Arbitration of Milan (Chamber of Arbitration) also has a Code of Ethics that empowers the Chamber of Arbitration to replace an arbitrator who fails to comply with the Code. The additional sanction is that the Chamber of Arbitration may refuse to confirm subsequent appointments of the errant arbitrator because of that violation.[39] Members of the Chartered Institute of Arbitrators (CIARB) are subject to the Royal Charter and its Bye-laws. A disciplinary tribunal may be set up by the CIARB to decide upon any violations of the code of ethics in the conduct of an arbitration. Sanctions may vary from reprimands and censure, on the one hand, to expulsion from the Institute, on the other.[40] In contrast, the Singapore International Arbitration Centre (SIAC) Code of Ethics for Arbitrators provides that breach of the Code is not intended to provide grounds for the setting aside of an award and does not appear to impose any penalty for violations of the Code.[41] The SIAC Code therefore makes it clear that an appropriate remedy for a party dissatisfied with the merits of an award is to attempt to set it aside or resist enforcement under the Model Law. To impose personal liability on an

[39] Chamber of Arbitration's Code of Ethics Article 13, *available at* http://www.camera-arbitrale.com/show.jsp?page=169945, states that, ''The arbitrator who does not comply with this Code of Ethics shall be replaced by the Chamber of Arbitration, which may also refuse to confirm him in subsequent proceedings because of this violation. The arbitrator shall not accept any direct or indirect arrangement on fees and expenses with any of the parties or their counsel.''

[40] Royal Charter and Bye-Laws of the CIARB Bye-Law 15.2, *available at* http://www.arbitrators.org/joining/charter_bye-laws.asp, sets out what constitutes ''misconduct,'' for example ''(3) falling significantly below the standards expected of a competent Practitioner or a competent professional person acting in the field of private dispute resolution.''

[41] SIAC Code of Ethics for Arbitrators art. 7.2, *available at* http://www.siac.org.sg/cop-ethics.htm.

arbitrator on the pretext of a breach of the institutional code of ethics is not a substitute remedy for challenging the merits of the award.

CLAIMS AGAINST ARBITRAL INSTITUTIONS

Although this paper seeks to focus on the claims against arbitrators for breach of ethical duties, it is useful to note that arbitral institutions have also become targets for aggrieved parties who have lost an arbitration. The general view is that there is a contractual relationship between parties to the arbitration and the arbitral institution administering the arbitration.[42] Arbitral institutions in common law jurisdictions have immunity, at least against negligence or errors of procedure, on the basis that they operate as quasi-judicial organizations to protect those functions that are closely related to the arbitral process and sufficiently related to the adjudicative phase of the arbitration. For example, Section 74 of the English Arbitration Act 1996 grants immunity to an appointing authority, and imposes liability for acts or omissions in bad faith.[43]

In the United States, arbitral immunity is absolute and covers acts by an arbitral institution that are associated with the judicial phase of the proceedings. In *Austern v. Chicago Board of Options Exchange,*[44] the investors (Austern) were parties to an arbitration. The investors had successfully set aside the arbitral award but went on to sue the Chicago Board of Options Exchange (as the sponsoring organization) for mental anguish and expenses of defending against the confirmation of the award. The court held that the administrator of an arbitration was immune from suit for the alleged failure to notify the investor of pending arbitration proceedings. The investors had already obtained the exclusive remedy of defeating the confirmation of the award.

In an Austrian case,[45] an arbitrator in the Vienna International Arbitral Centre (VIAC) was successfully challenged on the grounds of failure to

[42] Redfern & Hunter, *supra* note 12, at ¶ 5-21.

[43] Section 74 of the English Arbitration Act 1996, *supra* note 5, states that: ''(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith. (2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted to be done by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.''

[44] Austern v. Chicago Board of Options Exch., *supra* note 14.

[45] OGH Nov. 30, 2006.

disclose a material conflict of interest. The arbitrator then asked for his fees, but the Secretary-General of the VIAC decided not to pay out any fees to the arbitrator because he breached his duty of disclosure. The arbitrator sued the VIAC. The VIAC defended the case and won, so no fees were payable to the arbitrator who was removed for conflict of interest.

The French courts have affirmed the contractual relationship between the parties and the institution, and find it unnecessary to treat institutions as judicial bodies.[46] In *Société Cubic Defense System v. Chambre de Commerce Internationale,*[47] the French Cour de Cassation recognized a contract between the parties to the arbitration and the ICC. Under that contract, it was held, the ICC is contractually obligated to fulfill its essential function as an arbitral institution, that is, to follow the rules applicable to the arbitration, and is potentially liable for any breach of the arbitration agreement.

CLAIMS AGAINST ARBITRATORS FOR BREACH OF ETHICAL DUTIES

Claims for Delay by Arbitrators

National arbitration laws or institutional rules may stipulate a requirement to render a timely award or act without unnecessary delay,[48] which forms part of a tribunal's duty to act with due diligence. The ICC Rules fixes a time limit of six months for an arbitral tribunal to make an award,[49] though it may be extended by consent of the parties or at the initiative of the institution.[50] The English Arbitration Act 1996 provides that an arbitrator who fails to proceed with reasonable speed in conducting the arbitration, and making his award, may be removed by a competent court.[51] However,

[46] M. Rasmussen, ''Overextending Immunity: Arbitral Institutional Liability in the United States, England and France,'' 26 *Fordham Int'l L.J.* 1824, 1863 (2003).

[47] Société Cubic Defense System v. Chambre de Commerce Internationale, 1997 *Rev. Arb.* 417,

[48] Model Law, *supra* note 1, Article 14(1) states that, ''If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.''

[49] ICC Arbitration Rules art. 24.1, *supra* note 31.

[50] *Id.,* art. 24.2.

[51] English Arbitration Act 1996, *supra* note 5, Section 33(1)(b)

some caution must be taken against imposing liability for delay that is not excessive,[52] as what is ''reasonable despatch'' depends on the circumstances of the case.[53] Even if an arbitrator is found liable for being dilatory, it seems that his obligation to proceed with reasonable speed will not be enforced by specific performance.[54]

Under certain arbitration laws, the time limit is a ''drop-dead'' provision that terminates the authority of the arbitral tribunal and makes it *functus officio*, and the award will be null and void. Article 1456 of the French New Code of Civil Procedure (the French Code)[55] stipulates a period of six months for an arbitral tribunal to render an award in the absence of other provisions in the arbitration agreement. If the parties had not agreed to an extension of time or sought an extension from the court, the tribunal would have to request an extension of time to render the award. If the tribunal fails to do so, the award rendered out of time may be set aside under Article 1456. In the *Juliet* case in the First Civil Chamber of the Cour de Cassation,[56] the three-member tribunal published its award out of time in breach of Article 1456 of the French Code. The Court of Appeal annulled the award, as the tribunal failed to request an extension of time. A party to the arbitration brought a claim for breach of contract against the arbitrators. The Cour de Cassation found that the arbitrators were liable for damages for breach of contract. The tribunal had an obligation under Article 1456 of the French Code to obtain an extension of time from the court for delivering the award out of time, where the parties had not agreed to such an extension.

The AAA Commercial Arbitration Rules have a more restrictive time limit: the arbitral tribunal has to render the award no later than 30 days from the date of closing the hearing.[57] In *Baar v. Tigerman,*[58] the arbitrator (Tigerman) failed to render an award within 30 days from the date of closing the hearing and in fact had yet to make an award seven months after

[52] S. Franck, ''The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity,'' 20 *N.Y. L. Sch. J. Int'l & Comp. L.* 1, 57 (2000).

[53] D. Sutton & J. Gill, *Russell on Arbitration* ¶ 7-083 (22d ed. 2003)

[54] Sir M.J. Mustill & S.C. Boyd, *Commercial Arbitration* 231 (2d ed. 1989).

[55] *Available at* http://www.lexinter.net/ENGLISH/code_of_civil_procedure.htm.

[56] Louis Juliet, Benoît Juliet v. Paul Castagnet (arbitrator), Pierre Couilleaux (arbitrator) and Adolphe Biotteau (arbitrator), Case 1660 FS-P+B (Dec. 6, 2005).

[57] Rule 41 of the AAA Commercial Arbitration Rules states that, ''The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing of the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.''

[58] Baar v. Tigerman, 140 Cal. App. 3d 979, 211 Cal. Rptr. 426 (1983).

the submission. The authority of the arbitrator vested in him by the AAA contract and statutory law to make an award terminated. One party to the arbitration brought an action against the arbitrator and the AAA. That party alleged breach of contract, negligence, and breach of the implied covenant of good faith. That party also argued that the AAA failed to exercise reasonable care in the selection of Tigerman as an arbitrator, and therefore the AAA failed to administer the arbitration properly. The California Court of Appeals (Second District, Division 3) held that an arbitrator who breaches his contract to render a timely award was not entitled to judicial immunity. Further, it held that arbitration immunity did not extend to a private arbitration association for its administrative action. Following *Baar v. Tigerman*, the California Legislature adopted Section 1280.1 of the Code of Civil Procedure[59] to expand arbitral immunity to conform to judicial immunity and supersede the holding in that case. In *Thiele v. RML Realty Partners,*[60] the Court of Appeals (Second District, Division 7) extended arbitral immunity to the AAA on the basis that arbitral immunity should be liberally construed. The court stated that the act of sending out the arbitral award was sufficiently associated with the adjudicative phase of the arbitration to justify immunity. In *Morgan Phillips v. JAMS/Endispute*, the California Court of Appeals held that an arbitrator's failure to render an arbitral award is ''not integral to the arbitration process; [but] a breakdown of that process.'' A refusal to render an award is in effect a ''complete non-performance'' of the ultimate object of the arbitration agreement.[61]

The Austrian Civil Procedure Code imposes an obligation on arbitrators to act without undue delay. In an Austrian case before the Austrian Supreme Court[62] concerning two arbitrators who had been sued by the losing party, the Court set out two pre-conditions for the arbitrators to be held liable for breach of the duty to act without undue delay: (1) the award must have been successfully challenged, and (2) there had been some kind of negligent behavior on the part of the arbitrators.

The cases show that, where there is a strict time limit that must be adhered to, it would seem that there is no defence in a contractual claim for the failure to conduct the arbitration without undue delay in jurisdictions that recognize such a contractual claim against the tribunal. The award may be rendered null and void in such circumstances, but any damages inflicted

[59] California Code of Civil Procedure Section 1280.1 provides that ''[a]n arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract.''

[60] Thiele v. RML Realty Partners, 14 Cal. App. 4th 1526 (1993),

[61] Morgan Phillips v. JAMS/Endispute, *supra* note 20.

[62] OGH (June 6, 2006).

through the conduct of the arbitrators would be difficult to quantify.[63] However, the arbitral rules of the main institutions do not impose liability to compensate the parties for delay. In those jurisdictions that do not recognize such a contractual claim, there is no compensation in damages for a party who has suffered loss as a result of delay in proceeding with the arbitration.

Claims for Failure to Disclose Conflicts of Interest

The obligation to disclose conflicts of interest is essential to the independence and impartiality of the arbitrator. Article 12(1) of the Model Law imposes on an arbitrator a continuing obligation of disclosure of any conflicts of interest that may arise from the time of his appointment and throughout the arbitral proceedings.[64] The IBA Guidelines on Conflicts of Interest in International Arbitration set out an objective test for the disclosure of any conflicts of interest: an arbitrator should disclose circumstances that, ''from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence.''[65] The IBA Guidelines also enumerate various categories of specific situations in respect of which disclosure is made, and specific consent by the parties or a presumption of consent, if no timely objection is made, is required.[66]

Claims against arbitrators for failure to declare conflicts of interest can lead to the award being vacated or at least the termination of the arbitration.[67] The French courts have found arbitrators liable to compensate parties for losses incurred through a breach of the duty of disclosure that leads to a successful challenge of the award. In *Raoul Duval v. V*[68] (Tribunal

[63] Julian D.M. Lew, Loukas A. Mistrelis & Stefan Kröll, *Comparative International Commercial Arbitration* ¶ 12-59 (2003).

[64] *See also* AAA/ABA Code of Ethics for Commercial Arbitrators, *supra* note 2, Canon II (2004)

[65] IBA Guidelines on Conflicts of Interest in International Arbitration, *supra* note 2, General Standard 2(b) (2004).

[66] *See id.* Part II and the Non-Waivable Red List, Waivable Red List, Orange List and Green List.

[67] *Id.*, ¶ 5. The Working Group on the IBA Guidelines is of the view that a later challenge based on the fact that an arbitrator did not disclose facts or circumstances giving rise to justifiable doubts as to his impartiality or independence should not result automatically in either non-appointment, later disqualification, or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.

[68] Raoul Duval v. V, 1996 *Rev. Arb.* 41.

de Grand Instance, Paris),[69] the chairman of the arbitral tribunal started working for one of the parties the day after the award was rendered. The chairman failed to disclose this fact to the parties. The arbitral award was set aside on the ground of unlawful constitution of the tribunal. Duval then sued the arbitrator for loss caused by his conduct. The court held that the arbitrator was liable on a contractual basis to pay damages for the fees paid to the arbitrators and the arbitral institution, as well as costs incurred for the defense.

The Finnish courts have also found arbitrators liable to compensate parties for losses incurred through a failure to disclose conflicts of interest. In *Urho, Sirkka and Jukka Ruola v. X,*[70] the plaintiff had successfully annulled the arbitral award in a prior action in which he challenged the award on the ground of bias. In this subsequent action before the Finnish Supreme Court, the plaintiff sued the arbitrator directly for the costs and expenses of the arbitration. The arbitrator had failed to disclose the fact that he had given several legal opinions to the defendant company and financial institutions who were intervening parties in the arbitration. The Finnish Supreme Court held that the arbitrator's non-disclosure constituted a breach of contract and awarded the plaintiff the costs and expenses of the arbitration.

In the United States, claims against arbitrators for failure to disclose conflicts of interest do not result in any loss of arbitral immunity. Under Section 14(c) of the Revised Uniform Arbitration Act 2000, an arbitrator's failure to make a disclosure required by Section 12 does not cause any loss of immunity under this section. The typical remedy for a failure to disclose conflicts of interest is *vacatur* under Section 23 of the act.

There is a positive duty on arbitrators to investigate possible conflicts of interest.[71] In *HSMV Corp. v. ADI Ltd.*,[72] the arbitrator's law firm had an indirect professional relationship with the defendant. The plaintiff discovered this conflict of interest only after two awards were rendered and brought an action to vacate the second award. The arbitrator claimed that he was unaware of this relationship. The District Court for the Central District of California vacated the second award and held that arbitrators have an affirmative duty to investigate possible conflicts.

[69] Confirmed by Cour d'appel Paris in Rev Arb. 324 (1999) and Cour de Cassation.

[70] Urho, Sirkka and Jukka Ruola v. X, KKO 2005:14.

[71] Commonwealth Coatings Corp. v Continental Cas., 393 U.S. 145, 151-52 (1968); the U.S. Supreme Court held that arbitrators ''should err on the side of disclosure'' as ''it is better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship.''

[72] HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122 (C.D. Cal 1999).

Although an award may be vacated on the basis of apparent partiality, the doctrine of arbitral immunity in the United States ensures that arbitrators are not held personally liable for failure to disclose conflicts of interest. In *Blue Cross Blue Shield of Texas v. Juneau*,[73] Juneau was an arbitrator on the arbitration panel in a dispute between HealthCor Liquidation Trust (HealthCor) and Blue Cross Blue Shield of Texas (Blue Cross). The panel rendered a unanimous decision in favor of HealthCor. Blue Cross filed suit against HealthCor and two arbitrators, alleging ''gross mistake,'' and sought modification or vacation of the award. Blue Cross subsequently sued Juneau for evident partiality. Juneau had previously worked in the same law firm as the attorney who worked for HealthCor. However, Juneau did not have much contact with this attorney, and so he thought the relationship was trivial and not worth disclosing. The Court of Appeals of Texas held that arbitral immunity covers an arbitrator's failure to disclose conflicts of interest, even though the award might be vacated on the grounds of failure to disclose, because the disclosure requirement was directly related to the functions of an arbitrator.

In *Positive Software Solutions Inc. v. New Century Mortgage Corp.,*[74] the sole arbitrator had been co-counsel with the defendant's counsel in the arbitrator's prior law firm more than ten years prior to the arbitration. The arbitrator and the defendant's counsel failed to disclose this relationship in the course of the arbitration. The arbitrator ruled in favor of the defendant. The plaintiff discovered this relationship and sought to vacate the arbitral award. The district court (affirmed by the court of appeals) vacated the award on the ground that the prior professional relationship might create a reasonable impression of possible bias and that the arbitrator's failure to disclose that prior relationship deprived the plaintiff of the opportunity to make an informed choice of arbitrator. On the defendant's petition, the Fifth Circuit Court of Appeals reversed its own decision in a rehearing of the case *en banc*. The U.S. Supreme Court affirmed the court of appeals' decision and held that a failure to disclose trivial or insubstantial relationships is not a sufficient basis to vacate an award. The relationship must involve a ''significant compromising connection to a party.''

Parties to an arbitration have a duty to exercise due diligence in investigating possible conflicts of interest. A disgruntled party that wants to set aside the award on the basis of apparent bias may end up being time barred if it fails to discover information revealing bias (if any) within the

[73] Blue Cross Blue Shield of Texas v. Juneau, 114 S.W.3d 126 (Ct. App. Tex. 2003).

[74] Positive Software Solutions Inc. v. New Century Mortgage Corp., 337 F. Supp. 2d 862, 865 (N.D. Tex. 2004), *aff'd,* 436 F.3d 495 (5th Cir. 2006); *rev'd in reh'g,* 476 F.3d 278 (5th Cir. 2007) (*en banc*), *cert. denied,* June 11, 2007.

statutory time limit for vacating an award. In *Pullara v. American Aribtration Association, Paxson & Associates, P.C., and Stephen B. Paxson*,[75] the plaintiff (Pullara) sued the arbitrator and the AAA for damages for the arbitrator's failure to disclose his professional relationship (as general counsel) with a trade association. The plaintiff alleged that the arbitrator's professional relationship with the trade association was a material fact that he was entitled to know when he chose the arbitrator from the AAA's list of arbitrators. The plaintiff could not apply to vacate the award as it was time barred under the Texas Civil Practice and Remedies Code,[76] having discovered the arbitrator's undisclosed professional relationship only one year after the award was rendered. The Court of Appeals of Texas held that the arbitrator and the AAA were both immune against claims for evident partiality.

Claims for Being Corrupt

The national arbitration laws of common law jurisdictions and arbitral rules of the main arbitral institutions exclude immunity for fraud, dishonesty, or actual bias. If there are circumstances that give rise to justifiable doubts as to the impartiality of an arbitrator, the national court has the power to remove the arbitrator and institutional rules set out a procedure to challenge the arbitrator.[77] Some national arbitration laws may impose an additional sanction by giving the court the power to order the arbitrator to repay any fees or expenses already paid.[78] Allegations of actual bias go to the jurisdiction of the tribunal and should be remedied by challenging the arbitrators and seeking their removal or withdrawal,[79] or challenging the arbitral award.

