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ARBITRATION TRENDS

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THE INTERNATIONAL FRONT...

Understanding the Unique Features of International Arbitration

In the August 2012 issue of Quinn Emanuel's *Business Litigation Report*, we explained why international commercial arbitration is often the preferred mode of resolving international business disputes. The purpose of this article is to help corporate counsel better understand some of the unique features of international commercial arbitration in order to successfully achieve their business goals in such arbitrations. By international commercial arbitration, we mean any arbitration, venued in the United States or anywhere else in the world, between two or more corporations, governments or individuals from different countries. We are excluding from this analysis investment treaty arbitrations between foreign investors and sovereign states concerning treaty claims, which is the topic of the interview with Judge Charles N. Brower and Professor Brigitte Stern in this issue of *Arbitration Trends.*

Because arbitral awards are generally confidential, most publications on international commercial arbitration have had to limit their analysis to arbitral rules and court decisions about arbitration. However, just as one could not speak knowledgeably about litigation without reading judgments, one cannot write insightfully about international commercial arbitration without studying awards. This article draws on actual international arbitral awards obtained from public sources, and on the experience of Quinn Emanuel's attorneys who regularly serve as arbitration practitioners and arbitrators, in order to more fully illustrate some unique aspects of international commercial arbitration, so that corporate counsel can be more prepared when arbitral disputes arise.

I. The Arbitration Schedule

In U.S. federal litigation, once a lawsuit is commenced a judge is swiftly assigned to the case. The Federal Rules of Civil Procedure establish clear deadlines for various milestones in the lawsuit, such as for the submission of briefs and motions, regardless of the judge presiding over a case.

In contrast, in an international commercial arbitration, the tribunal may take months to constitute. Once constituted, the tribunal has significant discretion to control the speed of the arbitration and set deadlines.

(continued on page 2)

In this issue:

Quinn Emanuel Opens Fifth European Office in Paris Led by International Arbitration Specialist Philippe Pinsolle

Quinn Emanuel is very proud to announce the opening of its Paris, France office and the hiring of our new partner, Philippe Pinsolle, to manage it. Philippe was formerly a leading partner with the international arbitration group of Shearman & Sterling, Paris. He has over 20 years of international arbitration practice, and in his illustrious career has handled numerous international arbitrations, as an advocate, arbitrator and expert. Philippe has extensive investment arbitration experience, and served as counsel of record in the largest investment arbitration on record. As a specialist of oil & gas, he has also handled a series of gas price review arbitrations, both on behalf of buyers and sellers. *Chambers Global* reports that clients have described Philippe as "an outstanding strategist" with "a great tactical sense." In January 2012, Philippe was awarded the Swiss Arbitration Association's price for advocacy in international commercial arbitration. In addition, he has published numerous articles on international arbitration, and is the co-editor in

(continued on page 9)

(continued from cover)

For example, under Article 38(2) of the 2012 ICC Rules, the tribunal, "on its own initiative, may extend any time limit which has been modified . . . if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfill their responsibilities in accordance with the Rules." *See also* ICC Rules, Article 26(1) (noting that the tribunal has the flexibility to set the time and place of a hearing).

NTT Docomo, Inc. v. Ultra D.O.O., ICC Case No. 15 716, illustrates how the arbitration schedule may develop in an international arbitration. From start to finish, the *NTT* arbitration took 20 months. The Japanese claimant commenced ICC arbitration on July 2, 2008, alleging that the Slovenian respondent breached their stock purchase agreement to buy all of NTT's stock in Telargo, a Deleware corporation. Although Article 5(1) of the 1998 ICC Rules, in force at that time, required Ultra to file its answer to the request for arbitration within 30 days, Ultra took more than 60 days to file an answer. As the ICC Rules require each party to nominate an arbitrator in their initial papers, the ICC Court was only able to confirm the co-arbitrators on September 19, 2008. After almost another two months, the tribunal was fully constituted with the appointment of the presiding arbitrator. Three months after that, the parties agreed on the terms of reference of the arbitration. Finally, on March 10, 2009, nine-months after NTT commenced arbitration, the tribunal issued its first procedural order.

In its first procedural order, the *NTT* tribunal set deadlines for exchange of document requests, the production of documents and responses, the delivery of expert and fact witness statements with supporting evidence, the submission of prehearing briefs, the identification of live witnesses and hearings. In early May 2009, the tribunal ruled on disagreements over document production, in July the ICC Court rejected a challenge to the tribunal, and by August the hearing was completed.

After this five month flurry of activity from Order No. 1 to the hearing, the pace slowed down. Post-hearing briefs were ordered and the last round was submitted at the end of October 2009. The final award was issued three months later on January 26, 2010, and on March 9 the tribunal *sua sponte* corrected a typographical error in the quantum of damages it awarded.

Some arbitrations may be quicker than *NTT*. In *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, Award of Mar. 7, 2005, the notice of arbitration was served on May 18, 2004, and the tribunal, chaired by a former President of the ICC Court, Robert Briner, issued its award in less than a year. However, international arbitrations may also drag on for several years, such as *Four Seasons Caracas, C.A. v. Consorcio Barr, S.A.*, ICDR 50 I 180 00550 01, which was commenced on November 30, 2001 and ended in final award only on March 17, 2004.