[75] Pullara v. Am. Arb. Ass'n, Paxson & Assocs., P.C., and Stephen B. Paxson, 191 S.W.3d 903 (Tex. App.—Texarkana 2006).

[76] Texas Civil Practice & Remedies Code Section 171.088, Alternate Methods of Dispute Resolution (Cap. 171) provides that any application to vacate an award must be made within 90 days from the date of delivery of a copy of the award to the applicant. An award may be vacated on the basis of, for example, corruption, fraud, evident partiality, and misconduct or willful misbehavior.

[77] Lew, Mistelis & Kroll, *supra* note 63, ¶ 12-33. *See* ICC Rules, *supra* note 31, art. 11; LCIA Rules, *supra* note 35, art. 10; Model Law, *supra* note 1, arts. 12-13.

[78] *See, e.g.,* English Arbitration Act 1996, *supra* note 5, § 24(4).

[79] Lew, Mistelis & Kroll, *supra* note 63, ¶ 12-34. The U.S. courts take this approach; *see, e.g.* Int'l Union, United Auto. Workers. v. Greyhound Lines, 701 F.2d 1181, 1185-87 (6th Cir. 1983); Montero v. Travis, 171 F.3d 757, 761 (2d Cir.1999); Saavedra v. City of Albuquerque, 859 F. Supp. 526, 532 (D. N. Mex.), *aff'd,* 73 F.3d 1525 (10th Cir. 1996), Stasz v. Schwab, 121 Cal. App. 4th 420 (2004); Garland v. US Airways, 153 Lab. Cas. ¶ 10,762 (W.D. Pa. 2006).

Arbitral immunity in the United States extends to challenges of the arbitrators' authority to resolve a dispute and allegations of misfeasance by arbitral institutions. Immunity may extend to allegations of fraud, corruption, and conspiracy, and it is likely that, in such cases, the arbitral award would be vacated.[80] An arbitrator is also immune from allegations of libel and slander if the statements are made in the course of arbitral proceedings.[81] In *Tamari v. Conrad*,[82] the U.S. Court of Appeals for the Seventh Circuit held that arbitral immunity applies where the arbitrator's authority is challenged because arbitrators will be dissuaded from serving if they can be embroiled in a dispute and be saddled with the burdens of defending a lawsuit. In *International Medical Group, Inc. v. American Arbitration Association*[83] (IMG), the U.S. Court of Appeals for the Seventh Circuit upheld *Tamari v. Conrad*. In IMG, the respondents in the arbitration were clearly not interested in the arbitration proceedings as they sued the claimant, his lawyers and their law firm, the AAA and its employees, alleging malicious prosecution, abuse of process and ''bad faith arbitration'' (the last being a cause of action that the court did not recognize), and sought a stay of the arbitration proceedings. The court dismissed the claim on the basis of arbitral immunity and found that the causes of action were unsubstantiated.

Claims for Negligence

Allegations of negligence against arbitrators are premised on the arbitrators' incompetent handling of the arbitration and do not amount to the arbitrators' willful misconduct. An arbitrator may be liable for breach of contract or the tort of negligence if he is extravagant or dilatory, but the remedy is limited to his removal as an arbitrator and a forfeiture of his fees. Such sanctions are similar to those that are imposed on professionals who have a duty of care and skill.[84]

Arbitrators are immune against claims for negligence under national arbitration laws of common law jurisdictions and the rules of the main arbitral institutions.[85] Arbitration institutions in the United States are also immune against tortious claims based on wrongful exercise of jurisdiction over parties who are not parties to the arbitration agreement. The

[80] Jones v. Brown, 54 Iowa 140, 142-43 (Iowa 1880). In a subsequent case, the arbitrators were not allowed to recover their arbitral fees.

[81] Kabia v. Koch, 186 Misc. 2d 363, 713 N.Y.S.2d 250 (N.Y. Civ. Ct. 2000).

[82] Tamari v. Conrad, 552 F.2d 778 (7th Cir. 1977).

[83] Int'l Med. Group, Inc. v. Am. Arb. Ass'n, 312 F.3d 833 (7th Cir. 2002).

[84] Sutton & Gill, *supra* note 53, ¶ 4-203.

[85] *See also* Stasz v. Schwab, *supra* note 14.

appropriate remedy for parties who raise jurisdictional objections is to seek an injunction in an appropriate court against the party initiating the arbitration.[86] In a controversial English case, the arbitrator was removed by the court and held liable for the costs of the court hearing, and was awarded only £10,000 in arbitral fees. The court held that the arbitrator had no power under the English Arbitration Act 1996[87] to obtain double security for his anticipated fees and expenses and exercised the wrong principles in ordering the parties to give security for each other's costs.[88]

Jurisdictions that adopt a contractual approach to arbitral immunity are more likely to find arbitrators liable for claims for negligence. Arbitrators are contractually liable for loss and damages for the failure to perform their duties. For example, Argentinean arbitration law takes the view that the arbitral contract renders arbitrators liable for losses caused by any failure to perform duties.[89] In France, arbitrators have duties and obligations to both parties once they accept an appointment. If an arbitrator breaches any term in the agreement, he may be liable for damages.[90] However, the French courts have held that arbitrators can only incur liability in the event of gross fault, fraud, or connivance with one of the parties. In *Floragne v. Brissart et Corgie,*[91] a party brought an action against the arbitrators seeking to recover the loss suffered as a result of the arbitral award. The court held that the party's arguments implied that the arbitrators reached the wrong decision. The court dismissed the action, as no misfeasance was alleged or justified, and considered the action to be abusive and offensive. The court awarded the arbitrators the nominal damages that the arbitrators sought in their counterclaim.

[86] Int'l Med. Group, Inc. v. Am. Arb. Ass'n, *supra* note 83, Stasz v. Schwab, *supra* note 14.

[87] *Supra* note 5.

[88] Wicketts v Brine Builders, [2002] C.I.L.L. 1805, [2001] App. L.R. 06/08.

[89] Redfern & Hunter, *supra* note 12, at ¶ 5-17. National Code of Civil and Commercial Procedure Article 745 in Argentina states that ''acceptance by arbitrators of their appointment shall entitle the parties to compel them to carry out their duties and to hold them liable for costs and damages derived from the non-performance of arbitral duties.'' Peruvian General Arbitration Law Article 18 is virtually identical to Article 745.

[90] Ceckolovenska Obcendi Banka v. ICC, 1987 *Rev. Arb.* 367; P.B. Rutledge, ''Towards a Contractual Approach for Arbitral Immunity,'' 39 *Ga. L. Rev.* 151-214 (2004).

[91] French case; No. 482/77 (unpublished).

SHOULD ARBITRATORS APPEAR AS DEFENDANTS IN AN ACTION?

Claims against arbitrators for breach of ethical duties are fetters to their independence and ability to administer justice without fear of reprisals from disgruntled parties and ''arbitration guerillas'' who simply refuse to play the game by the rules.[92] Unmeritorious actions against arbitrators have a retrogressive effect on international arbitration as a dispute resolution mechanism[93] and increase costs for the parties and the arbitrators involved. Even if an arbitrator is found to be immune from suit, he is certainly not immune from the additional legal fees that he has to pay to counsel defending him.[94] The costs of professional indemnity insurance will consequently increase and is likely to be passed down to the parties.

Another concern that arises from litigation against arbitrators is whether arbitrators should appear in actions in which they are joined as defendants. Arbitrators may choose not to take full part in the proceedings as an active party. In the alternative, arbitrators may take a limited part in the proceedings by filing an affidavit setting out any facts that he considers may be of assistance to the court.[95] Appearing in such actions would mean that the arbitrators may be cross-examined on matters that pertain to the merits of the award, and lead to a relitigation of the merits of the arbitral award that undermine its *res judicata* effect. Not taking an active part in proceedings to set aside an award, for example, may be advantageous to the arbitrator, as an award of costs in such proceedings will ordinarily be

[92] M. Hwang, ''Why Is There Still Resistance to Arbitration in Asia?,'' *in Global Reflections on International Law, Commerce and Dispute Resolution* 401-11 (2005).

[93] *Id.* The principal author of this paper was a member of a tribunal in an arbitration in which the respondent not only challenged the jurisdiction of the tribunal in its local court, but also filed an action against the claimant for the tort of ''wrongful arbitration,'' claiming huge damages and a conservatory order seizing the claimant's assets. As a co-arbitrator, he had some difficulty persuading the other members (who were both from the jurisdiction of the local court) to issue orders while these court proceedings were pending, as they were fearful that any action taken by the tribunal to advance the hearing would result in similar court proceedings being taken against the members of the tribunal.

[94] The civil procedure rules of most common law jurisdictions require parties to pay their own solicitor and client costs. *See also* J.M. Townsend, ''Recourse against the Arbitrator after the Arbitral Award: An American Perspective, in The Status of the Arbitrator—Special Supplement,'' *ICC Int'l Court of Arb. Bull.* 115 (1995); M.L. Smith, ''Costs in International Commercial Arbitration,'' *in AAA Handbook on International Arbitration & ADR* (T.E. Carbonneau & J.A. Jaeggi eds., 2006).

[95] Port Sudan Cotton Co. v. Govindaswamy Chettiar & Sons, [1977] 1 Lloyd's Rep 166 (Q.B. Comm. Ct.).

inappropriate unless the arbitrator becomes a participant in the litigation or is guilty of collusion and dishonesty.[96]

Arbitrators may choose to expressly contract out of participating in any judicial proceedings in their terms of appointment. In the United States, the Revised Uniform Arbitration Act (2000) states that an arbitrator is neither competent to testify or required to produce any documents pertaining to an arbitration, except where it is necessary to determine the claim of an arbitrator or in a hearing to vacate an award.[97] The Act also aims to curb frivolous lawsuits against arbitrators by imposing liability for legal fees and other expenses of litigation on parties that commence civil action against an arbitrator, arbitral organization, or representative of an organization, and it is subsequently found that arbitral immunity applies.[98] Recent case law also demonstrates that judicial policy is moving towards imposing sanctions on parties who bring spurious lawsuits.[99]

Conflict-of-laws issues arise where an unhappy litigant who is unable to set aside an award in the local courts of the seat of arbitration attempts to vacate the award by bringing an action in the jurisdiction of the arbitrators on the basis of corruption or other grounds of public policy. In a famous case in the United States District Court in Beaumont, Texas, the unhappy litigant failed twice in Switzerland, the seat of the arbitration, to set aside the award given by the three-member tribunal. He then sued everyone he could think of, including the arbitrators, to vacate the award on the grounds that the tribunal had taken $25 million in bribes. The arbitrators did not take any active part in the proceedings, so no issue of arbitral immunity arose. The Texas judge made a finding that the court must have the jurisdiction to set aside the award before it could decide on the issue of corruption. Because the seat of the arbitration was Geneva and not Texas, he declined to do so.[100] That case is still on appeal, and there is now a joint *amicus* brief submitted jointly by the AAA and the Swiss Arbitration Association, presumably to support the dismissal of that particular claim.[101]

[96] Lendon v. Keen, *supra* note 6. *See also* Najjar v. Haines, *supra* note 10. The court held that arbitrators should be immune because of the overriding importance of the need for a judge to act independently and without fear of harassment by action.

[97] Section 14(d) of the Revised Uniform Arbitration Act (2000) and see commentary on the provision.

[98] Section 14(e) of the Revised Uniform Arbitration Act (2000) and see commentary on the provision.

[99] B.L. Harbert Int'l, LLC v. Hercules Steel Co., WL 462368 (11th Cir. 2006).

[100] Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp., 2006 U.S. Dist. LEXIS 86493 (E.D. Tex. 2006).

[101] The authors would like to note that on January 7, 2008, the U.S. Fifth Circuit Court of Appeals affirmed the dismissal of *Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp.* on the basis that it was a collateral attack on the foreign (Swiss)

Claims against arbitrators give rise to the question of the kinds of relief that can be obtained against them. In the *Beaumont* case mentioned above, the party claimed for the costs of arbitrating, lost revenue, profits that allegedly should have been awarded at the arbitration proceedings, damage to reputation from losing in the arbitration, and loss of business opportunities from losing the award. As the court decided it did not have jurisdiction, the court did not have to decide on the relief sought. In the Finnish case of *Urho v. X* (mentioned above), the claimant sought to recover the costs and expenses of arbitration. The court held that the arbitrator was liable to pay such damages as the arbitrator's failure to disclose conflicts of interest (which may have influenced his award) constituted a breach of contract.

SHOULD ARBITRAL INSTITUTIONS INTERVENE WHEN ITS ARBITRATORS ARE SUED?

Most arbitral institutions do not provide any protection for arbitrators who come under their purview, and arbitrators who are sued are generally left to fend for themselves. The ICC, which gets sued quite regularly around the world, together with their arbitrators, and the Swiss Arbitration Association[102] take this approach. Interestingly, the Netherlands Arbitration Institute (NAI) purchases professional indemnity insurance for arbitrators on its General Panel, but only if the arbitration is conducted under its rules and auspices. By contrast, the AAA actively assists its arbitrators in resisting claims but stops short of indemnifying them out of its own pocket.

CONCLUSION

Most jurisdictions recognize that immunity is necessary to ensure that the arbitrator acts independently and impartially. The degree of immunity available under the national laws of different jurisdictions and arbitral rules varies according to whether they accept the judge immunity analogy or the contractual analysis of the role of arbitrators. The formulation of arbitral

arbitral award in the underlying arbitration. The opinion of the U.S. Fifth Circuit Court of Appeals can be found at http://www.ca5.uscourts.gov/opinions/pub/06/06-40713-CV0.wpd.pdf. For a commentary on the case, see also ''Etat-Unis: United States Court of Appeals, Decision No. 06-40713, 7 January 2008. Appeal from the US District Court for the Eastern District of Texas. Gulf Petro, Plaintiffs-Appellants v Nigerian National Petroleum Corporation and other individuals, Defendants-Appellees,'' 26 *ASA Bull.* 167-80 (Jan. 2008).

[102] Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp., *supra* note 100.

immunity can be seen clearly in the grounds relied on in successful claims against arbitrators that are brought, more often than not, by an aggrieved party. While the personal liability of arbitrators for acts of bad faith in the exercise of their judicial functions provides some redress to the losing party, this cannot be used as an additional weapon or a substitute remedy for the setting aside of the award. Arbitrators ought to be protected from frivolous claims so that they can render awards judiciously and unaffected by potential lawsuits.

Part V

Mediation

Mediation Ethics: A Proposed Analytical Framework

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OVERVIEW

What does the term ''mediation ethics'' encompass? The term is a broad one and covers a span of issues, including confidentiality,[1] mediator disclosures obligations and conflicts of interest,[2] counsel's duty to advise clients of mediation,[3] counsel's good faith participation,[4] unauthorized practice of law by mediators and counsel,[5] association of lawyers with non-

[1] *See, e.g., Melissa A. Reason v. C.A. Wilson Concrete Products, Inc.*, 2004 Ohio 2744 (May 28, 2004)—Mediation Confidentiality (an out-of-state's attorney *pro hac* vice admission was revoked when the attorney sent a letter that disclosed certain liability positions of various defendants made during a mediation to all parties' counsel, even if counsel did not participate in the relevant mediation. The relevant statute at issue, Ohio Revenue Code Section 2317.023(b), provided that ''[a] mediation communication is confidential,'' and ''no person shall disclose a mediation communication in a civil proceeding or in an administrative proceeding.''); J. Coben & P. Thompson, ''Disputing Irony: A Systematic Look at Litigation about Mediation,'' 11 *Harv. Neg. L. Rev.* 43 (Spring 2006).

[2] *See, e.g.*, Model Standard of Conduct for Mediators (AAA/ABA/ACR) (Sept. 2005), *available at* http://www.abanet.org.

[3] M. Breger, ''Should An Attorney be Required to Advise a Client of ADR Options?'' 13 *Geo. J. Legal Ethics* 427 (2000).

[4] K. Kovach, ''Good Faith in Mediation: Requested, Recommended or Required? A New Ethics,'' 38 *S. Tex. L. Rev.* 575 (1997).

[5] *See, e.g.*, ABA Model Rule 5.5(c)(3)—Unauthorized Practice of Law; Multijurisdictional Practice of Law (alternative dispute resolution (ADR) ''safe harbor'' provision), *available at* http://www.abanet.org; In the Matter of a Non-Member of the State Bar of Arizona, Carly Van Dox, 152 P.3d 1183 (Sup. Ct. 2007) (Arizona licensed realtor, who also had been admitted to practice law in Virginia and Florida, did not contest the Arizona State Bar's conclusion that she engaged in the unauthorized practice of law in representing sellers in a real estate transaction in a private mediation, despite mediator's conclusion that such participation was ethically proper.); Pennsylvania Formal and Informal Opinions, Opinion 2003-13 (an attorney not admitted in Pennsylvania may participate in a non-judicial

lawyers in offering mediation services,[6] and services provided by provider organizations in the field.[7]

Addressing these ethics-related issues in the context of mediation presents unique challenges because of the need to maintain the inherent flexibility of mediation while simultaneously developing a sound ethical infrastructure. Mediation's flexibility is an important feature because it often enables the participants and mediator to resolve otherwise intractable disputes. A rigid ethical infrastructure would not be conducive to fostering a flexible process. Rather, a sound and predictable ethical infrastructure is needed to enhance the credibility of mediation for both the participants and public at large.

To date, different templates have been used to address mediation ethics. For example, in the area of conflicts of interest, the same standards used for an arbitrator have been widely used, even though the role of a mediator is drastically inapposite to that of an arbitrator.[8] In the area of duty of candor, the amorphous area of negotiation ethics has been used as a template when confronted with questions involving a lawyer's duty of candor. By using this template, lawyers participating as advocates have been allowed to treat mediation as a two-party negotiation for purposes of candor and largely ignore the unique role of the mediator.[9] And when issues arise as to a mediator's qualifications to conduct the mediation, guidance from

alternative dispute resolution in Pennsylvania as co-counsel with Pennsylvania counsel. However, ''[t]he participating by co-counsel in multiple ADR proceedings could constitute an unauthorized practice of law even under new Rule 5.5.'').