In light of the discretion generally available to the tribunal in setting the arbitration schedule and the potential for delays, corporate counsel and arbitration practitioners may take some practical steps to retain control over the pace of arbitration. In their arbitration agreement, they may select arbitral institutions known to constitute the tribunal swiftly, actively administer arbitrations, and decide challenges to arbitrators expeditiously. They may also adopt an appointment procedure that minimizes challenges to arbitrators, such as by asking an arbitral institution to provide a list of candidates that the parties rank or strike, leaving the ultimate choice of who to appoint to the institution. In providing the institution guidance on what sort of arbitrators should be included on the list of candidates, counsel may ask the arbitral institution to check that every potential candidate is free to hold a hearing before a certain date.

If party-appointed arbitrators are preferred, the parties may interview candidates to check that they are free to hold the hearing within a reasonable time. For this interview to be effective, counsel should consider how many witnesses are likely to be presented and how many hearing days will be required to present all the testimonial evidence, so that counsel may inquire if the arbitrator candidate has enough consecutive days free on his calendar for the hearing.

In order to avoid delays in an award being issued after the hearing, arbitrator candidates may be asked if they would be prepared to set aside dates on their calendar soon after the hearing to deliberate and draft the award while the evidence is still fresh in their minds. The parties could even write into their arbitration agreement that the tribunal is required to issue an award with a certain number of days after the close of the hearing, which may be extended only by the parties' consent.

Some of these approaches may be permitted under some arbitral institutions' rules but not others, and experienced arbitration counsel can advise clients how best to draft the arbitration agreement at the time when a transaction is put together.

II. Witness Testimony

Unlike U.S. litigation, where witness testimony is entered into evidence through direct oral examination, in international arbitration, "[i]t is standard practice . . . to require the submission of direct testimony in the form of witness statements served in advance of the hearing as part of the prehearing submissions." *Jorf Lasfar Energy Company, S.C.A.*, Award of Mar. 7, 2005, ¶50. At the hearing, the tribunal may dispense with direct testimony altogether and proceed straight to cross examination, or the tribunal may permit short direct testimony to give witnesses an opportunity to emphasize facts that the witnesses believe are the most important.

Failure to submit witness statements may result in forfeiture of the right to a hearing. In *Jorf Lasfar Energy Company, S.C.A.*, the tribunal had issued a procedural order that the parties should submit witness statements for any person they wished to testify in the proceedings. Respondents declined to submit any witness statements. The respondent later demanded a hearing, pursuant to Article 15(2) of the applicable UNCITRAL Rules, which states that if "either party so requests at any stage of the hearings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses." The tribunal refused to hold a hearing, explaining in its award that "because the Respondent deliberately forewent the opportunity to submit testimony in accord with the Tribunal's orders there was no reason to hold a hearing in order to hear witnesses." *Id.*, ¶51. On claimant's subsequent petition to confirm the award, the United States District Court for the Western District of Pennsylvania confirmed the award, finding that Respondent "failed to satisfy its burden to prove that the arbitral process violated our basic notions of fundamental fairness and justice." *Jorf Lasfar Energy Co., S.C.A. v. AMCI Export Corp.*, CIV.A. 05-0423, 2006 WL 1228930, at *3 (W.D. Pa. May 5, 2006).

At the hearing, unlike a U.S. civil trial, counsel will often not have deposed the witness they cross-examine. Thus, counsel have to think on their feet and will be prepared to use documentary evidence to impeach the witness. However, unlike the U.S. litigator who may have to cross examine a witness immediately after having heard his direct testimony for the first time, arbitration counsel have the advantage of having seen the witnesses' statements in advance of the hearing.

III. Applicable Law

In most U.S. litigation, the law of the forum governs procedural matters and the law governing the dispute is either stipulated in a contract or is determined under the conflicts of law rules of the forum. The applicable law in international arbitration is somewhat more complicated. The "seat" of the arbitration is the legal situs of the arbitration, even though for convenience or other practical reason the tribunal may choose to hold hearings at a country other than the seat. The law of the seat of the arbitration governs several important aspects of the arbitration, including the validity of the arbitration agreement, and court actions to set aside the award after it has been issued. Such court petitions may involve determinations of the validity of procedural decisions of the tribunal, as illustrated above by the *Jorf Lasfar Energy Company, S.C.A.* dispute. The arbitration proceedings are also governed by the arbitral rules selected by the parties in their arbitration agreement, as well as rules that the tribunal adopts (usually with the consent of the parties), such as the International Bar Association Rules on the Taking of Evidence.

The merits of the dispute are usually governed by the governing law of the contract if the arbitration concerns contract claims. If there are other non-contractual claims, the governing law of those claims may be the subject of intense debate among the parties.

International law and practices may also apply to procedural issues in the arbitration even if they are not explicitly chosen in the governing law clause of the contract. In *CPConstruction Pioneers Baugesellschaft Anstalt v. the Government of the Republic of Ghana, Ministry of Roads and Transport*, ICC Case No. 12048, claimants sought, and ultimately were awarded, 31 million Euro and 22 trillion Ghana Cedis for fees owed under a road construction contract. At an early stage of the proceedings, Ghana challenged the jurisdiction of the tribunal to arbitrate the claimant's claims, on the basis that the seat of the arbitration was Ghana and that a Ghana court had held under its law that the tribunal lacked jurisdiction. The tribunal accepted that Ghana law governed the arbitrability of the claimant's claims, but rejected the ruling of the Ghana court because it was "contrary to internationally accepted standards of judicial propriety," and concluded that the claims were subject to arbitration. *CPConstruction Pioneers Baugesellschaft Anstalt v. the Government of the Republic of Ghana, Ministry of Roads and Transport*, ICC Case No. 12048, at ¶130. In reaching this decision, the tribunal reasoned that "there is today ample authority in international arbitral jurisprudence for the proposition that the existence of a contact

involving a state or state party, as in the present case, is suffic[ient] to bring the resultant relationship [with the foreign counter party] within the sphere of international law." *Id.*, ¶131 (citing former International Court of Justice President Stephen Schwebel)(internal quotation marks omitted).

Similarly, international law and practices may also apply to the merits of a dispute. In one arbitration involving a Quinn Emanuel partner, the governing law of the contract selected "Russian law and international law," without stipulating which law would govern in the event of a conflict. The tribunal chose to interpret that clause as meaning that the applicable Russian law would be "supplemented by" international law. *See also Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of Libya* (1979) 53 ILR 389; *Libyan American Oil Company v. Libyan Arab Republic* Award of 12 April 1977 (1982) 62 ILR 140; *BP Exploration Co (Libya) Ltd v. Government of the Libyan Arab Republic* Award of 10 October 1973 (1979) 53 ILR 297 (governing law clauses at issue in these cases stated that international law only supplemented the national law). Even where the governing law clause of a contract does not select international law, a tribunal may nevertheless turn to international law as a supplementary source of law. In *Globe Nuclear Services and Supply GNSS, Ltd. v. AO Techsnabexport,* SCC Case No. 156/2003, the respondent challenged the validity of the sale of goods contract at issue, arguing, *inter alia*, that it violated public policy (*ordre public*). The tribunal rejected this argument after it took into account the law of the contract, Swedish law, as well as "arbitral precedent." *Globe Nuclear Services and Supply GNSS, Ltd. v. AO Techsnabexport*, SCC Case No. 156/2003, at ¶53.

Given the potential for tribunals to look to international law and arbitration practices to decide key procedural and substantive issues, successful arbitration counsel will often be versed in not only the domestic law governing the dispute, but also arbitral practices, awards, and public international law. Experienced counsel, especially those who also serve as arbitrators, will know whether international law and practices will support their case and they will be able to accordingly select party-appointed arbitrators known to them to be either inclined or disinclined to turn to international law and practices.

IV. Awards

Unlike U.S. courts, which generally provide detailed reasons and citations to legal authorities in their judgments, international arbitral tribunals are not required under the New York Convention or the Federal Arbitration Act ("FAA") to render reasoned awards. *Indocomex Fibres Pte., Ltd. v. Cotton Co. Int'l, Inc.*, 916 F. Supp. 721, 728 (W.D. Tenn. 1996)(noting that an "arbitrator is not required to explain or give a reason for an award"); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12-13 (2d Cir. 1997)(noting that "arbitrators are not required to provide an explanation for their decisions"); *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985)(holding that "arbitrators may render a lump sum award without disclosing their rationale for it").

Even where the applicable arbitral institution rules require awards to give their reasoning, the level of analysis of the evidence and the law can vary greatly in arbitrations. Although Article 27(2) of the ICDR Rules 2009 provides that awards must be reasoned (unless the parties have agreed otherwise), in *Verve Communications Pvt. Ltd. v. Software International Ltd.,* ICDR Case No. 50 117 T 00286 10, the sole arbitrator awarded the claimant over $300,000 in damages without stating the cause of action, citing any statute or case, or making findings of fact directly addressing claimant's claim. The award also dismissed claimants' claim for punitive damages on a finding that "the proof of alleged fraud is not sufficient to warrant that remedy," without identifying at all the relevant evidence or how it was insufficient. *Verve Communications Pvt. Ltd. v. Software International Ltd.*, ICDR Case No. 50 117 T 00286 10, at ¶7.

In contrast, other international arbitration tribunals have made careful findings of fact with citations to exhibits and the hearing transcript, *GE Transportation S.p.a and Athena S.A. v. The Republic of Albania*, ICC Case No.14403/FM, at ¶87 (considering exhibits and hearing transcript as part of award's reasoning) and they have corroborated witness testimony with documents or otherwise explicitly assessed the credibility of witness statements. *See Thai-Lao Lignite (Thailand) Co., Ltd and Hongsa Lignite (Lao PDR) Co., Ltd., v. Government of the Lao People's Democratic Republic*, Award. of Nov. 4, 2009, at ¶125.

In significant "bet the company" or "bet the country" disputes, the parties will often want awards that contain detailed reasoning with citations to evidence and law. This helps to ensure that the tribunal has carefully weighed the evidence and considered the law. It also helps the parties to understand the award and why they may have won or lost the dispute. Although arbitral rules requiring reasoned awards cannot in themselves guarantee that

arbitrators provide detailed reasons with citations to evidence and law, there are other strategies available help ensure that the tribunal renders a properly reasoned award. The arbitration agreement could specify that the award "shall specify the legal and factual basis for the award, with citations to relevant exhibits, testimony, laws, and cases." When constituting a tribunal, the parties should select arbitrators known to be careful in their deliberations and who can be expected to render detailed awards. Arbitration practitioners who have appeared before or served on tribunals with arbitrators will be able to advise their clients on which candidates can be relied upon to render carefully reasoned awards.

V. Limited Review

Arbitration awards are subject only to limited review under the New York Convention and the FAA, and are not subject to appeal. U.S. and other courts have held that the New York Convention requires that actions to vacate a New York Convention award may generally be brought only in the country in which the award was made. In countries other than the seat of the arbitration, an award may be denied recognition or enforcement, but it may not be vacated or annulled.

In the United States, the grounds for vacating an international arbitration award are very narrow. FAA Section 10, 9 U.S.C. §10, provides grounds to vacate an award. These grounds include instances where the award was procured by corruption, fraud, or undue means; one or more arbitrators were corrupt or unduly partial to one side; arbitrators improperly refused to postpone a hearing or to hear material evidence; arbitrators misbehaved in a way that prejudiced a party's rights; and where arbitrators exceeded or imperfectly executed their powers.