[6] *See, e.g.,* Maryland Formal and Informal Op., Ethics Docket 03-02 (to extent practice is limited to court-ordered mediation, which is defined by Maryland Rule 17-102(d) not to encompass the practice of law, lawyers would not be engaging in the practice of law and therefore could form a partnership with non-lawyers to offer mediation services); In the Matter of Hanson, 2001 Ariz. LEXIS 7 (Ariz. 2001) (attorney in mediation partnership with non-lawyer engaged in impermissible fee splitting and assisted unauthorized practice of law); New Hampshire Ethics Op. # 1993-94/4 (partnership between a lawyer and non-lawyer to provide mediation does not violate the Rules of Professional Conduct); Vermont Ethics Op. 93-5 (lawyer not barred from entering into business relationship with non-lawyer to provide mediation services if practice kept entirely separate from law practice); Rhode Island Ethics Op. 95-1 (lawyer prohibited from engaging in mediation practice with non-lawyer); Florida Ethics Op. 94-6 (operation of a mediation department within a law firm that employs non-lawyers is acceptable, provided the non-lawyers are not owners and the firm conducts the mediation practice in conformity with the Rules of Professional Conduct).

[7] *See, e.g.*, CPR-Georgetown Commission on Ethics and Standard of Practice in ADR, Principles for ADR Provider Organizations (CPR Institute, 2002).

[8] *See, e.g.*, ABA Model Rule 1.12 (Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral) (Appendix A).

[9] *See infra* ''Lawyer as Advocate in Mediation: Candor.''

authorities relating to the unauthorized practice of law have been drawn upon.[10]

One result of using these different templates without customizing them to mediation is unexpected outcomes. For example, a party may be surprised to learn that a mediator's law firm may be able to represent the other side in the very *same* dispute, provided the mediator is screened from the matter,[11] or that a provider organization assisting with a mediation can rely upon the arbitral quasi-judicial immunity doctrine as a defense to claims arising out of the quality of the services.[12] Similarly, a mediator may be surprised to learn that a lawyer has the *same* duty of candor toward both opposing counsel and the mediator.

As a working hypothesis, it is proposed that a more coherent framework to address mediation ethics could be developed by customizing the templates currently being used. It is further proposed that such customization would occur by first and foremost underscoring the mediation process as a whole in any ethical analysis rather than overly focusing on one of the participants in the process as is more commonly the case now. To demonstrate the present lack of a coherent core, three issues are highlighted—candor, conflicts of interest, and accountability. For each of these issues, a summary of relevant guidance is provided. What becomes apparent is that for each issue, the overall mediation process itself is not in the foreground. Rather, the focus tends to be on one particular participant to the exclusion of the others and the process itself. This proposal concludes with observations pertinent to a more consistent analytical framework.

LAWYER AS ADVOCATE IN MEDIATION: CANDOR

Issue: Does counsel owe a higher degree of candor to a mediator than to opposing counsel during the course of a mediation?

Guidance: The American Bar Association (ABA) Model Rule of Professional Conduct, Rule 4.1(a) prohibits a lawyer ''[i]n the course of representing a client'' from knowingly making ''a false statement of material fact or law to a third person.''[13] Rule 4.1 on its face does not apply to false

[10] *See, e.g.*, J. Nolan-Haley, ''Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem—Solving Perspective,'' 7 *Harv. Neg. L. Rev.* 235 (2002).

[11] *See infra* ''Mediator: Conflicts of Interest.''

[12] *See infra* ''Provider Organizations: Accountability.''

[13] Comment [2] to Rule 4.1 provides an additional explanation of ''statement of fact'':

statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

ABA Model Rule 3.3 also prohibits a lawyer from knowingly making ''a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.'' However, Rule 3.3 does not apply to mediations or negotiations among parties. Rather Rule 3.3 applies only to statements made to a ''tribunal,'' which does not include a private mediation[14] or a court-sponsored mediation unless a judge participates.[15]

The ABA Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion on the Lawyer's Obligation of Truthfulness When Representing a Client in a Mediation.[16] In this opinion, the ABA Standing Committee discussed the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, ''including the specialized form of negotiation known as caucused mediation.'' The committee explicitly discussed whether a different standard than that set forth in Rule 4.1 should apply to a lawyer representing a client in a caucus session of a mediation. The committee took note of the competing arguments as to whether lawyers involved in a caucus session should be held to a more exacting standard owed to the mediator or not. On the side of advocating a more exacting standard:

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to criminal or tortuous misrepresentation.

[14] Comment [5] to Model Rule 2.4. confirms that Rule 3.3 does not apply to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (*see* Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

[15] *See* ABA Committee on Ethics and Professional Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in F*ormal and Informal Ethics Opinions* 1983-1998 at 157, 161 (ABA 2000).

[16] ABA Standing Committee on Ethics and Professional Responsibility. Formal Opinion 06-439: Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation—Application of Caucused Mediation (Apr. 12, 2006).

> The theory underlying this position is that, as in a game of ''telephone,'' the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called ''deception synergy,'' the proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.[17]

The committee also considered arguments that the accuracy of information provided in a caucus session is less important because mediation occurs within an environment of ''imperfect information,'' which ultimately allows the mediator to help the parties in resolving their disputes.[18]

Without commenting on the validity of these competing points, the committee found that the Model Rules do *not* require any heightened standard of truthfulness by counsel in a caucus session held during the course of a mediation. In short, the presence of the mediator in a caucused session has no impact on the lawyer's conduct or obligations.

MEDIATOR: CONFLICTS OF INTEREST

Issue: Can a mediator (or his/her law firm) represent a party adverse to a party in the mediation?

Guidance: In contrast to the duty of candor analysis above where the mediator's role is analogized to that of counsel, other ABA Model Rules analogize the role of mediators to judges and arbitrators for purposes of conflicts of interest. One outcome of this approach is that if the mediator's work in a matter disqualifies him/her from subsequent representation, his/her firm may not be automatically disqualified provided screening, with notice, occurs.[19] If the mediator had been treated as counsel, he/she

[17] *Id.*

[18] *Id.*

[19] *See* ABA Model Rule 1.12 (Appendix A). *See also* Texas Formal and Informal Opinions, Op. 496—Conflicts of Interest ((''A mediator is an adjudicatory official as that term is discussed in Disciplinary Rule 1.11. [Under Texas Disciplinary Rules of Professional Conduct, an adjudicatory official is 'a person who serves on a tribunal.'] As such, during the pendency of a mediation, the mediator would be prohibited from ethically undertaking representation on behalf of or adverse to a party to the mediation in a matter related to or unrelated to the mediation. Likewise, the same

(including the law firm) would be disqualified absent consent of the parties.[20] Moreover, ABA Model Rule 2.4 treats mediators and arbitrators precisely the same for purposes of advising unrepresented parties that the lawyer-neutral is not representing them.[21]

Other guidelines exist to assist mediators, particularly non-lawyers who are serving as mediators, address issues relating to conflicts of interest and future relationships. For example, the Model Standard of Conduct for Mediators (American Arbitration Association/American Bar Association/Association for Conflict Resolution) (September 2005)[22] contains provisions relating to involvement with the parties in matters other than the mediation at hand.[23] Specifically, the Model Standard provides:

> F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

bar would apply to the mediator's law firm unless the parties to the mediation agreed that such representation would not compromise the impartiality of the mediator. Post-mediation representation by the mediator or the mediator's law firm on behalf of or adverse to a party to the mediation in a *matter related* to the mediation is addressed in Rule 1.11.'' ''Rule 1.11 does not address *post-mediation representation* by the mediator or mediator's law firm on behalf of or adverse to a party to the mediation in a matter *unrelated* to the mediation, and, thus, the inquiry falls outside the scope of the rule'' (emphasis added).).

[20] *See* ABA Model Rule 1.7.

[21] *See* ABA Model Rule 2.4 (Appendix A).

[22] Mediator Codes of Conduct also exist in numerous U.S. states. For example, under the Alabama Mediator Code, Standard 5(b)(8) states:

> A mediator must avoid the appearance of a conflict of interest both during and after the mediation. Without the consent of all the parties, a mediator shall not establish a professional relationship with one of the parties in a substantially related matter.

Standard 6(c) states:

> A mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information gathered during the mediation.

[23] *See* Appendix B.

Another set of guidelines are provided by the MEDAL Rules (International Mediation Rules).[24] However, these rules only address the narrow issue of whether a mediator can act an arbitrator or counsel in a subsequent proceeding and find that a mediator cannot to do so absent all the parties' consent. The issue of a screening mechanism is not addressed. Similarly, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation addresses the same narrow issue in the same manner.[25]

Several diverting judicial decisions exist on the issue of whether a mediator or his or her firm can represent a party in the same dispute that was mediated or one substantially similar:

1. *Clark v. Alfa Insurance Co.*:[26] In a case that the court considered to be an ''issue [that] may be new to American jurisprudence,'' a motion to disqualify a former mediator-attorney and all attorneys associated with his law firm from representing plaintiff in a Title VII litigation was filed by the defendant employer on the basis that just over a year ago the mediator-attorney acted as a mediator in a Title VII litigation between an unrelated plaintiff and the employer. The court denied the motion. In so doing, the court observed that ''[i]f and when some entity with authority to do so adopts a rule that would preclude what [mediator-attorney] proposes to do, all lawyers in North Alabama who want to be mediators can (1) change their minds; (2) limit their law practices to mediation; or (3) expose themselves to ethical violation complaints.''[27]

2. *Poly Software v. Su*:[28] The court disqualified a lawyer-mediator from representing a litigant in a subsequent matter related to an earlier case where the mediator had received confidences from the parties. The court formulated a standard providing that where a mediator has received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or substantially factually related matter unless all parties to the mediation proceeding consent after disclosure.

[24] In 2005, the following five international centers formed a partnership in commercial mediation and conflict management known as the International Mediation Services Alliance (MEDAL): JAMS (United States), ACB Mediation (the Netherlands), ADR Center (Italy), CEDR Solve (United Kingdom), and CAMP (France). For MEDAL Rules, see Appendix B.

[25] *See* Appendix B.

[26] Clark v. Alfa Ins. Co., 2001 U.S. Dist. LEXIS 25684 (N.D. Ala. 2001).

[27] *Id.* at *16.

[28] Poly Software v. Su, 880 F. Supp. 1487 (D. Utah 1995).

3. *Cho v. Superior Court:*[29] Although the firm had established a screening process, and the former judge stated that he did not recall the settlement conferences, the court disqualified the firm and stated that

> [n]o amount of assurance of screening procedures, no ''cone of silence,'' could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in a confidential settlement conference with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm—which is now pressing or defending the lawsuit against that litigant. No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent [footnote omitted].

PROVIDER ORGANIZATIONS: ACCOUNTABILITY

Issue: Is a provider organization accountable for a mediator's conduct?

Guidance: CPR-Georgetown Commission on Ethics and Standards of Practice in ADR (CPR Institute, 2002).[30]

The CPR-Georgetown Commission on Ethics and Standards of Practice in ADR developed Principles for ADR Provider Organizations to provide guidance to entities that provide ADR services, consumers of their services, the public, and policy makers. The Principles build upon the significant policy directives of the prior decade, which recognized the central role of the ADR Provider Organization in the delivery of fair, impartial, and quality ADR services.[31] Among the Principles is the establishment of a ''Complaint and Grievance Mechanisms'':

[29] Cho v. Superior Court, 39 Cal. App. 4th 113, 45 Cal. Rptr. 2d 863 (Cal. Ct. 1995).

[30] The Commission was a joint initiative of the CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Commission, chaired by Professor Carrie Menkel-Meadow of the Georgetown University Law Center, had also developed the CPR-Georgetown Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002), and provided guidance to the ABA Ethics 2000 Commission in its reexamination of the Model Rules of Professional Conduct on ADR ethics issues.

[31] The proposed Principles are intended to apply to entities and individuals which fall within the following definition:

> An ADR Provider Organization includes any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services.

> *Principle VI. Complaint and Grievance Mechanisms*
> ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclosure the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individuals against whom a grievance has been made.

The few relevant court decisions on the issue often spend the entire analysis on the applicability of arbitral immunity *vis-à-vis* mediation and reach different results:

1. *Simpson v. JAMS/Endispute*:[32] The appellate court affirmed the lower court's ruling that the common law quasi-judicial immunity doctrine protecting neutrals involved in alternative dispute resolution processes from civil liability actions also extended to organizations such as Judicial Arbitration and Mediation Services (JAMS) that provide the neutrals or sponsor the mediation.

2. *Morgan Phillips, Inc. v. JAMS/Endispute*:[33] The parties retained JAMS and a JAMS mediator to mediate the dispute. In September 2000, the mediator assisted the parties in reaching a settlement. The ''stipulation for settlement'' provided that any ''[d]isputes regarding this matter will be submitted to [the mediator] for binding resolution.''[34] A dispute subsequently arose and a ''binding arbitration'' hearing was held. At the conclusion of the hearing, the mediator attempted to settle the case. Thereafter, without settling the case, the mediator allegedly withdrew as the

[32] Simpson v. JAMS/Endispute, 2006 Cal. App. Unpub. LEXIS 6480 (Cal. Ct. App. 2006). Plaintiff Simpson asserted a refund claim against JAMS arising out of allegations that plaintiff paid $2,400 for mediation services; however, the mediator did not properly conduct the session, but rather advised Simpson to ''cut his losses short and settle'' the case. In a letter to Simpson, JAMS informed Simpson that it had credited him $450 toward the fees but was not prepared to make any further adjustments. The court stated that ''[b]ecause we uphold the court's grant of demurrer on the grounds that JAMS was immune from the claims asserted by Simpson, we need not address JAMS's additional arguments that the litigation privilege of [California] Civil Code section 47, subdivision (b), barred his claims because they were based upon communications made by the mediator during mediation . . . and that the demurrer was properly sustained because the evidentiary privilege of [California] Evidence Code section 703.5 renders the mediator incompetent to testify regarding the mediation proceedings and therefore prevents JAMS from defending itself'' [citations omitted].).

[33] Morgan Phillips, Inc. v. JAMS/Endispute, 140 Cal. App. 4th 795 (Cal. Ct. App. 2006).

[34] *Id.* at 798.

arbitrator and failed to render an award. Plaintiff sued the mediator/arbitrator and JAMS for, *inter alia*, breach of contract and negligent breach of the duty to provide binding arbitration services. The lower court dismissed the claim on the grounds that JAMS and the mediator/arbitrator were protected by the doctrine of arbitral immunity. However, the appellate court reversed and discounted JAMS's contentions that mediation confidentiality would prevent them from presenting a defense and therefore required dismissal of the claims.

OBSERVATIONS

As a working hypothesis, if each of the foregoing issues were analyzed within a framework that started the analysis with the mediation process and its purpose, followed by the participant at the center of the issue—lawyer as advocate, mediator, provider organization—a more coherent structure may emerge. For example, when guiding lawyers on candor during the mediation process, instead of starting with the lawyer, the analysis would begin with the mediation process and the lawyer's participation in that process. Such a framework would likely result in guidance that does not ignore the role of the mediator by only requiring the lawyer to provide the exact same degree of candor to a mediator in a caucus session that is owed to opposing counsel. Or, when guiding mediators and their colleagues in law firms as to whether representation of a party in the same matter is appropriate in the event of an unsuccessful mediation, if the high degree of frankness and breadth of information exchanged between the parties and the mediator is more accurately calculated into the formula, divergent views might diminish as to under what circumstances (if any) a mediator or a mediator's law firm can represent a party who participated in the failed mediation. Or, if quasi-judicial/arbitral immunity could not serve as a complete defense for breach of contract actions against provider organizations, dispute resolution mechanisms more in keeping with the spirit of mediation to resolve these claims might be used, thereby enhancing the public's overall impression of a fair process.

The goal is the same for all involved in the field—to allow mediation to maintain its flexibility within a sound ethical infrastructure. To do so, an agreed protocol of analysis, which begins with the mediation process followed by the participant at the center of the issue (rather than the other way around or to the exclusion of one or the other), would benefit the further development of a mediation ethical infrastructure.

APPENDIX A

ABA Model Rule 1.12[35]

Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. . . .

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.[36]

[35] *Compare* CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, Model Rule for the Lawyer as Third-Party Neutral (CPR Institute, 2002). (Model Rule 4.5.4: Conflicts of Interest—This Model Rule does not allow for law firm representation in the ''same'' matter, even with screening, and thus differs from ABA Model Rule 1.12, which allows a law firm to undertake or continue representation in the same matter provided the disqualified lawyer—neutral is timely screened and the other factors of Model Rule 1.12 are satisfied.).

[36] Author's Note: Courts remain uncertain about the validity of an ethical screen to avoid disqualification in cases involving private sector attorneys. For example, appellate courts in California have held that no configuration of an ethical screen will prevent the imputation of knowledge from a firm's new attorney to his or her law colleagues, and thus disqualification of the entire firm is required if the new representation involves the same subject matter as the attorney's prior representation. *See* R. St. John,'' Screened Out: When an Ethical Screen Can be Used to Avoid Vicarious Disqualification of a Law Firm Remains Unsettled,'' 27 *Los Angeles Law.* 29 (Feb. 2005).

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

. . .

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. . . . Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. *See* Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6 [Confidentiality of Information], they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] . . . Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

ABA Mode Rule 2.4

Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

APPENDIX B

Model Standard of Conduct for Mediators (American Arbitration Association/American Bar Association/Association for Conflict Resolution) (September 2005)

Standard III. Conflicts of Interest

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether part or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the

relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

. . .

Standard V. Confidentiality

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law. . . .

MEDAL Rules (International Mediation Rules)

Disclosures and Replacement of a Mediator

6. Any mediator, whether selected jointly by the parties or appointed by the MMO [MEDAL Member Organization], will disclose both to the MMO and to the parties whether he or she has any financial or personal interest in the outcome of the mediation or whether there is any other matter of which the mediator is aware which could be regarded as involving a conflict of interest (whether apparent, potential or actual) in the mediation. Upon receiving any such information, or in any other circumstance in which a selected mediator indicates that he or she is unable to act, after soliciting the views of the parties, the MMO may replace the mediator, preferably from the lists of acceptable mediators previously returned by the parties.

Role of Mediator in other Proceedings

15. Unless all parties agree in writing, the mediator may not act as an arbitrator or as a representative, or counsel to, a party in any arbitral or judicial proceedings relating to the dispute that was the subject of the mediation.

UNCITRAL Model Law on International Commercial Conciliation

Article 5. Number and appointment of conciliators

5. When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings,

shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

. . .

Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Critical Components for Mediation Training

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INTRODUCTION

When originally asked to speak and then write about the topic of mediation training, I found myself remarkably and unusually reluctant. Given my strong belief in the value of mediation, in court-annexed settings as well as through private providers, my reaction puzzled me. It was not until I began putting my thoughts to paper (or word processor) that the reasons for my attitude clarified, namely that mediation is not a skill one can fully learn by being ''taught.'' Certainly, there are some basic concepts that can be explained through the use of lectures, for example, mediation theory, evaluative vs. facilitative styles, general skills and attributes of a mediator, negotiation fundamentals, and ethical guidelines. Putting those concepts into action, however, is something one learns only by ''doing.'' Even then, it is as much art as skill, and is a role for which some are simply not, and never will be, well suited.