In addition to the express FAA grounds for vacatur, some U.S. courts have vacated awards on the ground that the arbitral tribunal manifestly disregarded the law. This unenumerated ground emerged out of *dictum* in a mid-twentieth century U.S. Supreme Court decision. *See Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). However, recent Supreme Court decisions have cast some doubt on this ground. In *Hall Street Associates, L.L.C v. Mattel, Inc.*, 552 U.S. 576 (2008) which involved a motion to vacate, modify or correct a domestic arbitral award, the U.S. Supreme Court was asked to determine whether parties to an arbitration agreement may contract to permit judicial review on a ground not mentioned in the FAA. The Court held that the "manifest disregard of law" *dicta* in *Wilko* might have been "shorthand" for one of the statutorily enumerated grounds in the FAA, and that it would therefore make more sense to see the FAA grounds as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." 552 U.S. at 585-558. It is now debatable whether the "manifest disregard of law" ground is available to vacate an award, as conflicting opinions have emerged since *Hall Street*. *See Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008)(noting, in dicta, that manifest disregard of law is not a valid ground for vacating or modifying an award under the FAA); *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1281, 1283 (9th Cir. 2009)(noting that an arbitrator's manifest disregard of the law remains a valid ground for vacatur in the form of a judicial gloss on the statutorily enumerated grounds in the FAA); *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F3d 281, 285 (7th Cir 2011) (noting that "manifest disregard of the law is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act").

Even if manifest disregard of the law remains available for vacatur, the scope for review of an arbitral award remains limited. It is thus extremely important to select an arbitrator who is able to give the matter his full attention and to study the law and facts carefully.

VI. Conclusion

Although the generalized nature of arbitral rules leaves great discretion to the tribunal, the international arbitration bar has strong social norms about how arbitrators should conduct proceedings and render decisions. Understanding those norms will avoid surprises in arbitration proceedings. The open-textured nature of arbitral rules also presents opportunities not generally available in litigation. By carefully selecting their arbitrators according to what is required in a particular dispute, counsel can enhance their likelihood of succeeding in an international arbitration. If properly understood, the unique features of international arbitration can be used to great advantage to achieve the business goals of clients. Q

The Future of Class Arbitration in the United States

I. Introduction

Is class arbitration dead in the United States? A close examination of the U.S. Supreme Court's decisions in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1757 (2010) ("*Stolt-Nielsen*"), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) ("*Concepcion*") and recent case law interpreting these decisions suggests that predictions of the demise of class arbitration are premature. Indeed, on November 9, 2012, the Supreme Court granted *certiorari* in *In re American Express Merchants' Litigation*, 681 F.3d 139, 140 (2d Cir. 2012), *cert. granted*, 81 USLW 3070 (U.S. Nov. 9, 2012) (No. 12-133) ("*American Express Co.*"), to assess arbitration clauses that prohibit class arbitration in contracts between American Express Company and retail merchant companies. In light of this development, class arbitration may still prove to be a weapon for consumer, employee, investors and other classes of plaintiffs both domestically and internationally. Corporate respondents may need to continue to grapple with class arbitrations for years to come. This article analyses the recent cases and considers the potential of class arbitrations gaining more traction.

II. A Brief History of Class Arbitration

Class arbitration is the term used to refer to the application of class actions in arbitration. Class actions have traditionally been more commonly used as a tool in domestic litigation. In recent decades, this tool has been applied by state courts, particularly those in California, to permit similarly-situated claimants, subject to identical arbitration agreements with the same respondent, to commence class action arbitration. After the United States Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), use of class arbitration became more frequent. The availability of class arbitration was viewed as a matter that should be left for arbitrators to decide, subject to minimal judicial review.

This shift, favoring class arbitration, was strengthened by state courts that held that some clauses waiving class arbitration, particularly in consumer contracts, were unconscionable. In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) ("*Discover Bank*"), the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable if the agreement is an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud.

While the number of domestic class arbitrations has grown considerably in recent decades, the landscape for class arbitration has recently become more complicated. The shift towards class arbitration suffered a setback with the Supreme Court's 2010 decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1757 (2010), where the court held that class arbitration could not be implied from the mere existence of an arbitration clause, absent any "consent" by the parties to class arbitration. Within a year, the Supreme Court issued another landmark decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), in which the Court held that arbitration agreements waiving class arbitration are enforceable in accordance with their terms and that the Federal Arbitration Act (the "FAA") pre-empts state laws that otherwise deem class action waivers presumptively unconscionable. Although these two decisions have largely been viewed as heralding an era of increased judicial hostility to class arbitration, examination of the decisions themselves, and recent lower court case law interpreting them, suggest a more varied landscape.

III. Agreement, Consent, and Stolt-Nielsen

In *Stolt-Nielsen*, charterers brought class antitrust claims against owners of parcel tankers, pursuant to an arbitration clause that was purportedly "silent" on the issue of class arbitration. The arbitral tribunal held class arbitration was impliedly permitted by the parties' agreement, even though no wording in the arbitration clause specifically mentioned class arbitration. The United States District Court for the Southern District of New York disagreed, and vacated the arbitral award. The Second Circuit reversed the District Court's decision, and remanded with instructions to deny the petition to vacate. The U.S. Supreme Court arrived at a 5:3 decision, Justice Sotomayor took no part in the argument and judgment, holding that there was *no* agreement or consent between the parties to engage in class arbitration because class arbitration could not be implied merely from the existence of an arbitration clause that is "silent" on class arbitration. Indeed, the majority decision held that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*

Specifically, the Court held "it follows that a party may not be compelled under the FAA to submit to

class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached 'no agreement' on that issue." *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1757, 1775 (2010). The majority opinion appeared to construe the term "no agreement" as being synonymous with "silent." Although the majority held that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate," *Id.*, 1775, the majority stopped short of holding that an express agreement to class arbitration is required by the FAA. Nor did the Supreme Court explain what constitutes sufficient "agreement" or "consent" to authorize class arbitration under the FAA. Thus, the majority's decision leaves room for argument about what kinds of "silent" arbitration clauses and agreements will give rise to an implied agreement or consent to authorize class arbitration.

Not surprisingly, *Stolt-Nielsen* has resulted in considerable variation in the treatment of class arbitration claims among the lower federal courts. The Second, Third, and Fifth Circuit have recently disagreed about the correct interpretation of *Stolt-Nielsen* and the level of deference that courts should afford to arbitrators. In *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d. Cir. 2011), the United States Circuit Court for the Second Circuit confirmed an arbitrator's decision to permit class claims in the absence of any specific mention of class arbitration in the arbitration clause. The Second Circuit held that class arbitration was permissible in this employment discrimination case because the arbitrator relied solely on the terms of the agreement and Ohio law, as opposed to the public policy grounds that the Supreme Court rejected in *Stolt-Nielsen*. *Id.*, 116-117, 123-24. The United States Circuit Court for the Third Circuit recently agreed with this approach, and held in *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3rd Cir. 2012) that an arbitrator's decision to allow class arbitration based on an arbitration agreement that never mentioned class actions at all was correct. *Id.*, 217-18. In the *Sutter* case, the arbitration clause stated that "[n]o civil action concerning any dispute arising under [the] Agreement shall be instituted before any court," but must be to arbitration in New Jersey under the American Arbitration Association Rules. This clause was interpreted to include "all conceivable court actions, including class actions." *Id.*

In contrast, in *Reed v. Florida Metropolitan Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012) the United States Circuit Court for the Fifth Circuit vacated an arbitration award that permitted class arbitration, on the grounds that reference to "any dispute" and "any remedy" in the arbitration clause could not be construed to extend to include class arbitration. Specifically, the Court held "the arbitrator lacked a contractual basis upon which to conclude that the parties agreed to authorize class arbitration. At most, the agreement in this case could support a finding that the parties did not preclude class arbitration, but under *Stolt-Nielsen* this is not enough." *Id.* In yet another approach, the New York State Appellate Court (1st Department) has held in *JetBlue Airways v. Stephenson*, 88 A.D.3d 567 (1st Dept. 2011) that while the FAA prohibits class arbitration in the absence of any "agreement" to engage in class arbitration, the FAA does not prohibit "collective arbitrations," even if the arbitration clause is silent on class arbitration. In that case, despite the absence of any clause concerning class arbitration, the Court held that *Stolt-Nielsen* did not apply to preclude collective arbitration where plaintiffs in an employment dispute were seeking a multiparty, joint, or collective arbitration that consolidated in one arbitral tribunal the independent claims of 18 named plaintiffs and 728 unnamed ones.

IV. Class Arbitration Waivers and Concepcion

Within a year of the *Stolt-Nielsen* decision, the Supreme Court once again revisited the question of class arbitration in the context of assessing the enforceability of class arbitration waivers. A cellular telephone contract between members of the class (the Concepcions) and AT&T provided for arbitration of all disputes, but the contract did not permit class arbitration. The Concepcions filed a complaint against AT&T (that was later consolidated with a class action on behalf of other phone users) in the United States District Court for the Southern District of California alleging that AT&T had defrauded them by charging a sales tax of approximately $30 on the retail value of phones that were free under their service contracts. The Southern District of California denied AT&T's motion to compel arbitration under the Concepcions' contracts and relied on the California Supreme Court's *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) decision, holding that the arbitration clause was unconscionable because it disallowed class-wide proceedings. The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the arbitration clause was unconscionable under California law and

that the FAA, which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, did not pre-empt its ruling. The majority of the Supreme Court disagreed, in a 5:4 decision, holding that California's *Discover Bank* rule was pre-empted by the FAA, thus reversing the Ninth Circuit's decision and remanding the case to arbitration.

The majority's decision makes the argument that when state law prohibits outright the individual arbitration of a particular type of claim, the FAA pre-empts the conflicting rule. The majority held that the *Discover Bank* rule could not be applied to avoid the express agreement between the parties to (1) arbitrate all disputes; *and* (2) waive class arbitration. Although the court's holding and some of its *dicta*, expressing skepticism of an arbitral tribunal's ability to adjudicate complex class-based claims, might suggest increasing Supreme Court hostility towards class arbitration, it is important to note that the court's decision was very fact-based. The court seems to have taken comfort in the fact that AT&T had set up what the court viewed as an expedient and equitable system for arbitrating individual claims (including expedited hearings, hearings by telephone, and a generous payout scheme). It is not clear that the Supreme Court would so readily uphold the validity of class waivers in other contexts.