Predicting, *a priori*, who will be a ''good mediator'' is also difficult. Legal training, although certainly helpful in understanding the legal issues in a case, is not by itself sufficient and can even be a hindrance. The adversarial skills that are deemed essential in an advocate sometimes can be fatal in establishing the atmosphere of trust and conciliation that is so important in reaching a compromise resolution. Similarly, some lawyers believe that retired judges make poor mediators because of an inability to take off their black robes, that is, to refrain from sending an implicit (if not explicit) message of ''because I said so, that's why.''

This is not to say that lawyers and judges, as a group, cannot and do not become skilled and artful mediators. It is to say, however, that being an effective mediator means accepting the fact that you are not the star of the show, that you actively listen and look, that you react accordingly, that you engender trust, that you are patient, and that you try to understand what is going on below the surface of the mere words being expressed.

CRITERIA FOR MEDIATION TRAINING

The use of mediation as an efficient and relatively inexpensive method of alternative dispute resolution (ADR) has increased significantly in the past decade, due in some part to passage of The Alternative Dispute Resolution Act of 1998, H.R. 3528,[1] which formally made ADR an integral part of the judicial system in federal district courts. That act not only mandated the establishment of court-annexed programs, but essentially ratified the use of private providers as an adjunct to internal court programs.

A useful starting point for this paper thus seemed to be a comparison of court run mediation training versus private provider training. For purposes of this paper, that comparison was limited to the systems with which I have the most experience, namely Judicial Arbitration and Mediation Services (JAMS) Resolution Center, with whom I am now associated, the District Court for the Northern District of California, on which I served for almost 17 years, and the Federal Judicial Center (FJC) in Washington, DC, where I served as Director for four years. Each of these entities has been providing mediation services and/or training for many years and has well-established training programs, giving me confidence that they serve as reasonable exemplars.[2]

My first conclusion, reached easily after comparing the tables of contents for each program, was that there was little difference in substance between them, that is, private versus court-annexed seem to have no inherent distinctions. My second conclusion led to my earlier statement that mediation is learned by doing, not by lectures or reading. As is stated in the Northern District's training materials, ''The training focuses primarily on participation in role plays of the various stages of mediation.'' That emphasis on role-playing is also the central part of the various JAMS training sessions in which I have participated and in the mediation training for federal judges provided by the FJC. It is in the ''doing'' of role playing that one begins to understand the importance of active listening, and the need to gain the trust of the parties, as well as the counterproductive effects of being too intrusive.

The above, having been said, does not mean that mediation training is not at a minimum valuable and more likely a pre-requisite for all

[1] Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998).

[2] I am deeply indebted to Magistrate Judge Wayne Brazil of the Northern District of California and to Donna Stienstra of the FJC, true experts in the field of ADR training and program development, both of whom provided much of the background for this article and allowed me to borrow freely from their work. The opinions expressed in this article, however, are mine, as is the responsibility for any errors. I do not presume to speak for the Northern District, the FJC, or JAMS.

professional neutrals. What it does mean is that the implementation of appropriate ''training'' may have a somewhat different structure than is the norm in other fields. Although mediation is clearly growing in popularity, across all types of litigation, there is not necessarily a single style or procedure that serves as a paradigm for every mediator or for every case.

Nevertheless, there do appear to be common attributes that a good mediator training program should strive to incorporate into its agenda. Any training, private or court sponsored, should recognize the need for mediators to be flexible in providing an approach that is informal, relatively inexpensive, and adaptable, while recognizing the fact that many cases referred to mediation can be factually or legally complicated and have high stakes. A brief summary of the development of the FJC training programs may be illustrative.

The FJC has been offering judges training in mediation (as distinguished from judicial settlement conferences) for approximately ten years. The course is two and a half days long and is usually limited to about 25 judges. When the course first began, it was directed solely to magistrate judges, who were considered to be the only court group that would serve in a mediator capacity. About five years ago, however, district judges began asking for similar training. Although there was some initial skepticism about the reality of their involvement, 100 district judges sought enrollment the first time the course was opened to them, and demand has remained high.

The first FJC course was taught by private trainers, but since then, the course has been taught by magistrate and district judges, already experienced in the area. The course has a heavy emphasis on role playing and is sensitive to the difficulties that judges may have in suspending judgment. The style taught is facilitative (as is the case with the Northern District and with JAMS) with an awareness of the ways in which that style can be challenged or altered by the court context and the judicial experience. More about the differences between evaluative and facilitative styles is discussed later in this paper.

The training of private lawyers to serve in court-annexed mediation programs is somewhat more complicated and generally takes one of three approaches. The Northern District of California has one of the largest and most long-standing programs, as well as its own qualified ADR training staff, which manages the training of its neutral applicants prior to an applicant being accepted. By conducting the training themselves, and by requiring participation in the training before accepting an applicant, the ADR staff can witness first hand the strength of the candidates, which permits them to make careful appointments to the courts' ADR panels. The staff also conducts advanced training courses, on-going brown bag lunch discussions, as well as topic-specific short courses, which enhance neutral quality and provide opportunities to monitor the neutrals. The staff also sends a follow-

up questionnaire to all those who participate in an ADR process, asking for feedback on the quality of the program.

A more common approach among the district courts is to hire a consultant to provide training for individuals the court has pre-selected to be on its panel of neutrals. Although with good trainers this can be adequate, the applicants are pre-selected before any training, which means that the training does not provide a pre-appointment screening opportunity. Additionally, because it takes always scarce court funds to hire trainers, the programs are likely to be too short and too infrequent.

The third approach, and probably the most common is to simply establish a training requirement, for example, 40 hours of training, and ask the applicants to affirm that they have had such training. This system often includes no monitoring as to the quality of the training but seems to assume that the market will ensure quality.

Additionally, there are procedural considerations and responsibilities that court-annexed or sponsored programs must have before granting the court's imprimatur. Some of these basic attributes were listed in The Report of the ADR Task Force of the Court Administration and Case Management Committee (CACM), December 1997, which are still relevant and are set forth in modified form in the next section. Because there are relatively few, if any, guidelines governing private providers or independent trainers, the author has taken the liberty of altering the CACM rules to include, where appropriate, private trainers as well. Whether mandated by law or not, all providers and independent trainers programs should be cognizant and respectful of their own responsibilities to the judicial process. Particularly important are rules regarding ethical issues, such as maintaining confidentiality and revealing conflicts of interest. Those rules will be addressed by another author in this symposium and will thus not be further discussed herein.[3]

Before turning to criteria for effective mediation programs, I would like to briefly touch on the issue of facilitative versus evaluative mediation styles. As stated above, all of the training models discussed above emphasize a facilitative approach. My own view, however, is that such an approach is not necessarily appropriate for every case, nor is it what every client seeks when engaging in the mediation process. In talking to litigators, both within and outside of the mediation setting, the feedback I get is that lawyers, at least those who select retired judges as mediators, make that selection because they want evaluative feedback from the mediator as to the inherent strengths and weaknesses of their case. Sometimes this is to confirm the

[3] This article does not address private mediator training programs run by non-providers, for example, colleges or private training centers or other professionals who do training only.

lawyers own view of the case, and sometimes it is an attempt to give a recalcitrant client a different view of reality.

Although I have no hard evidence directly supporting my belief, there is data relating to expectations for judicial settlements that might reasonably be extrapolated to the mediation situation. In a 1985 study sponsored by the Lawyers Conference and the National Conference of Federal Trial Judges of The Judicial Administration Division of the American Bar Association, an overwhelming number of litigators said that judges should be actively involved in settlement negotiations in most cases in federal court.[4]

An amazing 85 percent of the 1,886 lawyers who responded to the questionnaire felt that involvement by federal judges in settlement discussions was likely to improve ''significantly'' the prospects for achieving settlement. Almost the same percentage said they preferred a settlement judge who actively offered suggestions and observations to one who simply facilitated communication between the parties. The most effective judicial style was viewed as one that was ''carefully analytical and coolly logical, not emotionally high pressured.'' In fact almost half of the responding lawyers believed that an impatient, aggressive approach by the judge was actually counterproductive. Thus, it is not unreasonable to assume that lawyers who retain a retired federal judge as a private mediator would likely have similar views.

Do the statistics cited above indicate that there is disconnect between what trainers are teaching and what clients want? Not necessarily. It may simply be a reflection of what is obvious. The amazing increase in mediation over the past decade is reflected not just in the number of cases, but in the types of cases. Mediation first got a toehold in fields of litigation that revolve around very personal issues, for example, divorce and child custody, landlord-tenant, employment disputes. Today, however, the spectrum of cases being mediated is much more diverse and includes cases where the legal issues are more complex and arcane, for example, class actions, intellectual property, and anti-trust. Although these cases still demand patience, active listening, and an ability to empathize, the participants often want and need the mediator to offer suggestions for an appropriate settlement, whether based on legal issues, industry practice, or technology. Well-rounded mediation training programs, whether private or court-annexed, would do well to consider that in designing their programs.

In summary, whether private or court sponsored, facilitative or evaluative, there are certain basic criteria that should be followed. In any mediation, a mediator should attempt to:

1. make the proceedings manageable;

[4] 106 F.R.D. 85 (1985).

2. develop an atmosphere conducive to problem-solving negotiations;
3. gather all the information available about the interests of the parties;
4. help the parties to create options;
5. help the parties narrow the options and move towards agreement; and
6. help the parties make rational decisions between agreement an pursuing a claim.

CRITICAL ATTRIBUTES FOR SUCCESSFUL ADR PROGRAMS

This paper has dealt only with training programs that are part of a comprehensive ADR program, that is, programs directed by the end-use provider, whether court or private. It is axiomatic that in selecting a qualified mediator, it is equally important to select a mediator associated with a qualified provider. Other than by word of mouth, however, it can be difficult for an end-user to choose among the various providers now available, especially in the private sector. To that end, the list of attributes below, while not necessarily exhaustive, can easily be verified and should be part of any efficient and competent organization.

1. The court or other trainer (Provider) should, after consultation among bench, bar and participants, define the goals and characteristics of its program and approve it by promulgating appropriate written rules or guidelines.
2. The Provider should provide administration of its program through an administrator who is trained to perform these duties.
3. When establishing a roster of neutrals for cases referred to it, the Provider should define and require appropriate levels of training and experience for its neutrals, and continuing training should be provided through the Provider or a professional outside organization. Training should include techniques relevant to the neutral's functions in the program, as well as instruction in ethical duties.
4. The Provider should adopt written ethical principles to cover the ethical conduct of its neutrals.
5. Where an ADR program provides for the neutral to receive compensation for services, the Provider should make the method and limitations upon compensation explicit. Court-sponsored programs should have provisions to provide *pro bono* services to litigants unable to afford the cost of ADR.

6. The Provider should adopt a mechanism for receiving complaints regarding its ADR process and for interpreting and enforcing its guidelines for ADR, including the ethical principles it adopts.
7. The Provider should carefully define the scope of confidentiality intended for information exchanged in its ADR program, striking a balance between absolute protection of ADR process information and the need to avoid shielding misconduct by participants or neutrals.
8. The Provider periodically should evaluate and measure the success of its ADR program, perhaps in conjunction with an advisory group.

APPENDIX: GUIDELINES FOR ENSURING FAIR AND EFFECTIVE COURT-ANNEXED ADR: ATTRIBUTES OF A WELL-FUNCTIONING ADR PROGRAM AND ETHICAL PRINCIPLES FOR ADR NEUTRALS

Report of the ADR Task Force of the Court Administration and Case Management Committee
December 1997

I. Background

In June 1995, the Court Administration and Case Management Committee established an ADR Task Force, composed of Magistrate Judge John Wagner (OK-N), Bankruptcy Judge Barry Russell (CA-C), and District Judge Jerome Simandle (NJ), who served as chair. The purpose of the Task Force was to consider the issue of ethical guidelines for private sector attorneys who serve as neutrals in court-annexed ADR programs. This step was prompted by the substantial growth of such programs during the 1990s, programs which at this time are governed only by local rules. The Task Force's concerns were driven largely by rapid change in the district courts, but it recognized that ADR has grown apace in the appellate and bankruptcy courts as well.

To determine the incidence and nature of ethical problems in district court ADR proceedings, the Task Force held a series of meetings with those involved in court-annexed programs, including judges, court ADR staff, attorneys who serve as neutrals, and academics. There was general agreement that the incidence of ethical problems is low but that the combination of rapidly growing programs, sometimes inadequate training of ADR neutrals, and judges who are unfamiliar with ADR creates a potential for serious ethical breaches.

Through its meetings with the various ADR experts, the Task Force identified four areas where problems are likely to arise when courts use private sector attorneys as ADR neutrals: past, present, and future conflicts of interest; confidentiality of materials and information disclosed during ADR; exposure of the neutral to subpoena to testify in subsequent litigation; and protection of ADR neutrals from civil liability through immunity.

For a number of reasons, the Task Force determined that national ADR ethics rules would be premature at this time. Not only did the ADR experts advise against them, but the Task Force believes there is considerable value in encouraging further experimentation at the local level before national rules, if any, are drafted. Furthermore, some issues, such as immunity and conflicts of interest, are either very complicated, are currently the subject of in-depth study by other organizations, or would require statutory authorization, which the Task Force is not prepared to recommend.

Nonetheless, the Task Force did conclude that it would be useful for the Committee to issue a general statement encouraging courts to give careful consideration to several specific ethical issues and advising the courts on the attributes of a well-functioning court-annexed ADR program. A recommendation to this effect was made and accepted at the June 1996 Committee meeting. The Task Force has subsequently identified the attributes of a well-functioning court-annexed ADR program and has developed a set of ethical principles for ADR neutrals. These are presented below.

II. The Attributes of a Well-Functioning Court-Annexed ADR Program

Our Task Force agrees with the consensus view that a federal court must make a conscious effort to determine whether some type of ADR is an appropriate response to local dockets, customs, practices, and demands for ADR services. We also believe that, for ADR to be most responsive to local conditions, it should be implemented at the local court level (district, appellate, or bankruptcy). There is sufficient breadth in the Federal Rules of Civil Procedure and other legislation, as the Judicial Conference has found, to foster and support implementation of varying ADR programs in the local courts.

Although we have witnessed the gradual development of a preference for mediation, we have not seen the emergence of a single type of ADR that should serve as a paradigm for all courts and we recommend none here. Nevertheless, the Task Force believes there are common attributes of well-functioning ADR programs that all courts should strive to incorporate into their ADR programs and that should be enunciated through local rules.

At the same time, we recognize the need for flexibility in providing a means for dispute resolution that is informal, inexpensive, and adaptable. ADR is often valued, in fact, as an alternative to rule-bound and costly procedures like motion practice and trial. One cannot lose sight of the fact, however, that federal cases referred to ADR can be factually or legally complicated and can have high stakes. In such an environment, the basic ingredients of a fair and effective court-annexed ADR program should include at least minimal rules with respect to the expectations placed upon the court staff and judicial officers, the appointed neutrals, and the participants (attorneys and litigants).

Both research and anecdote suggest that, to date, litigants in federal court ADR programs have had positive experiences.[1] Our goal is to ensure that this remains true in the future. As use of ADR and understanding of its characteristics continue to grow, we feel that some guidance is both warranted and now possible. Thus, we offer the following eight attributes of a well-functioning court-annexed ADR program, drawn from our discussions with ADR experts, our own experiences, and other sources.[2] Given the critical role played by ADR neutrals, on whom the effectiveness, integrity, and reputation of court ADR rests, we address this attribute of court programs separately in Section III.

1. The local court should, after consultation among bench, bar and participants, define the goals and characteristics of the local ADR program and approve it by promulgating appropriate written local rules.

   Comment: The program's structure follows the identification of its goals. The court should identify its needs after consultation with all constituencies, especially the advisory group set up under the CJRA if it is still in operation. The necessity for written guidance is self-evident, and the local rules process provides the surest means of careful promulgation. These rules should contain provisions to address each of the attributes discussed here, with special attention to ethical guidelines for ADR neutrals.

2. The court should provide administration of the ADR program through a judicial officer or administrator who is trained to perform these duties.

   Comment: An ADR program does not run itself and cannot succeed without leadership. The selection of cases, administration of the panel of neutrals, matters concerning compensation of neutrals, and ethical problems will need to be addressed from time to time by a person with authority to speak for the court. During the past five years, a number of

[1] Research has consistently shown high attorney and litigant satisfaction with ADR procedures, including the fairness of these procedures. For the most recent research in federal courts, see *Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND 1997) and *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Federal Judicial Center 1997).

[2] Other sources include two symposia offered by the Federal Judicial Center for representatives from district and bankruptcy courts with new or established ADR programs, as well as the National ADR Institute for Federal Judges, co-sponsored by the Federal Judicial Center, the Center for Public Resources, and the ABA's Litigation Section. A handbook prepared for the Institute, *Judges's Deskbook on Court ADR* (Center for Public Resources 1993), has served as a useful guide for courts interested in ensuring the quality of their ADR efforts.

courts have appointed full-time, professional ADR staff, to whom they have assigned many core ADR functions, such as recruitment and training of neutrals, assignment of cases to neutrals, and evaluation of program effectiveness. Professional ADR staff can be particularly helpful in handling problems that arise in ADR, providing a buffer between the parties, neutral, and assigned judge. Although courts can retain these staff through the use of local funds, additional funding will depend on actions taken by the Judicial Resources Committee and the Judicial Conference of the United States. Where such staff are not available, their important functions can be and often ably have been performed by an ADR liaison judge. The important point is to have someone who is responsible for the program.

3. When establishing a roster of neutrals for cases referred to ADR, the court should define and require specific levels of training and experience for its ADR neutrals, and appropriate training should be provided through the court or an outside organization. Training should include techniques relevant to the neutral's functions in the program, as well as instruction in ethical duties.

   Comment: Court-appointed ADR neutrals are typically experienced attorneys from the local bar or, less frequently, attorneys specializing in an ADR practice. We have found, however, great variability in the training of these appointed neutrals. Some courts require no training, some provide training by judicial officers, and some provide training by expert consultants. No funding for training of attorney-neutrals has been available from central budget sources, so courts have sometimes funded training from local sources, such as bar associations or attorney admission funds, or have required the trainees to bear the cost. The training of a court's ADR neutrals, tailored to the goals and structure of the local program, is an essential ingredient of a well-functioning court-annexed ADR program. ADR neutrals cannot be expected to perform the sensitive functions of their role unless they have the necessary skills. Mediation and other techniques require special insights into the process that may be unavailable to ordinary litigators, no matter how experienced. Training should include instruction on ethics, to increase the sensitivity of the court-appointed neutral to the ethical demands of these duties.