Indeed, the Supreme Court has just granted *certiorari* to assess whether the use of class action waivers in other circumstances is permissible. *In re American Express Merchants' Litigation*, 681 F.3d 139, 140 (2d Cir. 2012), *cert. granted*, 81 USLW 3070 (U.S. Nov. 9, 2012) (No. 12-133). *In American Express Co.*, the class of plaintiffs are claiming that inclusion of a class arbitration waiver in a non-negotiable form contract between American Express and small merchants are unenforceable. Specifically, the Second Circuit, in a series of decisions now under review, accepted the argument that the class waiver was unenforceable in part because mandating individual arbitration in this context involves hearing claims that are individually not large compared to the costs of litigation, and thus effectively rendered the plaintiffs' statutory claims under federal antitrust laws prohibitively expensive to adjudicate on an individual basis. *Id.*, 140. Other Circuit Courts, however, have rejected the reasoning that the potentially prohibitive costs of individual adjudication are sufficient to render a class waiver unenforceable. For instance, in *Brokers' Services Marketing Group v. Cellco Partnership d/b/a Verizon Wireless*, Civil Action No. 10-3973 (JAP), 2012 WL 1048423 (D.N.J March 28, 2012), the United States Court of Appeals for the Third Circuit rejected the Second Circuit's approach and upheld an arbitration agreement with a class arbitration waiver despite the practical impact of that decision being that the plaintiffs' access to federal statutory claims were ostensibly blocked.

Another emerging issue has been the enforceability of class waivers in the employment context. The National Labor Relations Board (the "NLRB") in the *D.R. Horton v. Cuda* decision (Case 12-CA-25764) ruled that certain class waivers in employee arbitration agreements violate the National Labor Relations Act. Since *D.R. Horton v. Cuda*, the U.S. Court of Appeals for the Third Circuit has enforced an arbitration agreement in an employment case that it construed to include a class action waiver, *Quilloin v. Tenet HealthSystem Philadelphia Inc.*, 2012 WL 833742 (3d Cir. March 12, 2012), while other district courts, specifically the United States District Court for the Southern District of New York, have reached differing results in cases involving employment class waiver provisions and the Fair Labor Standards Act (the "FLSA"). *See, e.g., Sutherland v. Ernst & Young*, 2012 WL 130420 (S.D.N.Y Jan 17, 2012) (holding that class arbitration could be granted because the employee was unable to vindicate her rights on an individual basis); *LaVoice v. UBS Financial Services Inc.*, 2012 WL 124590 (S.D.N.Y. Jan 13, 2012) (holding that class arbitration could be waived, and the motion to compel individual arbitration could be granted because the plaintiff would still be able to exercise his rights on an individual basis). Since the NLRB's ruling in *Cuda* (which is pending on appeal to the U.S. Court of Appeals for the Fifth Circuit), of the 16 federal and state court decisions that have considered this issue, 13 have chosen to disregard the NLRB's decision that class waives in employment contracts violate the NLRA.

Absent any bright line rule from the Supreme Court, the validity of class arbitration waivers will likely continue to be tested on a case-by-case basis.

V. Protection of Investors and Abaclat

At the same time the Supreme Court has been signalling less tolerance for class arbitration in the domestic context, the majority of the tribunal in *Abaclat* affirmed the jurisdiction of an International Centre for the Settlement of Investment Disputes ("ICSID") tribunal over a mass class-like arbitration. *Abaclat* concerned the jurisdiction of the ICSID tribunal over mass claims filed by over 180,000

Italian bondholders (reduced to 60,000 after filing) against Argentina for breach of the Argentina-Italy Bilateral Investment Treaty (the "Argentina-Italy BIT") relating to Argentina's default and subsequent restructuring of its sovereign debt. The tribunal's discussion of the admissibility of mass-claims under ICSID has been subject to controversy, not least because the tribunal held that it had jurisdiction over mass-claims brought by Italian investors despite the fact that the 18-month litigation requirement contained in the Argentina-Italy BIT had not been met. In contrast to the majority in *Concepcion*, the majority in *Abaclat* emphasized that, in the specific circumstances of the dispute, class arbitration provided the Italian investors with a more efficient dispute resolution mechanism than addressing the dispute through local courts. The *Abaclat* award thus indicates that class arbitration can be applied within the international finance sector to allow investors to bring mass claims.

However, the extent to which the class arbitration mechanism may translate into the domestic arbitration setting in the investor/financial institution context remains to be seen.

Earlier this year, the Carlyle Group attempted to include a class arbitration waiver in its registration statement in advance of its initial public offering. The impact of the arbitration clause would have been to force investors into private individual arbitration and remove the possibility of both shareholder suits and class arbitration. The provision was, however, removed after widespread publicity and objections from the SEC.

Part of the objection concerned a perception that mandatory individual arbitration provisions delegate out to private companies the interpretation of federal securities law, with no guarantee that those laws would be properly applied. Another concern related to the perception that "the private arbitration system has been shown to have a repeat-player bias—favoring companies that hire them over and over again, as opposed to the individual shareholders who bring a single claim." Mark Lebovitch and Ann Lipton, '*The Carlyle Group Tries to Bar Investors From Court*,' The Harvard Law School Forum on Corporate Governance and Financial Regulation (August 19, 2012).

Despite the majority decision in *Concepcion*, the Supreme Court has not, until now, had the opportunity to address whether the federal policy in favor of arbitration might, in some circumstances, be reconciled with the notion of federal legislation offering protection to investors against waivers of class arbitration. *American Express Co.* provides this opportunity. Q

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(continued from cover)

chief of the *Paris Journal of International Arbitration/Cahiers de l'Arbitrage* and of the *French International Arbitration Law Reports*. He is also the former President of the International Arbitration Committee of the Union Internationale des Avocats. Philippe is a licensed barrister in England and Wales, and a leading member of the Paris bar. Q

An Interview with the Honorable Charles N. Brower and Professor Brigitte Stern

Judge Charles N. Brower has been a partner at White & Case LLP, Acting Legal Advisor of the United States Department of State, Judge of the Iran-United States Claims Tribunal and Deputy Special Counsellor to President Reagan. Judge Brower has also served 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), and of the panels of arbitrators of a number of arbitral institutions around the world. As counsel or arbitrator he has handled cases on all six continents, principally under the rules of the ICC, UNCITRAL, the LCIA, the AAA, the UNCC, ICSID, SCC, ARIAS and LMAA.