4. The court should adopt written ethical principles to cover the conduct of ADR neutrals.

   Comment: Well-defined ethical principles are part and parcel of a well-functioning ADR program and are discussed in greater detail in Section III. Principles addressing past, present, and future conflicts, impartiality, protection of confidentiality, and protection of the trial process all should be included in a court's ADR rules. No national model for such

ethical rules has yet emerged. It should be apparent that the American Bar Association's (ABA) Model Rules of Professional Conduct (RPC) (which derive from an adversarial conception of an attorney-client relationship that is not pertinent to an attorney-neutral) and the Code of Conduct for United States Judges (which addresses the ethics of judges who adjudicate cases by exercise of judicial power) do not precisely fit the roles and functions of the appointed ADR neutral in most court programs. Similarly, the Model Standards of Conduct for Mediators, promulgated in 1995 by the American Arbitration Association (AAA), ABA, and Society for Professionals in Dispute Resolution (SPIDR), provide a helpful and thoughtful guide for mediators generally but not necessarily for mediators in court-annexed programs. Therefore, until national federal rules or guidelines, if any, are promulgated, courts should make certain their local rules spell out the duties of and constraints upon ADR neutrals.

5. Where an ADR program provides for the attorney-neutral to receive compensation for services, the court should make the method and limitations upon compensation explicit. A litigant who is unable to afford the cost of ADR should be excused from any fees.

   Comment: Methods of compensation for ADR neutrals vary widely from court to court.[3] Some courts use a panel of neutrals who serve completely pro bono. Other courts use a modified program, where a certain number of hours are rendered free of charge, with a fixed hourly rate thereafter, while still others have a fixed per-case payment schedule (such as in the statutory arbitration courts under 28 U.S.C. § 651, et seq.). [Editor's note: Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659-62 (1988) (amended 1997) (previously codified at 28 U.S.C. §§ 651 to 658 (1994)). After preparation of these Guidelines in December 1997, the ADR Act of 1998 was codified at 28 U.S.C. § 651-658 (1998). Before passage of the ADR Act in October 1998, these U.S. Code provisions were more limited in scope, authorizing mandatory arbitration in ten districts and voluntary arbitration in another ten districts and setting out provisions for implementing the arbitration programs. The ADR Act of 1998 retains the authority of the twenty districts to refer cases to arbitration (see 28 U.S.C. § 654(d) (1998)) but it also authorizes ADR more generally for the district courts.] Other programs have left the matter of compensation to the participants themselves, for negotiation with the neutral. Whatever funding mecha-

[3] For the range of fee arrangements used in the district courts, see *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 29-56 (Federal Judicial Center 1996).

nism is decided upon, the court's rule should minimize undue burden and expense for ADR, yet not impose on the ADR neutrals to render sophisticated or prolonged services on a pro bono basis as a matter of course. Where the court draws upon a panel of federal litigators to render service as ADR neutrals, the court must avoid the appearance of an attorney earning a benefit in litigation as a result of service to the court as an ADR neutral.

6. The local court should adopt a mechanism for receiving any complaints regarding its ADR process and for interpreting and enforcing the local rules for ADR, including the ethical principles it adopts.

   Comment: Courts have adopted a variety of mechanisms for handling problems in ADR, ranging from the appointment of a compliance judge (or ADR liaison judge) with general supervisory authority to the appointment of an ADR administrator who receives such complaints or other feedback and channels them appropriately to the court. It is important, whatever mechanism is decided upon, that the parties be aware of its availability and that it be relatively speedy and simple. Among the problems such a mechanism can address are failures of a party to attend the ADR session, scheduling difficulties, ineffectiveness of the ADR neutral and ethical problems.

7. The court should carefully define the scope of confidentiality intended for information exchanged in its ADR program, striking a balance between absolute protection of ADR process information and the need to avoid shielding misconduct by participants or neutrals.

   Comment: The candor of adversaries in a negotiation process can often depend on the confidentiality of negotiations, although this concern may be lessened in an evaluative or arbitral settlement process involving little or no confidential exchange. The rules of confidentiality and disclosure for attorney-client information under RPC 1.6 [Editor's note: RPC refers to the American Bar Association's Model Rules of Professional Conduct] will generally not apply to negotiations between adverse parties or discussions with an ADR neutral, and likewise Fed. R. Evid. 408 will not render confidential, but merely inadmissible for most purposes, evidence of conduct or statements made in compromise negotiations. In addition, most states have not adopted a statutory ADR privilege and therefore the degree of protection given by a local confidentiality rule will vary.

   A blanket rule deeming the entire ADR process confidential has appeal, to protect the need of participants to share settlement facts with each other and with the attorney-neutral without fear that such information will be used against them in another forum. If the ADR process permits *ex parte* communications with the neutral, the participants should be assured that information imparted in confidence will not

be shared unless authorized. A rule of complete confidentiality may be overbroad, however, and therefore costly if, for example, a participant has abused the process or revealed a fraud or crime. As in Rule 408, evidence does not become confidential merely because it was presented to the ADR neutral if it was otherwise discoverable by an adverse party independently of the ADR proceeding.

To avoid the problems of an overbroad rule, the confidentiality rule could provide that (a) all information presented to the ADR neutral is deemed confidential unless disclosure is jointly agreed to by the parties and (b) shall not be disclosed by anyone without consent, except (i) as required to be disclosed by operation of law, or (ii) as related to an ongoing or intended crime or fraud, or (iii) as tending to prove the existence or terms of a settlement, or (iv) as proving an abuse of the process by a participant or an attorney-neutral.

Whatever rule of confidentiality a court chooses, it will be informing the expectations of the ADR participants. The parties' expectations at the outset are material and will shape the ADR neutral's duties of confidentiality, as reflected in suggested Principle 6 below. The AAA/ABA/SPIDR standards, *supra*, thus state as to confidentiality: ''A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.'' It is best practice to assure that the participants understand the contours of the confidentiality requirements and protections at the outset by having the ADR neutral review the court's rule with them.

8. The court should evaluate and measure the success of its ADR program, perhaps in conjunction with its advisory group.

Comment: In many districts with successful ADR programs, the advisory groups established by the CJRA have had important roles in designing, implementing, and evaluating the court's ADR processes. Whether an advisory group is used or not, however, it remains the responsibility of the local court to ensure that its program provides the quality and integrity of service that is commensurate with the court's aspirations and the parties' expectations. Unless such evaluation and measurement are included, the court may remain unaware of areas in need of improvement.

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These attributes of healthy and responsive ADR programs are not meant to provide an exclusive list. Courts may have needs and goals that go beyond these principles. The Task Force recommends the consideration of these principles as constituting a benchmark for a court-annexed ADR program.

III. Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs

If courts continue to use practicing attorneys as neutrals in court-annexed ADR programs, they must make sure their local rules satisfactorily address the role of the attorney-neutral. Particularly important are rules regarding ethical issues, such as maintaining confidentiality and revealing conflicts of interest. When adopting such rules, courts should make sure the rules are consistent with the type of ADR program established. For example, while existing rules for judges and lawyers operating in advocacy roles may translate to some extent to adjudicative ADR processes such as arbitration, they cannot properly be applied to non-adjudicative ADR processes such as mediation, where the attorney-neutral acts neither as judge nor advocate but rather as a neutral facilitator in a non-binding process. In designing ethical guidelines appropriate to the type of ADR program adopted, courts should be encouraged to consider each of the following principles.

1. An attorney-neutral appointed or selected by the court should act fairly, honestly, competently, and impartially.

   Comment: This is an objective, not subjective, standard. Should the integrity or competency of an attorney-neutral be questioned, the inquiry should be whether an attorney-neutral has acted fairly, honestly, competently, and impartially. Whether this standard has been met should be measured from the point of view of a disinterested, objective observer (such as the judge who administers the ADR program), rather than from the point of view of any particular party.

   The imposition of a subjective appearance standard would unfairly require the neutral to withstand the subjective scrutiny of the interested parties, who, for example, might seek to attack the neutral's impartiality if disappointed by the settlement. As this would undermine the important public interest in achieving binding settlements, there is no intention to impose such a subjective standard under this principle.

2. An attorney-neutral should disqualify himself or herself if there is a conflict of interest arising from a past or current relationship with a party to the ADR process.

   Comment: Ordinarily, an attorney-neutral cannot perform effectively as a neutral if there is a past or present representational or other business relationship with one of the parties to the dispute, even if that relationship existed only in connection with entirely unrelated matters. However, such conflicts of interest may be waived by the parties, so long as the particulars of the representational or other business relationship are first fully disclosed on a timely basis. Family relationships, and relationships that give rise to an attorney-neutral's having a financial

interest in one of the parties or in the outcome of the dispute, or prior representation with regard to the particular dispute to be addressed in the ADR process, cannot be waived.

The Code of Conduct for United States Judges, which incorporates 28 U.S.C. § 455, provides guidance as to the grounds for disqualification of judges. Although the Code of Judicial Conduct is not directly applicable to the attorney-neutral context, it does set out some guiding principles that can be applied if modified to accommodate the different orientation of an attorney-neutral operating in an ADR, as opposed to a public adjudication, context. Keep in mind, however, that § 455 is expressly required as the appropriate standard when evaluating the actions of arbitrators (28 U.S.C. § 656(a)(2)). [Editor's note: *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4662 (1988) (previously codified at 28 U.S.C. § 656(a)(2) (1994)). *See also* 28 U.S.C. § 655(b)(2) (1998)]

3. An attorney-neutral should avoid future conflicts that may arise after the ADR proceeding is complete. Thus, an attorney-neutral should be barred from representing a party to the ADR proceeding with regard to the same or substantially related matters, as should his or her law firm, except that no future conflict with regard to substantially related matters will be imputed to his or her law firm after the expiration of one year from completion of the ADR process, provided that the law firm shields the ADR neutral from participating in the substantially related matter in any way.

   Comment: Parties to an ADR proceeding have a reasonable expectation that they will not be harmed in the future from an ADR neutral's knowledge about them, especially confidential information gained during the ADR process. Thus, this principle would preclude the ADR neutral from representing any other ADR party in the same or substantially related matters, recognizing the sensitive nature of information, opinions, and strategies learned by the ADR neutral. The same impairment would be imputed to the neutral's law firm in the same case, but it would dissipate with the passage of time, our recommendation being one year, in any substantially related matter. This safe harbor recognizes that it would be far too draconian to automatically preclude the law firm's representation of a prospective client for all time merely because an attorney-neutral in that firm conducted ADR proceedings involving that party in the past, even in a substantially related matter. This provision assumes that the attorney-neutral has observed the duty of confidentiality and that he or she can be screened from any future related matter undertaken by the firm.

   A conflict rule that generally disqualifies an entire law firm from representing any party that participates in an ADR proceeding conduct-

ed by an attorney in the firm will have severe and adverse effects on court-annexed ADR programs that use active lawyers as neutrals. Finally, because an attorney who serves as a court-appointed ADR neutral does not thereby undertake the representation of the participants as clients in the practice of law, ethical rules governing future conflicts of interest arising from past representation, such as the ABA Model Rules of Professional Conduct 1.9 and 1.10, do not appear to apply.

4. Before accepting an ADR assignment, an attorney-neutral should disclose any facts or circumstances that may give rise to an appearance of bias.

   Comment: Once such disclosure is made, the attorney-neutral may proceed with the ADR process if the party or parties against whom the apparent bias would operate waive the potential conflict. The best practice is for the attorney-neutral to disclose the potential conflict in writing and to obtain written waivers from each party before proceeding.

5. While presiding over an ADR process, an attorney-neutral should refrain from soliciting legal business from, or developing an attorney-client relationship with, a participant in that ongoing ADR process.

   Comment: This provision prohibits the development of a representational attorney-client relationship, or the solicitation of one, during the course of an ADR process. It is not intended to preclude consideration of enlarging an ADR process to include related matters, nor is it intended to prevent the ADR neutral from accepting other ADR assignments involving a participant in an ongoing ADR matter, provided the attorney-neutral discloses such arrangements to all the other participants in the ongoing ADR matter.

6. An attorney-neutral should protect confidential information obtained by virtue of the ADR process and should not disclose such information to other attorneys within his or her law firm or use such information to the advantage of the law firm's clients or to the disadvantage of those providing such information. However, notwithstanding the foregoing, an attorney-neutral may disclose information (a) that is required to be disclosed by operation of law, including the court's local rules on ADR; (b) that he or she is permitted by the parties to disclose; (c) that is related to an ongoing or intended crime or fraud; or (d) that would prove an abuse of the process by a participant or an attorney-neutral.

   Comment: This provision requires protection of confidential information learned during ADR processes. For this purpose, information is confidential if it was imparted to the ADR neutral with the expectation that it would not be used outside the ADR process; information otherwise discoverable in the litigation does not become confidential merely because it has been exchanged in the ADR process. This principle also permits disclosure of information that is required to be disclosed by

operation of law. This provision accommodates laws such as those requiring the reporting of domestic violence and child abuse.

7. An attorney-neutral should protect the integrity of both the trial and ADR processes by refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the ADR process, unless all of the participants agree and jointly ask the attorney-neutral to communicate in a specified way with the assigned trial judge.

   Comment: Courts implementing ADR programs should specifically adopt a written policy forbidding attorney-neutrals from speaking with the assigned trial judge about the substance of confidential negotiations and also prohibiting the assigned trial judge from seeking such information from an attorney-neutral. Docket control should be facilitated by means of the attorney-neutral's report of whether the case settled or not or through other periodic reporting that does not discuss parties' positions or the merits of the case. Such reports should be submitted to the ADR administrator, judicial ADR liaison, or the court clerk or his or her designee.

   Public confidence in both the trial and settlement processes can be undermined if direct communication is permitted between the attorney-neutral and the assigned trial judge regarding the merits of the case or the parties' confidential settlement positions. However, it does no harm to communicate with the trial judge at the joint request of the parties, such as requests for continuances, discovery accommodations, more time to pursue the effort, or administrative closure of the case pending implementation of a settlement agreement.

8. An attorney-neutral should fully and timely disclose all fee and expense requirements to the prospective participants in the settlement process in accordance with the rules of the program. When an ADR program provides for the attorney-neutral to receive a defined level of compensation for services rendered, the court should require the parties to make explicit the method of compensation and any limits upon compensation. A participant who is unable to afford the cost of ADR should be excused from paying.

   Comment: If the court intends to require a certain level of *pro bono* service in order to participate as an attorney-neutral in a court-annexed ADR program, the level of the *pro bono* commitment should be explicitly defined. Where courts permit neutrals to charge a fee to ADR participants, disputes about ADR fees, though rare, can be prevented through disclosure at the outset of the fee arrangements.

The Explosive Growth of International Mediation

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While the concept of amicable settlement using a third party is literally thousands of years old, mediation, as an institutionalized way of settling commercial disputes, was rarely used ten to 15 years ago.[1] The typical domestic State court version of commercial mediation consisted of the lawyers standing in front of the judge's bench when he would ask each of you what you wanted and then tell you to split the baby down the middle. If you said ''no,'' he (it was always ''he'' in those days) glared at you and told you to pick a jury. This led to settlements in which the parties themselves rarely participated and bred disrespect for a system that cared little for the merits of a dispute.

The U.S. federal appellate system in the Second Circuit had a program where a magistrate would caucus with the parties and try to resolve a pending appeal. That system, which was later expanded into several other jurisdictions, met with some success and began to educate the New York bar as to the added value in the settlement process of an independent third party who actually knew something about the merits. The use of magistrates as settlement masters, especially in the U.S. federal courts, then came into use adding to the positive view of a negotiated settlement using a third party who had actually read the papers and thought about the case.

However, the possible use of mediation as a means to resolve complex commercial disputes did not come into most litigators' arsenals until relatively recently. Mediation as a means to resolve international commercial disputes is in its very early stages.[2] The American Arbitration Association (AAA) began a program years ago in which a case manager would call the lawyers for the parties in new arbitrations and then suggest mediation. Some took advantage of the suggestion, but not very many. The success rate for those who opted for mediation was by all reports uneven at best.

[1] Mediation in the labor relations field was, of course, well known.

[2] *See generally* Antonin I. Pribetic, ''The 'Third Option': International Commercial Mediation.'' 1 *World Arb. & Med. Rep.* 4 (2007).

In 1979, three California judges started a company called Judicial Arbitration and Mediation Services (JAMS).[3] Its model was the use of retired judges to assist parties to resolve their differences. It worked with a fair degree of success and began to grow quickly with the entry into the company of several highly skilled retired judges whose success rates made the mediation of commercial disputes, at least in California, much more acceptable and well regarded.

In 1992, JAMS sought expansion beyond California and merged with an ADR company on the East Coast named Endispute. The two formed what was then—and is now—the largest of the private providers of these services. Meanwhile, other groups began to enter the field largely dealing with specialized matters, such as the resolution of community-based disputes, employment, or family law matters. SPIDR[4] and the Academy of Family Mediators (AFM) were two of these.[5]

By the year 2000, the AAA was doing perhaps 150 or so commercial mediations.[6] Mediator training was uneven and consisted of mostly war stories and some role play. The more successful mediators, through trial and error, developed their own techniques for resolving these cases.

Internationally, the International Chamber of Commerce (ICC), which began as an institution in 1919, had rules for the longest time that were called the ''Rules for Conciliation and Arbitration.''[7] While at Baker & McKenzie as a young associate in the 1970s, I participated in one of the first international ''conciliations.'' It consisted of the selection of three prominent European professors and the parties' preparation and exchange of briefs. The lawyers then assembled in Paris at the ICC's headquarters where—after an extraordinary expenditure of time and money—these three professors announced with great solemnity that they had carefully considered the positions of the parties and suggested that they settle the dispute at one-half of the damages claimed. The case did not settle and ultimately went the route in arbitration.

The notion of ''conciliation'' which implied a totally evaluative exercise by prominent academicians or retired counsel did not prosper and, indeed,

[3] The company is now known simply as ''JAMS.'' Its Web site is at http://www.jamsadr.com.

[4] SPIDR was an acronym for the Society for Professionals in Dispute Resolution.

[5] SPIDR and AFM merged in January 2001 with the Conflict Resolution Education Network (CREnet) to form ACR, which is an acronym for the Association for Conflict Resolution. ACR's Web site is at http://www.acrnet.org.

[6] The AAA's Commercial Mediation Procedures can be found at http://www.adr.org/sp.asp?id=22440.

[7] The ICC's U.S. representative is the U.S. Council for International Business (USCIB). The ICC's Web site is http://www.iccwbo.org.

its lack of success in Europe still inhibits, I think, the growth of the process there.

That being said, the ICC, as of July 1, 2001, published ''ADR Rules'' intended to replace the old Rules of Optional Conciliation. ''ADR'' by the way, stands for ''amicable dispute resolution'' and not ''alternative dispute resolution.'' Article 5(2) of the ICC ADR Rules says ''In the absence of an agreement of the parties on the settlement technique to be used, mediation shall be used.'' That of course implies that mediation is a known process familiar to most.

I believe that there were about 100 ADR referrals last year at the ICC. It is a fair assumption that many of these involved cross-border transactions. The AAA reported 73 international commercial cases that went to AAA mediation in 2006.