Professor Brigitte Stern is Emeritus Professor of International Law at the University of Paris I, Panthéon-Sorbonne. She has also been a Professor at the Graduate Institute of International Studies in Geneva from 2000 to 2007 and Director of the CERDIN-Paris I, Centre of Research in International Law from 1991 to 2007. She is an Expert for International Organizations and Governments—for example, she has been 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 an international arbitrator (sole arbitrator, member or president) in numerous ICSID, ICC, NAFTA, Energy Charter Treaty and UNCITRAL arbitrations. Professor Stern is also a member of World Trade Organization List of Panelists and a member of the General List of Arbitrators of the Court of Arbitration for Sport. She served as a Judge of the United Nations Administrative Tribunal (UNAT) from 2000 to 2009, and since 2009, is a Judge of the Administrative Tribunal of the Bank for International Settlement (ATBIS).

Professor Stern and Judge Brower are interviewed by Quinn Emanuel partner, Tai-Heng Cheng.

THC: Thank you, Judge Brower and Professor Stern, for agreeing to this joint interview. You are both eminent international arbitrators well known to the international arbitration bar. But for the benefit of corporate counsel and practitioners in other fields, would you tell us about your experiences in international arbitration?

BS: I am actually a young arbitrator since my experience in arbitration only dates back something like 12 years. This may come as a surprise since I have been a University Professor in France for 40 years, a part time professor at the Geneva Graduate Institute of High International Studies for nine years, and a judge of the UNAT—the United Nations Administrative Tribunal—for nine years. Still, please do not attempt to add these figures together with the time I have been studying at the Universities of Strasbourg, Paris and NYU, in order to guess my age: there is indeed some overlap between these periods of my career! I mention these various professional duties since I believe they indicate what my DNA is in international arbitration. When sitting as a Member of an arbitral tribunal, as a Sole Arbitrator, as a President or as a Member of an *ad hoc* annulment Committee, I tend to first set the general legal framework of a problem in order to reach a solution. Many of my co-arbitrators do not share this view and go straight to the solution. I think my approach gives more predictability to stakeholders.

In short, when I received my first two nominations twelve years ago, one by a State, and one by an investor, I was more than ready for what I consider a new career, even if I had been previously involved in other forms of international dispute resolution, for example as a counsel before the ICJ. The rest has unfolded very quickly and I received nominations in ICSID, ICC, UNCITRAL, Energy Charter Treaty and NAFTA cases. Since 2009, I am fully committed to international arbitration, mainly investor-state arbitration. And I must admit that I immensely enjoy the work of an arbitrator as much as I have loved my teaching career.

CB: It's not clear to me whether you simply want my arbitral CV, or anecdotes about memorable arbitrations. Assuming it is the former, the answer is simple. Until I was 45 years of age I hadn't touched an international arbitration professionally. I became a partner in White & Case LLP in New York City years ago on the strength of being a commercial litigator, a trial and appellate lawyer, with a lot of prominent criminal defense work as well, principally in the State and Federal Courts in New York City. I never traveled south of Washington, D.C., west of Philadelphia, or north of Schenectady, New York. Four months after becoming a partner, however, I resigned to accept the first of three positions I eventually held in our Department of State. In four years there I was largely a public international lawyer, a constitutional lawyer, and an administrative lawyer, though there was plenty of scope for exotic litigation as well. When I left the Department of State and rejoined White & Case LLP in Washington, D.C., I spent the bulk of my time suing the United States. Then, however, luck brought me my first international arbitration, as counsel, then another, then the *Amco Asia* case for Indonesia at ICSID, also my first appointment as arbitrator, and then I was appointed to the Iran-United States Claims Tribunal the first time, in 1983. When I returned to practice, again at White & Case LLP in Washington, D.C. in 1988, my practice became virtually exclusively international arbitration, both commercial and investment disputes, treaty-based and otherwise. I received appointments as arbitrator, which however were quite limited due to the conflicts one faced as a partner in a firm with 40 or so offices around the world. Following my reappointment to the Iran-United States Claims Tribunal starting January 1, 2001, joining 20 Essex Street Chambers in London at the same time, and being then shot of the conflicts of White & Case LLP, I began to receive a lot of appointments as arbitrator. So, while I have a diverse background in the law, for more than the past three decades international arbitration has been my life.

If you instead were looking for anecdotes, well, doubtless they'll come up in response to other questions you have.

THC: Given the long experiences that you have both had with investor-state arbitration, how, if at all, do you think attitudes about investor-state arbitration have changed over time?

CB: Quite a lot, actually. In 1965 the ICSID Convention was adopted on the theory that in order to encourage foreign investment there should be a neutral forum in which investors and host states alike could arbitrate any differences that might arise. The object was to depoliticize such disputes by taking them out of the diplomatic channel, and providing both investors and host states the protection of a mechanism for mandatory arbitration if they would agree to it. Well, this all began to change when ICSID cases morphed from being purely contractual disputes to ones alleging treaty breaches based on sovereign acts. It turned out that such cases are inherently political. The advent of the UNCITRAL Rules in 1976, which were as good as moribund until the Iran-United States Claims Tribunal put them on everybody's map, added a further venue, as subsequently NAFTA, the Energy Charter Treaty and others have done. All of this has coincided with the proliferation of bilateral and multilateral investment promotion and protection treaties. Now states, which almost invariably are the respondents in such arbitrations, increasingly have drawn back, and are in many cases endeavoring to recapture at least some of their earlier power over the disposition of investment disputes. Some countries have withdrawn from ICSID. Some have threatened to denounce substantive treaties. Australia has announced that it no longer will include arbitration provisions in its investment treaties, and South Africa has announced a policy of discontinuing all its BITs with EU Member States. Even my own country, the United States, has acted with its NAFTA partners to "interpret" NAFTA in a way that is intended to restrict the scope of application of "fair and equitable treatment." A number of states have been taking positions designed to narrow the terms of treaties. In other words, we are traveling a road leading from depoliticization to re-politicization, or what I call "re-statification," which I find frankly worrying.