The ICC, in February 2007, hosted its Second Annual International Mediation Competition in Paris. The competition was modeled after the Vis Moot in Vienna. About 40 law schools competed. I was pleased to be one of the judges. The ICC's goal, obviously, is to promote the use of mediation to resolve cross-border disputes.

The Center for Public Resources (CPR), is now known as The International Institute for Conflict Prevention and Resolution. In 2004, CPR joined with the Conciliation Center of the China Council for Promotion and International Trade (CCPIT)/China Chamber of International Commerce (CCOIC) to form the U.S. China Business Mediation Center, an alliance for the provision of mediation services in China and for the training of mediators.[8] There have not been any cases of which I am aware, but you have to understand the way cases are mediated traditionally in China. In China International Economic and Trade Arbitration Commission (CIETAC)[9] arbitrations it is quite common and even expected that the arbitrator or the chair of the panel will, at some point in the proceedings, become a facilitator for the parties. That is, the arbitrator will actually recommend a settlement that the parties will then consider and to which they will often agree. This eliminates the risk of one of the parties ''losing face''—a serious cultural taboo—and resolves the case after the merits have been fairly presented. Parties in these cases, therefore, understand that their dispute

[8] The Web site for The International Institute for Conflict Prevention and Resolution can be accessed at http://www.cpradr.org. Information on CPR's mediation project in China is at http://www.cpradr.org/CPR_China.asp?M=10.3.

[9] CIETAC was formed in 1956 under the name, the Foreign Trade Arbitration Commission (FTAC). The FTAC changed its name to CIETAC in 1988. Since 2000, the CIETAC is also known as the CCOIC. *See supra* note 8 and accompanying text for a description of CPR's joint venture with the CCOIC. CIETAC's Web site is at http://www.cietac.org.

will be ''mediated,'' at least in the evaluative sense, and will therefore have less incentive to engage in a formal mediation prior to the commencement of an arbitration.

In 2002, United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Conciliation. ''Conciliation'' is defined in the Model Law as ''a process whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute.''[10] The Web site[11] does not report that the Model Law has yet been adopted by any States, but its mere existence is a testament to the acceptability of the process of mediation outside of the United States.

The World Intellectual Property Organization (WIPO) now has Mediation Rules.[12] So does the Hong Kong International Arbitration Centre (HKIAC),[13] the London Court of International Arbitration (LCIA)[14] and many regional centers such as Singapore International Arbitration Centre (SIAC).[15]

This is all well and good. There are obviously clients and counsel out there who feel the need for these services, but the numbers thus far—at least as reported by the various institutions—rarely exceed 50 to 100 substantial commercial cases in a given year. The sole exception, at least institutionally, seems to be JAMS, although the number of ''international'' mediations, depending upon how one defines the term, probably does not exceed 250.

I was asked to speak at a conference in August of 2006 on the growth of international mediation and, in preparation, I sent a blast e-mail to my colleagues at JAMS asking them for the number of international mediations that they had conducted since January 1. 2006. In asking the question, I defined an ''international mediation'' rather strictly. An ''international mediation'' was defined as a mediation in which either you got on an airplane and flew to another country to conduct the mediation or a mediation in which at least one of the participants got on a plane and flew into the United States (or participated by way of video conference). There are about 200 neutrals at JAMS; 35 reported back. There were 91

[10] Model Law art. 1(3), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html.

[11] UNCITRAL can be found at http://www.uncitral.org.

[12] *See* http://www.wipo.org.

[13] The mediation rules of the HKIAC can be accessed at http://www.hkiac.org/HKIAC/pdf/Rules/en_mediation.pdf.

[14] The LCIA Web site is http://www.lcia-arbitration.com.

[15] SIAC's mediation rules can be found at http://www.siac.org.sg.

international mediations by that definition conducted by JAMS neutrals probably through mid-July of last year. If you extrapolate through to the end of last year, that means that JAMS does one international mediation about every business day.

These numbers are good, but JAMS neutrals mediate between 9,000 and 10,000 cases each year, so ''international mediations''—at least as it was restrictively defined—do not constitute a substantial percentage of the total. That being said, the ''explosive growth in international mediation'' may well be measured not only by the number of cross-border or cross-cultural mediations that are conducted, but by the absolute number of larger commercial mediations that involve parties resident in different States or that involve transactions that take place outside of the jurisdiction where suit or arbitration may be brought.

Europe, aside from the ICC, is very much in the mediation business. In 2004, JAMS joined with the leading mediation service providers in Europe to form the International Mediation Services Alliance (MEDAL)[16] MEDAL's members include Centre for Effective Dispute Resolution (CEDR) Solve in London,[17] ACBMediation in the Netherlands,[18] CMAP in France,[19] and ADR Center in Italy.[20]

Now, some numbers. The largest mediation provider in the world, probably by a factor of ten or more, is JAMS. JAMS counts over 10,000 case filings a year and 70 percent of its revenue comes from mediation. That means that JAMS administers between 9,000 and 10,000 mediations a year, many of them large commercial cases or class actions (a class action counts as a single case). I have already given you the figures for ''international mediations'' as JAMS has defined it.

The HKIAC reports that it conducted 280 arbitrations and 12 mediations in 2004. In 2005, it administered 281 arbitrations and 21 mediations, an increase in the mediations of about 40 percent. The AAA reports that it conducted 73 international commercial mediations in 2006, 27 of which (or 37 percent) involving claims of at least $500,000.

I do not have actual numbers for others, but the anecdotal evidence, judged by the number of trainings offered and the number of institutions with international mediation rules,[21] is that the case numbers and the

[16] MEDAL's Web site is at http://www.medal-mediation.com.

[17] CEDR trains and certifies mediators as well as conducts mediations. Its Web site is http://www.cedr.com.

[18] ACBMediation is a not-for-profit organization. It can be accessed at http://www.mediation-bedrijfsleven.nl.

[19] CMAP's Web site is at http://www.mediationetarbitrage.com.

[20] ADR Center can be accessed at http://www.adrcenter.it.

[21] *See generally* Robert B. Davidson, ''Initiating an International Mediation,'' *in Practitioner's Handbook on International Arbitration and Mediation* ch. II.2 (2d ed. 2007).

amounts at issue are growing. Of course, this could be like Y2K and evidence a great deal of anticipation over what turns out to be very little, but my belief is that we are in the beginnings of a huge increase in case numbers abroad. There is little doubt that the case numbers will continue to grow so long as there are skilled neutrals to do these cases. Much of this growth will be fueled when a critical mass of lawyers have had a positive experience with the process. Much of the impetus for growth comes from the abysmal court systems in many countries, systems that are rife with corruption or bogged down by interminable delays. Many of the courts abroad have a system of appointing judges that leaves complex cases in the hands of less competent people or very young lawyers just out of law school. I heard the other day that it takes 11 years for a lawsuit in India to wend its way through the court system there.

This all, of course, bodes well for alternative (or ''amicable'') forms of dispute resolution. Combine these facts with the growth of trade and the increasing complexity and cost of taking these disputes to a court judgment or an arbitration award and you have a recipe for growth in mediation.

I would like now to talk briefly about what we mean in terms of process when we talk about an ''international mediation.'' My experience has taught me that there are some skills that are needed for cross-border mediations that are not that critical in domestic settings. I'd like to speak about some of them. I am speaking now about commercial cases as opposed to smaller employment, personal injury, or family law matters that tend to be local.

JAMS mediated a case some months back involving a trade disparagement claim brought by a Japanese company against a U.S. alleged disparager. It was a particularly bitter dispute, and the Japanese company was represented by extremely aggressive counsel who was seeking $100 million in damages. The U.S. counsel was billing his client on a contingency basis. The CEO from Japan personally attended the mediation. The mediation began and the CEO, in joint session, announced—much to his U.S. counsel's horror—that the company was not looking for money. Instead, it was looking for an apology. The CEO then took a piece of paper out of his pocket and handed it to his counterpart on the other side of the table. The paper, of course, had the apology written on it. The mediator, seeing the distress on the lawyer's face, suggested a brief adjournment. The case settled, but the most difficult negotiation turned out to be the fee due the lawyer rather than the language of the apology that settled the case. This is a rather stark example about how a cultural norm prevailed over dollars and cents (or euros and cents if you prefer).

A mediation that I conducted between an American machinery purchaser and the French/English consortium that sold the goods also had its cultural nuances. The challenge was to communicate fairly to the non-U.S. parties the risk of a jury trial in Dade County Florida and the real

possibility of punitive damages being part of an adverse verdict. While inside counsel for the European consortium was experienced, he had never seen a case taken to verdict in the United States and certainly not in a Florida state court.

One of my other mediations involved a mediated settlement driven primary by the local consequences that would befall one of the parties if it stopped its production of a certain petroleum product. It seems that, if the seller's factory stopped producing the product that it was selling, the environmental laws in its country of domicile would have required the plant to shut down and to then be decommissioned in an environmentally friendly way. That implied a huge expenditure. Thus, an important concession by the buyer was its willingness to take product over a longer period of time, thus deferring the need for an immediate expenditure in clean-up costs that would have otherwise been required by the operation of local law.

This latter example demonstrates why an international mediator has to be sensitive to the many odd rules and regulations (that is, rules and regulations not operating in the U.S. context) that could impact significantly on the negotiation positions of the parties. For example, a good working knowledge of international arbitration—its costs and the time required to reach an award in the context of various institutional settings—is quite helpful. Most of these international mediations, at least in my experience, are subject to resolution in an international arbitration proceeding if the parties are unable to arrive at a settlement.

An international mediator, however, need not know the environmental laws of every country or the institutional rules of every regional arbitration center, but he or she must be ready to probe potentially sensitive substantive areas with the parties to ferret out the pressure points in the negotiation. For example, the possible applicability of international conventions to a dispute, such as the Convention on the International Sale of Goods, or the effect of competition laws in Europe and elsewhere can have a determinative impact on a mediated settlement. The fear of U.S. style discovery, or the lack of it, can also drive a settlement.[22]

[22] 28 U.S.C. Section 1782 permits a district court in the United States to order broad discovery from a third party located in its jurisdiction ''for use in a foreign or international tribunal.'' In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the U.S. Supreme Court interpreted 28 U.S.C. Section 1782 broadly and suggested that it applied to international arbitrations. Earlier cases, such as *National Broadcasting Co., Inc. v. Bear Stearns & Co.,* 165 F.3d 184, 185 (2d Cir. 1999), had determined that Section 1782 did *not* apply to an international arbitration. The *Advanced Micro Devices* case appeared to change that rule, and, indeed, courts in the United States have now begun to order U.S.-style discovery upon the application of

So, we are left with a growing area of practice for mediators and an exciting new arena for non-U.S. businesses seeking to limit expense and mitigate risk. The mediation alternative will only get more popular as more mediators acquire the facilitative skills and experience needed in this process, and as more companies have their own success stories to tell.

one of the parties to the arbitration which is pending abroad. *See, e.g.,* Oxus Gold PLC, Misc 06-82, 2007 U.S. Dist. LEXIS 24061(D.N.J. Apr. 2, 2007).

Mediation and Its Uses Beyond the Obvious

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Mediation has a cost/benefit ratio like no other dispute resolution process and is now firmly embedded in the dispute resolution world. But given mediators' skills and success rates, we should be doing so much more than simply providing a process by which parties can exit the adversarial legal system.

There are certainly less obvious ways in which mediators can provide a service to the commercial world, and my recent experiences, coupled with anecdotal evidence, suggests that mediators are beginning to work in areas far beyond their traditional offering.

So, let's have a look at few cases that I think provide ample support for the proposition that it is high time for mediators to extend their services backwards—in other words, earlier in the timeline of a dispute and in fact right back to the beginning, pre-dispute!

THE VERSATILITY OF MEDIATION

A few months ago I mediated an outsourcing dispute. I need not bore you with the detail, for the detail was irrelevant. The dispute was merely symptomatic of a commercial relationship gone wrong. Yet I was retained only to resolve the dispute at hand, the facts of which were encapsulated in well-drafted letters from opposing counsel, letters that did not even hint at the broader relational and contextual problems. But it was not long into the mediation before we all appreciated what needed to be done—an overhaul of the entire outsourcing relationship—in fact a rejigging of a number of separate agreements dating back nearly 15 years. Fees, discounts, bonuses, service level agreements, the term of agreements, geographical boundaries, etc., were all discussed and, by and large, altered to reflect a changing world. Wage inflation in countries to which many services had been outsourced, increased personnel, upgraded/faltering IT systems, mergers, etc., had all conspired to challenge what had once been an extremely good relationship.

Clearly not something for the ''one-day wonder'' type mediation, but rather a structured remedial program with constructive rather than negative dialogue pervading, with true interests rather than absolute or extreme

positions addressed. A series of mediator-managed meetings later, interspersed with a number of meetings that were not attended by me, and all was resolved. Although this case was resolved on the basis that the parties continued their relationship, albeit on a revised basis, it may well have gone the other way—the parties could have drawn a line under their relationship. However, had that been the outcome of the process, we would have seen an orderly unraveling. No ''terminations for cause'' (and associated reputational issues) or diversionary drawn out disputes. A ''clean break,'' a managed exit with the minimum of fuss.

So why was my brief confined to one specific dispute, the metaphorical tip of the iceberg, when it was as plain as a pike staff that a resolution so confined would be no more than scratching an itch, momentary relief from a symptom, not a cure for the underlying cause of the irritation? I suggest it is because of the assumption that mediators only appear when parties are ready to exit a fully fledged dispute, their role, as the one- or two-day mediation perhaps indicates, confined to resolution of a few well-defined issues.

Another dispute I mediated recently was described as a licensing dispute. And, at one level, it most certainly was. It was between two companies—one a minority shareholder in the other, and the issue I was asked to resolve related to a series of technology licences dating back several years. Yet that was not really the problem at all. The problem was how the minority shareholders felt they were being treated and how they perceived the company in which they had a valuable minority stake was being run.

The two companies were doing business in very different jurisdictions, and there were cultural and all sorts of other differences between them. These were the real issues. Again, the headlined dispute took a back seat and the mediation took on the characteristics of a commercial ''kick-off'' meeting at which a road map was worked out for the establishment of a joint venture. Was that an expected mediation outcome? No! But the mediation was the catalyst for discussing the wider and more important issues that resulted in a new, better structured and more profitable relationship.

PUSHING BACK THE BOUNDARIES

Both of the cases discussed above were referred to mediation because of a dispute symptomatic of a commercial relationship gone or going wrong. Could a mediator have been used to address the underlying relational issues before the disputes arose? Of course! The costs of the disputes could have been saved or significantly reduced as could the management time spent instructing lawyers, there would have been less polarization in terms of positions and willingness to ''talk,'' and the relationships put back on track far earlier.

It seems clear to me, as it does to many others, that mediators need to sell their services more broadly. This is not easy given that mediators have become so associated with the quick exit from proceedings, that their employment elsewhere in the lifecycle of a faltering relationship simply does not occur to many. But mediators must come out from the shadows of the adversarial system under which they typically work and apply their skills in a wider context. Why not bring them in when parties know there is something wrong, albeit at a time when a dispute has not yet crystallized? The advantage to businesses—it would cost them a fraction of what they spend resolving disputes, preventing them in the first place.

But what are our chances of expanding the use of mediation techniques beyond the obvious ''quick fix''? Well, those businesses that do use neutrals to address issues before anyone has thought of reaching for their nearest litigation lawyer report favorable results. Indeed, there is a growing recognition that mediation is essentially a commercial process and one that should be seen as an invaluable business tool, not just to manage problems, but to enhance commercial relationships.

So, the landscape is changing and one example of this is the ''institutionalization'' of mediation in long-term projects in the form of ''project mediation.''

PROJECT MEDIATION

''Project mediation'' is a term that is gaining recognition in the United Kingdom. Put shortly, project mediation is the real-time resolution of disputes or differences by experienced dispute resolvers familiar with the industry concerned and the contractual relationship in question. It is a collaborative problem-solving process that encourages creativity and enhances working relationships.

Project mediation puts the process very much in the forefront of the hearts and minds of contracting parties, but at the outset of a relationship, as opposed to sometime after the crystallization of a dispute. Typically, the mediator or mediators (there can be more than one—legal, technical expert, etc.) will meet with the contracting parties and discuss what form of dispute resolution framework should be put in place. Thus, if and when an issue does arise, the parties have immediate access to expert dispute resolvers that they know and who have respect for the value of a continuing commercial relationship that they are familiar with.

More generally, dealing with issues as they arise is the best way to manage a relationship, and it avoids needless escalation of what is often a minor and easily solvable problem into a dispute. Perhaps more importantly, having a bespoken and trusted process in place, which parties have ''bought into'' at the outset, is likely to deter parties from immediately

taking a totally positional approach to differences or perhaps the more dangerous step of simply doing nothing until the entire relationship is put at risk by a cataclysmic explosion of built-up anger and frustration at issues left to fester.

Having a process in place also avoids any embarrassment or sense of failure over referring an issue to mediation—issues were expected to arise and that is why there is a process in place, a process by which issues can be resolved speedily by readily accessible experts who are known to the parties and who are up to speed with the context in which such issues have arisen.

And the results? The evidence so far suggests that project mediation helps bring in projects on time and within budget!

But it is not just in the context of a relationship under strain (as opposed to a crystallized dispute) that mediation can be used. ''Deal mediation'' is also coming to the fore, another less obvious use of the process.

DEAL MEDIATION

Business partners or prospective partners sometimes employ mediators, not to resolve a dispute (because there isn't one), but to facilitate stalled or difficult negotiations. A wonderful example of a deal mediation was the subject of an article published in the *IBA Mediation Newsletter,* which I used to edit.[1] The facts were these. Company A owned a trademark portfolio that they licensed to Company B. Company A had no interest in continuing to own the portfolio, and Company B preferred to own the portfolio rather than be a licensee. This was a case of willing buyer, willing seller—all well and good. But they could not agree on a price, and each party had very different figures in mind. It was agreed that they would each commission a report on the value of the trademarks from brand valuation experts.

The reports came back and, guess what? They were very different. Company A's report contained a figure unacceptable to Company B and vice versa. The parties talked. It was established as a matter of principle that both would move from the figures stated in their respective expert's report. Further proposals were made, but still there was a gap. The parties were sophisticated however. Rather than simply give up the commercial outcome both sought because of what appeared to be an unbridgeable gap, they considered the options.

Arbitration was rejected—neither wanted to risk an extreme outcome. ''Baseball arbitration'' was considered where the arbitrator has to decide

[1] ''Arb-Med Einstein's Theory of Relativity Really Works!,'' 2(2) *IBA Mediation Newsletter,* Sept. 2006.

between ''best'' offers from each party. The arbitrator can do nothing else. The process encourages reasonable rather than extreme proposals, as the arbitrator can only choose the proposal he or she considers the most realistic.

Other options were looked at, but eventually the parties plumped for an ''Arb-Med.'' The ''two-hatted'' neutral spent a morning as arbitrator and arrived at a figure for the value of the trademark portfolio. He did not disclose the valuation but put his finding in an envelope. He then became a mediator on the understanding that if a deal could not be agreed in the mediation process, the envelope would be opened and his valuation would become binding. The advantage of such a process to the parties was that there would be a certain outcome one way or the other. Needless to say, a deal was done at the mediation, and the envelope was never opened. The mediator had bridged the gap!

This was a situation in which there was no dispute, just two parties trying to conclude a commercial transaction who needed a bit of help from a mediator to finalize matters. What a superb use of a mediator's skills!

CONCLUSION

Mediators have, for far too long, been pigeon-holed as dispute resolvers to be called up when parties decide, as they usually do, that enough is enough in the adversarial ring. But it is high time we were thought of as so much more, as deal makers in situations where a bit of oil on the wheels is needed, as enhancers of commercial relationships in long-term and other arrangements, and as an expert resource in getting the best out of commercial interactions of all kinds.

International Mediation

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In their seminal book, *Getting to Yes,* Roger Fisher and William Ury, some 20 years ago, said: ''A basic fact about negotiation, easy to forget in corporate and international transactions, is that you are dealing not with the abstract representation of the other side but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints, and they are unpredictable. But so are you.''[1]

I love that quote, and it is something that I remind myself of as often as I can. As lawyers, as arbitrators, and as mediators we need to understand that intellectual emotions do in fact actually play quite a big part in how we advise and how we act in helping our clients break deadlock.

THE CHALLENGE OF BREAKING AN INTERNATIONAL DEADLOCK

There are a lot of challenges facing the international mediator. Some of the challenges are of a more pragmatic nature:

- Getting at the right information, and what information do you need to actually break deadlock? Some of it is about the law, but some of it is about a great deal more than the law.
- Getting the right people involved in the discussions and making them take responsibility.
- There is the issue of which forum, which law, how long the process, and how much is it all going to cost?
- In some environments, the threat of instability, role of government, and international monetary factors.

[1] Roger Fisher & William Ury, *Getting to Yes* 18 (1981).

With this last point in mind, it is interesting that in the last several years the World Bank has worked with CEDR, and possibly approached other institutions, to develop with them an approach to bring mediation to certain parts of the world. It is recognized that cross-border elements of a dispute may come from the place of business of one or both of the parties, the place of the mediation or the place of the competent court, the governing law of the transactions, the governing law of the mediation agreement, and possibly the governing law in a different and enforcing jurisdiction.

It is important to ensure that parties going into mediation have a mediation agreement, mediate in friendly jurisdictions, and are advised by competent counsel. It is the role of the lawyers to consider confidentiality enforcement. Counsel should check that you are mediating in a mediator-friendly jurisdiction where confidentiality is understood and protected, where mediators are properly trained and have professional codes and standards, and if a settlement is reached, it is drawn in a way that will in fact give the parties what is intended—a workable and binding settlement.

Trust is right at the pinnacle of mediation practice. As one of the participants on one of our CEDR international courses, Steve Davy of the Red Cross, said, ''Trust is a fragile commodity.'' This is never more so than when a mediator is working with parties in international disputes where they may be dealing with a procedure they have not been engaged in before, and the role of the third party may be new to them. Mediators have to work very hard to build up the appropriate empathy and trust and get to a point at which principals will trust them and devise ways in which matters may be settled.

In all mediations, empathy, trust, and professionalism are key, and in an international context, one needs to be particularly attuned to cultural sensitivity. Even if you can meet these needs on a domestic basis, in an international setting, more time and effort are required on the part of the mediator and those advising the clients to ensure that they understand the process and its intentions, its capabilities and limitations, and their role in the process and likely reactions of the parties.

Agenda and timings are always important in all mediations, but even more so in international cases—it is very easy to get ambushed with parties announcing other commitments, the need to get to the nearest airport, and so forth.

As a mediator, I will work with the lawyers or other professional advisors who are going to be much closer to the clients and talk about expectations, process, about the roles of their clients and the decision makers. This will obviously cover things like cultural expectations, language, and interpreters, but one has got to drive towards creating the best possible environment to keep the energy and focus on settlement at all times.

A SOPHISTICATED MARKET?

What I see as a mediator and what CEDR and our International Mediation Services Alliance (MEDAL) partners see is a growth in Europe from non-users of mediation and non-believers in its value to more mature users.

In recent years, CEDR has witnessed a large volume of international clients resolving their conflicts using the mediation process. The currently proposed European Union (EU) directive demonstrates a further maturing in the field. It is still true, however, that the majority of mediations take place in the context of civil proceedings, and a great deal of our international work in London comes through our commercial court.

The view of the EU commission is that providing a stable and predictable legal framework should contribute to putting mediation on an equal footing with judicial proceedings. I was pleased to see that in drafting the directive, the emphasis is very much on the positive opportunities for clients in mediation. That is, mediation has a value in itself as a dispute resolution method to which citizens and business should have easy access and which deserves to be promoted independently rather than as a system to offload pressures on a court system.

The overall directive emphasis is client orientation and value added, which I think is again to be welcomed. It will give the same kind of recognition and harmony of approach that has existed for the use of arbitration for a number of years. In the same way that judges in various jurisdictions have been influential in taking mediation to a new level of legal recognition, the work of the commission, if enacted, will raise the level and profile of mediation, particularly in the international context.

There are certainly many more sophisticated lawyers now engaged in mediations than in previous years. I have even encountered European lawyers who had no previous mediation experience but were able to act in an effective way on behalf of their clients in a case that otherwise would have gone to arbitration.

Clients that are well advised are willing in many instances to run a multitrack approach to resolving their problems. So they may well want to run litigation or arbitration alongside negotiation and mediation.

I have seen a number of venture capitalists who do not have the time to sit around for the complexities of international arbitration. They are either going to get a deal or they are going to get out and do something different. They have chosen to mediate in a number of the situations where they have actually wanted the venture to work. So venture capitalists have often led the march.

I have been talking to the insurance and reinsurance industry now for about 16 years. This year, within six weeks, I was asked to address the industry three times along with some colleagues from the New York Center for Public Resources (CPR). In one of those audiences, there were 180

attendees at a session, none of them lawyers; all were industry people. The chair asked their choice of how they would choose to resolve their disputes. How many would choose to arbitrate? Three hands went up. How many would choose to litigate? About four hands went up. I was completely surprised, because it was my job to talk about mediation. How many would choose to mediate? About 80 percent of the audience put their hand up. I thought that was really very interesting from the client perspective.

I cannot claim that all decision makers are embracing mediation yet, but the indications are looking positive.

The role of the court in mediation has developed too. Certainly in London, our international court has a very good reputation around the world. However much I appreciate it, it may be expensive to litigate in London. Because of pioneers in that court, mediation, particularly in the international context, has been used successfully for about 16 years.

In terms of enforcing mediation provisions in contracts, the *Cable & Wireless v. IBM*[2] case in the English High Court is an important instance of upholding such provisions. I suppose CEDR was quite pleased because it was our procedure that was upheld. The judge said that given the CEDR procedure, there was enough certainty to enforce the contract for the clients to have to mediate.

THE WINNING FORMULA?

Last year, in 2006, I was very privileged to be asked to speak in Paris at the Organisation for Economic Cooperation and Development (OECD), where they have put mediation into their guidelines. I listened carefully to the National Coordinating Persons discuss how they deal with what they call ''specific instances of difficulty'' in various jurisdictions around the world—with environmental issues, labor, corruption, and so on.

Listening to this prompted me to ask myself, ''Why is it that mediation, particularly in an international context, can meet these needs?''

Why Mediation Works

1. A proper structured agenda:

   Mediation works because you have a structured agenda. It is not just sitting across the table trying to negotiate for an hour or two. You have actually made a decision to mediate for a day or two days, you

[2] Cable & Wireless v. IBM, [2002] E.W.H.C. ch. 2059.

have actually got a process in play, and you have in fact put together some form of a properly structured agenda.

2. Ultimate control of participant to decide—essentially working with their ''enlightened self-interest'':

   I feel quite strongly that as mediators we should do a very effective job, but we should keep a relatively low profile. Mediation is successful when the advisors and the clients work with the mediators before the process to structure this agenda and thereby get the content right.

3. Commitment and engagement are key to success:

   Once you have parties involved in the process at the mediation table, my experience is that it is amazing how, even in the most difficult of circumstances, you can get an astonishingly good commitment on the same day.

4. Proper balance of sharing of critical information on history and evolution of the dispute with a forward approach based on solutions:

   How much information you need has to be balanced with what can be dealt with—too much can stall the process and too little can derail it. The art is getting critical information—not just about the law, but about the commercial aspects and, often in my experience, the calculations that go behind those.

5. The patience and skill components:

   This involves not just the mediator, but also the patience and skills of the parties and their advisors. The counterside of this is a deal may in fact be far more attractive than waiting for a third party or a panel third party of three individuals to take that control from you and make the decision.

6. A deadline does inject reality:

   Most clients are in international mediation to settle their disputes. Almost all are pleased when their disputes are resolved, although they may have lost ground from their original position. Deadlines of working over one or two days or a month do in fact keep people's minds on the issues and agreements do follow.

There is of course always a risk that some mediations will not be successful, but in my own experience, it is a rare thing. Mediation, if

conducted well, will have created a focal point for parties to understand the issues and to recognize not just the legal questions, but also the commercial issues and what they are up against. I believe this has to be a good thing in terms of helping the parties to progress to settlement or to narrowing of the differences between them.

Case Studies

Since parties own the conflict, they need to be involved in the decision whether to settle, how to settle, or whether ultimately their interests are best served by a third party making a decision. Let me put this into context by looking at some of the real cases that I have been involved in mediating. I have chosen three examples just to highlight the point:

- an international dispute involving the failure of a electricity generator in a third world country;
- international chemical companies dispute post-sale of company;
- international entrepreneurs fighting over technology.

Failure of a Power Generator in a Developing Country

When I was working in Washington three years ago on a project, I received a call to mediate on an infrastructure project. The issues involved were: the failure of one engine; possible allegations of breach of warranty by the supplier (local law); the immediate effect on the local community; the needs and interests of third parties' project financing (New York law); insurance claims around property damage and business interruption (English law); and lots of interweaving issues on governing law. This case was mediated at short notice, and we had two very long days. The 40 individuals, with lawyers and advisors from many countries, presented the various issues, experts were involved, complicated computations around the issues of energy calculations pertaining to financial and business interruption claims were presented. The case settled at 3 a.m. in the morning.

Why did it settle? It settled because all the decision makers were present—the important people from third-party project finance were there to use their muscle and persuasion. There were of course risks and uncertainty, insurers and reinsurers were all present to think about their potential liability. There was one missing party—the engine supplier. But we were able to phase the settlement with a two-month time lag to finalize all other issues, including communications with the engine supplier and the possible issue of further proceedings to put some leverage on them.

What I talked about at the beginning was the present parties focusing long and hard. The decision makers were involved, there was an energy, there was a pressure chamber effect, there was lots of flying of feathers and upset. At one point I was told by one American that he thought I was not being evaluative enough—which was very funny given I had only received a very large amount of paper the day before. He rather overlooked the real role of the mediator, which is to facilitate understanding but not to behave as a judge. That is the life of the mediator. Calming him down, calming the parties down, and keeping everything on track did indeed work.

Chemical Company

Here the claim made by the purchaser, ''Seltrack,'' against ''Rapid'' was that in acquiring the share capital of a subsidiary, ''Acid,'' there were several breaches of the Share Purchase Agreement (SPA), and a claims letter was delivered to Rapid. The essence of the claim was that the one-off price for Acid SPA was gauged by the production capacity of Acid, and given the management information provided pre-acquisition, the purchaser alleged that the seller was in breach of various warranties under the SPA. There were five heads of claim, although some of the heads of claim were dropped before the mediation.

The essence of getting this dispute settled was to examine the different heads of claims, simplify the heads of claim, examine the big numbers, work through the calculation of loss of profit to see how those calculations had been arrived at, and understand the calculations. In the course of the mediation, it was necessary to sit down with the accountant and the General Manager of Seltrack and suggest that it would be helpful if they revamped some of their numbers to look at the loss of profit calculation: this revamping of the numbers did help to concentrate the mind in the way in which the matter could be settled. There were a number of private sessions working on the numbers, and having two days and an overnight period to reflect was also extremely helpful. Both teams were ably represented by corporate lawyers who were smart and quick on the numbers. The small team focus and the ability of the participants made it, although a highly technical mediation both as to numbers and facts, a good mediation in terms of being able to arrive at a result in terms of pre-mediation involvement.

The two-day mediation resulted in a binding settlement agreement. The claim was for more than 10 million euros. The parties reached an agreement whereby the purchaser reduced its claims. The SPA was varied in a number of respects, and the terms of guarantees and deferred payments were altered to allow for effective price reduction.

Entrepreneurs and Inventors

This case is interesting because at least part of it came out of San Francisco, which is where I learned about mediation. Venture A was not able to obtain the financing for interesting technology and went bust. Venture B ended up back in Europe. Somebody involved in Venture A found out what was happening in Europe and said, ''Goodness, that looks to me like the venture I was involved with.'' So, allegations were made of breach of trade secrets, intellectual property (IP), etc. Litigation proceedings were begun in California.

Venture capitalists supporting Venture B saw this wonderful technology and saw that the opportunity to make a lot of money was not going to happen, that is, it was going to be severely impaired if this litigation in California really got legs. What was interesting here, in terms of identifying the issues, was that one team said, ''This is entirely technical'' and the other team said, ''This is entirely legal.'' By talking to the parties and working with them and coaching them before the mediation session, it was perfectly possible to say, ''That's fine.''

One team came and gave what the other team might have thought was a dead-boring one-hour presentation on technology. But I had persuaded the other team that this was going to happen and that they needed to listen and show respect and acknowledge this. The other team then gave an incredibly impressive legal presentation on why litigating in San Francisco might be slightly uncomfortable. But the person did it with amazing empathy because they had a lot of mediation experience.

This was another example of why face-to-face negotiations are valuable. One of the venture capitalists had tried to negotiate this and had not succeeded because it was not structured with a neutral. So in this case, again, it was possible to break the impasse.

The strangest thing about this case was that the impasse was broken when I drew two circles on a flip chart at about 3:00 p.m. in the afternoon. I said, ''You know what's happening is, where these circles are overlapping, your colleague from Venture A feels this big area in the middle here is where actually he had something to do with that, and he's expecting you to acknowledge that and give him some money.'' For some reason, the drawing of the circles was what did it for this particular guy who was involved in Venture B, who was a very, very bright scientist. He had not understood any of the pleadings or anything about the law, but two circles did it for the scientist. He said, ''This is the first time that anyone has been able to explain this dispute so I understand it.''

Thankfully, at 5 o'clock, somewhat unwillingly, but with support from the venture capitalists, they came up with some money to make sure the person involved in Venture A went back to California somewhat happier

than when he arrived. This is another example of the enormous potential in the use of mediation. It is borne out by the realities in case after case.

CAN ARBITRATION AND MEDIATION BE PARTNERS?

CEDR this year set up a commission and is examining the whole issue of rates of settlement, with the support of over, I think, 25 countries and senior arbitrators from around the world. Chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler, the commission will consider the role of the arbitration community in helping clients more effectively settle their disputes. The commission hopes to report next year.

I think that, along with the CEDR arbitration commission, we are all going to be learning a lot over the next year. It will be very interesting for the arbitration community to obtain the feedback of practitioners and clients and to genuinely look to see how arbitration might add more opportunities to find ways out of deadlock. This cannot happen in every case, but it could certainly happen more frequently than it is happening now.

FORM AND FLEXIBILITY

In the just published second edition of *International Mediation—The Art of Business Diplomacy*[3] written by myself with Karl Mackie, we talk about the development of international mediation and look at *"Form and Flexibility,"* in part inspired by the following quote from Howard Bellman, a U.S. environmental and labor mediator:

> There is in our work as mediators, when it is going well, a peculiarly American blend of learned structure and conventions, and improvisation strongly supported by talent and intuition. It is jazz: there are a few orthodoxies and a lot of ad hoc ensemble invention.[4]

I think this reference to *"Form and Flexibility"* as the critical balance in mediation is a really good place to start when looking at international mediation:

[3] Eileen Carroll & Karl Mackie, *International Mediation—The Art of Business Diplomacy* (2d ed. 2006).

[4] *Id.* at 55.

Form—It is acknowledged that a minimum degree of compatibility of civil procedural rules is necessary as concerns the effect of mediation on such basic issues as limitation periods and how confidentiality of the mediation will be protected in any subsequent judicial proceedings. It is also acknowledged how settlement agreements are capable of translation to court-based judgments. All these issues are acknowledged in the draft EU directive.

Flexibility—It is recognized that mediation, while benefiting from a legal framework, should be sufficiently fluid to preserve its key strength as a flexible process as far as design, conduct, and the role of parties is concerned. There is now a European Code of Conduct for mediators and mediation organizations promoting self-regulation.

WHAT MAKES A GREAT NEGOTIATOR AND MEDIATOR?

As John F. Kennedy said, ''Never fear to negotiate, but do not negotiate out of fear.''[5]

As a society we should all come to the negotiation table much more often than we do. There is great importance in ''putting yourself in the shoes'' of others. I have not met anyone who does not hold Nelson Mandela in great esteem. When he was in prison, he made it his job to understand the Afrikaaners. He even learned their language. When you are in deep conflict, putting yourself into the place of the opponent can be key to understanding and breakthrough. I think as lawyers, and as arbitrators and mediators, this course is not a soft option. Some of the toughest people in the world who have lived through the most difficult of situations and helped to resolve the most difficult conflicts have done precisely that.

What do we all need to do, both as mediators, negotiators, and advisors? It is pretty tough. We do need to be good and attentive listeners. Lawyers too frequently try to engage with how to respond, what the next argument is going to be—often not actively listening. It is extremely tough to be an attentive listener, and clients, as well, are too often not good listeners because they often feel defensive.

A mediator has to step back, even if the clients cannot do it, to create a process in which it is possible to get much more active listening, much more acknowledgement, which does not mean rolling over and being ''easy,'' and to be able to reframe the issues and look at other ways of solving the problems.

[5] Inaugural Address, Jan. 20, 1961.

CONCLUSIONS

When parties decide to mediate, they have the opportunity to use all elements of the ''Rich Tapestry'' of conflict to find their solution:

- the legal rights;
- the commercial and social considerations;
- the needs and responsibilities, and
- importantly, the human dynamics and relationships.

Today, we have a situation in which lawyers, solicitors, barristers, and indeed judges and arbitrators understand mediation and can use it as a tool to engage and review all elements of conflict to help disputing parties reach a decision and reach an agreement.

Mediation is mainstream and part of conflict resolution's rich tapestry. It works in conjunction with the law courts and the legal community, all who are very much a part of its development. But most importantly, when it works, it works because and on behalf of those affected by conflict.

Mediation in Hong Kong

Norris Yang
Chairman (2003-2006), Hong Kong Mediation Council
Hong Kong

Mediation is a one of the oldest methods of resolving disputes. There is a long history of using conciliation in Asia. In Cantonese (one of the hundreds of Chinese dialects), there is a phrase literally translated as: ''The two of us should stop arguing. Let us sit down, three mouths and six faces, and resolve this.'' This phrase is commonly used in Southern China (and surprisingly, I can find no similar phrase used in Northern China). With two people in a dispute, I can count only two mouths and four faces (each person having a left face and a right face). We are missing one mouth and two more faces. So who is this missing third person? He is the conciliator, most likely the village chief or a respected elder in the village. Is the resolution of this dispute a facilitative process or is it guidance by the elder? The world is now a global village. Who is the village chief in a global village? Which set of ''Rules'' should we use?

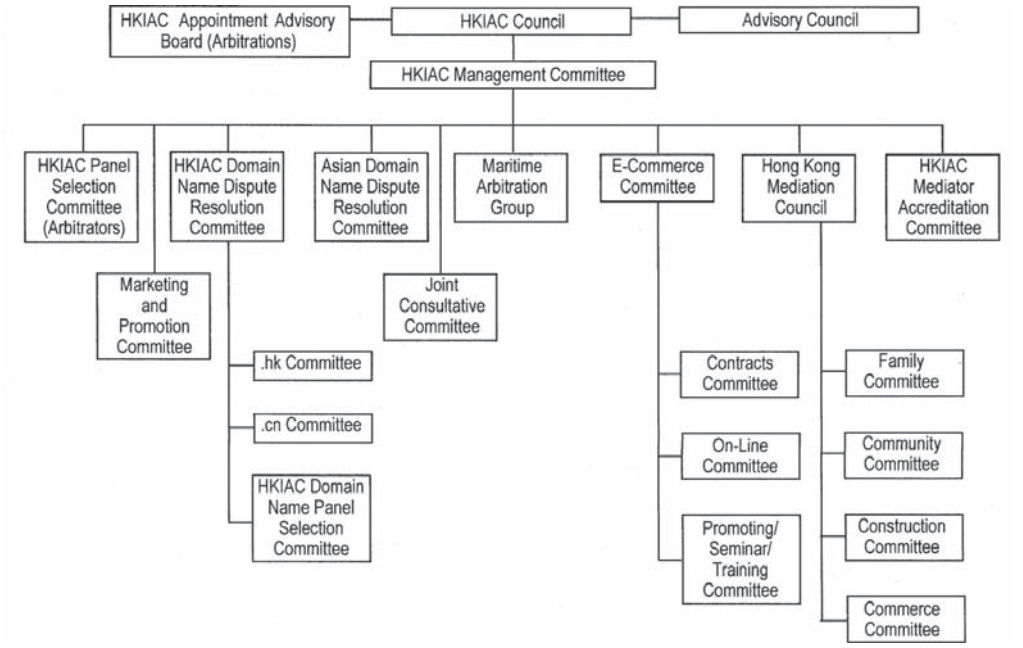
The Hong Kong International Arbitration Centre (HKIAC)[1] is empowered by statute to appoint arbitrators and determine the number of arbitrators in the tribunal (under the Hong Kong Arbitration Ordinance Chapter 341). The HKIAC is a charitable non-profit organization established in 1985 to promote arbitration and alternative dispute resolution (ADR) in Hong Kong. The Hong Kong Mediation Council (HKMC) was established in 1994 as a division of the HKIAC to promote and develop the use of mediation in Hong Kong. It has 500 members who elect the members of the main committee and the committees of the four interest groups: construction; family; community; commercial.

There is no legislation in Hong Kong regulating mediation, the accreditation of mediators, or the rules or procedures to be followed. The HKIAC has taken the lead in establishing an accreditation system, mediation rules, and, procedures for appointment of mediators.

The HKIAC has a mediator accreditation committee, which applies high international accreditation standards to ensure that ''HKIAC Accredited Mediators'' have undergone adequate training and assessments so they

[1] *See* http://www.hkiac.org.

Structure of the HKIAC



can conduct mediations professionally. Mediations conducted by well-trained mediators have a higher chance of success. HKIAC has two accredited mediator panels: general mediators and family mediators. There are 245 and 139 members, respectively, on these panels.

The HKIAC/HKMC Mediation Rules have only 15 clauses. They were designed to be simple and easy to follow. A party who does not respond to a request for mediation is deemed to have refused the offer to mediate (Rule 4). Either party or the mediator can terminate the mediation (Rule 11). The appointment of the mediator is only for a period of 42 days (which can be extended to 90 days by consent—Rule 7). We have the usual rules regarding confidentiality (Rule 12), and, most importantly, the mediator should not take on any other role in any subsequent proceedings of the same dispute (Rule 14).

The traditional Asian conciliations in a village setting are more likely facilitative, with the village elder ''walking softly and holding a big stick'' laced with cultural taboos and buttered with a lot of guilt. This is not exactly a workable formula for a global village setting. In Hong Kong, the mediation model we promote is ''facilitative mediation.''

Most legal professionals in Hong Kong feel that parties in a dispute should voluntarily agree to mediate and that ''mandatory mediation'' does not point in this direction. The right to have ''one's day in court'' is still held as a sacred right in Hong Kong. Once litigation is initiated,

negotiations are often conducted by the parties' legal counsel without reference to mediation. If mediation is designed as part of the litigation procedure, perhaps we should consider using the term ''procedural mediation'' instead of ''mandatory mediation,'' which implies that the parties are forced to mediate. Court pleadings in common law jurisdictions (as part of the litigation procedure) do not include the adjective ''mandatory'' even though they may be required and essential as part of the litigation process.

During a speech that Professor Hazel Genn gave in Hong Kong a few years ago, she questioned the mind-set we have regarding mediation. The question ''Why is this case still being litigated?'' might be more appropriate than ''Is this case suitable for mediation?''

That view is spreading rapidly in Hong Kong. The Hong Kong government is initiating changes in the ADR area. The family court initiated a Mediation Pilot Scheme for matrimonial matters between 2000 and 2003. Of the 1,000 or so cases, almost 70 percent of the cases achieved full settlement, and almost 10 percent of the cases were partially settled. It took an average of only ten hours to reach full settlement. The satisfaction rate of the parties towards mediation exceeded 90 percent (and all expectations of the court). As a result, the Legal Aid Department initiated a Mediation Pilot Scheme on matrimonial cases in 2005.

The High Court initiated the Construction Mediation Pilot Scheme in September 2006. The Lands Tribunal is proposing a Building Management Mediation Pilot Scheme for 2008. These pilot schemes were established through ''Court Directions'' issued by the Chief Justice rather than by legislation. The judiciary is undergoing a major exercise in Civil Justice Reform (CJR) with many proposed amendments of the present legislation, and ADR might play some role in the final metamorphosis of the CJR.

There are other mediation pilot schemes in place and some of them are *pro bono*. The HKMC initiated such schemes for the construction industry and lately for the insurance industry. The results of their final report cards will become apparent in the near future. A most commendable scheme is the Peer Mediation Project organized by the Hong Kong Family Welfare Society. The society allows secondary school students to mediate disputes among students. The students report excellent results, and as a side benefit, parents report that their children (over 1,000 students participated in the program) no longer ''talk back'' immediately to them. Their children now listen first, and then reflect on what that parents had in mind.

Asia is growing as a major international business power—particularly China and India. Hong Kong is in an excellent geographical location to act as the business hub for Asia. It is a Special Administrative Region (SAR) of China and has it own system of laws based on the English common law instituted by the British colonial government in the late 1900s. It is also the melting pot of China's different regions as well as the multicultural collage

of almost every ethnicity of the world. Hong Kong is indeed the legal, cultural, and linguistic bridge between Asia and the rest of the world. Hong Kong is therefore most suited to be the Asian ADR Center for commercial disputes between parties originating from Asia, the Americas, Europe, Australia, and Africa.

An iceberg is a good illustration of what parties to a dispute perceive. Only about 10 percent of the iceberg is above the water, and the 90 percent that is underwater sank the Titanic. It can also derail a negotiation. It is essential that more of the hidden 90 percent is perceived by all parties. How can this be done? The iceberg can be raised (a technical feat that is difficult to achieve) or the parties (one or all) can dive into the water to analyze the part of the iceberg below the water line. Alternatively, the neutral mediator can go below the water, investigate the terrain, and lead each of the parties to review the areas of most concern to that party. This requires the mediator to have excellent communication instincts and skills to keep the channels open. He must understand the cultural and linguistic nuances of the parties, as these differences can becomes much more significant when the parties are in dispute. As an example, partners in a business might slap each other's back as a sign of friendship or brotherhood, but if one or both of them is sun burned, even a gentle touch of the skin can be extremely painful. In a dispute, we can equate the ''sun burned'' skin analogy to sun-burned ''feelings,'' ''trust,'' ''honor,'' ''liability,'' and ''respect.'' Any little move by one party can be interpreted negatively by the other party.

If we live in a global village, who is the village elder? Can he facilitate or guide the parties towards a settlement? Which set of rules should be applied? As the parties come from different backgrounds, we need panels of neutrals that are acknowledged as experts (accreditation and training) and a set of acceptable mediation rules.

What about cultural bias? How do Asians think? How do North Americans or Europeans think? In reviewing how dates are recorded internationally, Asians often refer to a date by the year, month, and day in that order. Some Western cultures refer to a date by the day, month, and year in that order. Others might prefer month, day, and year in this order. The year is usually the last parameter to be stated. Does this indicate different cultural inclinations towards macro or micro thinking and analysis?

There are hundreds of different Chinese dialects, and we have dozens of different English ''dialects''—some homegrown and have evolved over the years. ''Chinglish'' (''CHINese'' + eGLISH'') is often spoken in Hong Kong, and there is ''Singlish'' (''SINapore'' + ''enGLISH'') in Singapore. There are always great jokes with translations. A sign on the side of a river in China says ''Please be Careful Not Fall'' in Chinese. The Translation? ''Carefully Fall to the River.'' An ATM machine in Chinese is literally a ''Self

Help Terminal Machine.'' One translation labeled an ATM as a ''Help Oneself Terminating Machine.''

There are many legal considerations unique to each jurisdiction. The Hong Kong Arbitration Ordinance allows for conciliation and settlement in arbitration. Hong Kong is bound by the New York Convention[2] (as China is a member State), but there is no legislation on mediation or the protection of mediators. The legal profession is split into barristers and solicitors. Barristers have a right of audience in High Court (and higher courts), while solicitors conduct the commercial side of legal practice and have a limited right of audience in the courts. This is the system in the United Kingdom transposed to Hong Kong. Contingency fees or champerty is not allowed in Hong Kong. Some Asian countries adopted the English common law system while under British colonial rule. Others (such as China and Japan) adopted the civil law system.

Legal costs are awarded in favor of the successful party. Interestingly enough, the court directions for the Construction Mediation Pilot Scheme grant the presiding judge power to impose adverse costs sanctions if a party unreasonably refuses to mediate (Rule 19: ''Notice of failure to attempt mediation may expose a party to an adverse costs order''). The proposed Mediation Pilot Scheme for Building Management seems to go even further. The rules specifically refer to leading English cases on adverse costs sanction.[3]

Most international commercial disputes will involve contracts drafted in English. The parties will in most cases have at least a good working fluency in English. Experience indicates that parties still prefer to conduct verbal communications in their mother ''dialect'' or ''language.'' They feel more comfortable expressing themselves in that way, and if the mediator can demonstrate rapport in this area, he or she can go a long way toward building trust and respect.

A recent mediation conducted in Hong Kong involved a case litigated for five years in seven jurisdictions (of which two were civil law based) on three continents. The mediation was conducted in English and three Chinese dialects. The parties spoke different Chinese dialects. Some of them understood or spoke English with various fluencies. The parties resided in six different cities in North America and Asia. Despite common

[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 [hereinafter New York Convention].

[3] Halsey v. Milton Keynes, *available at* http://www.hmcourts-service.gov.uk/judgmentsfiles/j2515/halsey-v-mkg.htm); Dunnett v. Railtrack, *available at* http://www.atkinson-law.com/cases/CasesArticles/Cases/Article_93.htm).

ethnicity, the diverse background of the parties proved most challenging to the mediator. The mediation was successfully settled in one week.

How can we promote mediation of international commercial disputes? Consider a ''Mediate then Arbitrate Clause'' in the contract. Parties to a joint venture are like newlyweds at the time when they sign their initial agreement. Their relationship may be at its highest point. This is the best time to introduce such clauses. Consider including clauses that allow the parties to transform a successful mediation settlement into a consensual arbitral award. This is particularly useful for parties from different jurisdictions, as this award may then be enforced in member States of the New York Convention.

Best of all, consider using Hong Kong as the seat for the mediation and arbitration, and enjoy the trip to Asia when the parties appoint you as the neutral.

The use of mediation in Asia is gaining strength. There is much to learn from the experiences gained in North America, Australia, and Europe. In time, legal practitioners can also pose this question: ''Why is this dispute still stuck in litigation when mediation is such a timely and cost efficient method that can help the parties resolve this case?''

A Note on Institutional and *Ad Hoc* Mediation

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Institutional and *ad hoc* mediation is a topic that cannot be approached in the international context without making reference first to the different reasons why mediation has succeeded in different countries and without taking into consideration cross-cultural diversity.

THE SUCCESS OF MEDIATION IN DIFFERENT JURISDICTIONS

Briefly, it can be stated that in the United States, the success of mediation is strongly linked, among other things, to legal costs. Judge Smith refers to mediation's success in the United States as a ''financial issue.''[1] In England and Wales, the boost given by the judiciary has been a determinant for the success of commercial mediation in those jurisdictions.

There are countries in which the lack of independence of the judiciary is the cause for the incipient presence of mediation as a dispute resolution mechanism for businesses. However, in countries where legal fees are comparatively not that high, such as most of the civil law jurisdictions of Europe, and where the judiciary is reliable, the development of commercial mediation has been slower. The discussion in the negotiation of the European Union (EU) Commission's proposal for a Directive of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters[2] show the diversity of legal and cultural approaches to mediation in Europe. It must be stated, nevertheless, that the mere fact of the existence of the draft Proposal has implied that all the

[1] Fern N. Smith, Statements made at the Second Annual Conference on International Arbitration and Mediation, Fordham Law School, New York, June 18-19, 2007.

[2] EU Commission's proposal for a Directive of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters, COM(2004) 718 final (June 10, 2004). EESC Opinion, O.J., 17.11.2005, C 286/1 (June 9, 2005). EU Parliament Report, Final A6-0074/2007 (Mar. 23, 2007).

member States' Ministries of Justice have studied the issue, stated their views on it, and some have even adopted regulations on it.

CROSS-CULTURAL DIVERSITY

As a matter of fact, the only jurisdictions in which commercial mediation has succeeded up to now are Anglo-Saxon, common law jurisdictions. This is true also of the business mediation models developed in these countries. There is clearly great value in these models, and they can certainly be applied in other cultural settings, but thought must be given to the need to adapt them to different realities, different sensibilities, the different ways things are done in different parts of the world.

Yves Derains' first tip for international arbitrators is to show and maintain neutrality: he says parties need to feel at home.[3] It is exactly the same in international mediation: parties need to feel at home. And feeling at home is made up of many nuances.

None of us feels at home when using words and techniques with which we are not familiar. This happens in many parts of the world when talking about brainstorming or telling the parties that the mediator will keep confidential whatever is said to him or her in the private meetings unless the party allows that information to be given to the other party.

There are also non-verbal language issues. In cultures where people speak also with their hands, a mediator who hardly moves them may be perceived as hierarchic or haughty. Perhaps a mediator raising an eyebrow can be very effective in some places,[4] but it can be fully misunderstood in others. A sense of humor is undoubtedly a powerful tool for the mediator, but a sense of humor is very different in different countries and different cultures.

The inner rhythm of things and people also differ from one culture to the other. Jon Lang states that parties are outcome-focused and successful mediators are, by and large, deal-completion focused.[5] This is true in some countries, and yet in other cultures, such as, in my experience, the Arab and the Latin American cultures, the way the outcome is reached may, in particular cases, be more significant than the outcome itself. In these cases as well, deal-completion focused mediators can be counterproductive.

[3] Yves Derains, Statements made at the Second Annual Conference on International Arbitration and Mediation, Fordham Law School, New York, June 18-19, 2007.

[4] Jon Lang, Statements made at the Second Annual Conference on International Arbitration and Mediation, Fordham Law School, New York, June 18-19, 2007.

[5] *Id.*

INSTITUTIONAL AND *AD HOC* MEDIATION

Ad hoc mediation needs mediators to be well known enough in the market for parties to know whom to appoint. This may be feasible in the United States or England and Wales, but it is far more difficult in countries in which commercial mediation is not developed. In addition, of course, since different mediators have different styles, institutions are often in a better position than parties to be familiar with those styles and appoint the mediator or propose a short list of people who may best serve the specific case.

Neutrality and independence being at the core of the mediators' role, it would seem that several financial issues of the mediation business are better served by an institution than by *ad hoc* mediation, and by that means an added value is offered to the parties. In this category one can think of mediators' legitimate interest in being appointed and of the negotiation of mediators' fees.

Mediators' availability is also an issue that can be better handled in institutional than in *ad hoc* mediation. Institutions can appoint another mediator more efficiently than parties alone.

Obtaining feedback on the mediator from the parties once the mediation is over is another added value that institutions offer. Feedback allows the market, in an indirect way, to benefit from the information, because the future appointments by the institution will be made having the feedback in mind. This is relevant because mediations do not always end with a settlement agreement, and yet this does not necessarily mean that the mediator has not performed well, even though he or she has not successfully assisted the disputing parties to reach a settlement. It is important that this value is recognized as such both by the market and by mediators. If not, there is the risk of mediators being judged only by the percentage of settlement agreements reached in the mediations they handle.

It must be borne in mind, moreover, that many disputes are addressed in more than one dispute resolution mechanism. In my experience, combining arbitration with mediation or conciliation is very effective, especially in the international arena and in those jurisdictions in which mediation is not yet fully developed. No one is in a better position to offer that combination to the market than institutions. One could envision that those institutions that have, on the one hand, tried and tested rules of arbitration and other mechanisms and, on the other, a sound and professional staff could become multi-door dispute resolution centers. Parties can be assisted by institutions to identify the mechanism or combination of mechanisms more efficient for their particular dispute, and different neutrals could be then properly appointed or short lists proposed to the parties.

Dispute resolution is a business in which institutions have a very important role to play in order to guarantee to the users trust in the system as a *sine qua non* for the market to flourish. If institutions do not fulfill this role, much hard work is left to practitioners who handle cases on an *ad h*oc basis. This being very often the case for me, it is with full awareness that I hope institutions will do more and better work in mediation.

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