BS: I think that the major change in investor-state arbitration has occurred in 1989, with the so-called *Pyramids* case, where for the first time an arbitral tribunal admitted that the necessary consents to arbitration by the two parties could be given separately: in this case, the State's consent was given in a national law. Soon after, the same analysis was made in relation to a State's consent given in a BIT, in the case of *AALP*. This was the beginning of the huge development of what is now known as "arbitration without privity." The fact that all this took place before I entered the scene of arbitration does not mean that I missed the importance of this

change: I have indeed used for years the *Pyramids* case as a "*cas d'école*" for my students!

More recently, I think the biggest change has been the fact that international arbitration is no longer performed behind closed doors, but is more and more in the public light. The quest for transparency, which has started in WTO, has then undergone a continuing expansion, spilling over into NAFTA, and then ICSID, and now even into commercial arbitration. This is not surprising since international arbitration is dealing with issues such as cigarette packaging, sovereign debt restructuring or the exercise of the State's regulatory powers concerning for example environmental measures which are key to the civil society.

This "opening-up" takes different forms of intervention which I have personally experienced: *amici curiae* have been acknowledged by a modification of Article 37 of the ICSID Rules in April 2006 and I did sit in two arbitral tribunals accepting an *amicus curiae* from the European Commission in cases where questions of European law were raised; broadcasting of the debates over the Internet with the agreement of the parties which happened in the case *Pac Rim v. El Salvador,* in which I was sitting; publication of most of the awards in investor-state cases.

THC: A long-time practitioner in investor-state arbitration recently observed that arbitrators are increasingly polarized on the interpretation of bilateral investment treaty provisions, such as "most favored nation" clauses. Do you think this observation is accurate?

BS: I am somewhat surprised by this kind of statement: would you say that tennis players are polarized by the ball? Arbitrators are "polarized" by the interpretation of bilateral investment treaty provisions, as this is precisely their job! It would be a great concern to find that they are not polarized and that they are overlooking the terms of the BIT which is applicable to the case they are dealing with.

Having said that, I imagine that your question is not as innocent as it may look, and that you are trying to have Charles' view and my view on the MFN clause! But for that you do not need to interview us, and you can just be referred to our contradictory dissenting opinions on the possibility to use an MFN clause to change the dispute settlement mechanism in the applicable BIT, more precisely a separate opinion and two dissents by Charles in *Renta 4 v. Russian Federation, Austrian Airlines v. Slovak Republic* and more recently in *Daimler v. Argentina*, respectively, and one dissent by me in *Impregilo v. Argentina*, in which we were sitting together and had deep and challenging deliberations!

CB: Well, you've come to the right place with that one. I am the only person to have sat as arbitrator in three of the four cases that have been based on the Germany-Argentina BIT. In the first one, *Siemens*, the Tribunal unanimously found that the MFN clause overcame the treaty provision otherwise requiring that an investor spend 18 months litigating its dispute before the courts of Argentina, even if that were a fruitless exercise, before being entitled to arbitrate. Therefore we had jurisdiction. Then along came the *Wintershall* case, the one of the four in which I did not sit, and the Tribunal unanimously ruled the other way and dismissed for lack of jurisdiction. The *Hochtief* case, in which I was appointed, ruled the same way as *Siemens*, but with a dissenting opinion by my co-arbitrator. Finally, most recently the *DaimlerChrysler* case was dismissed, that Tribunal aligning itself with *Wintershall*, again with a dissenting opinion, in that case mine. A quirk of this last case is that the arbitrator appointed by Argentina, who also sat in the *Siemens* case, which was unanimous, changed his position, thus forming a majority for dismissal. Now, isn't that all a fine kettle of fish?

By the way, this phenomenon is not limited to MFN clauses, although they perhaps present the starkest example of it. Differing appreciation of what constitutes "fair and equitable treatment," of what "full protection and security" means, and varying applications of the "doctrine of necessity" are also prominent examples of how differently tribunals may decide issues.

THC: Some arbitration practitioners, corporate counsel, and government officials have expressed dissatisfaction with recent investor-state awards and annulment decisions. Do you think this "backlash" against investor-state arbitration is real or overstated?

CB: Of course it is real. It exists, though the degree to which it exists is debatable. Definitely a couple of recent ICSID annulments of awards have caused great, and in my view justified, concern. And to

anyone it is unsatisfactory that different tribunals take different views of essentially the same issues because that militates against the predictability that investors and host countries both understandably desire. The cure for that has not yet been found, however. I think that by and large the benefits of the system are seen, at least by investors, to outweigh the negatives. For many of them, of course, such arbitration is the only reasonable medium for resolving disputes with the host country, so they must stick with it.

BS: In a way, Darwinism applies to arbitration: I see evolutions, criticisms and further evolutions. Four years ago, I was in a colloquium at Columbia University where the central topic was the legitimacy crisis of the system of international arbitration. I said at that time that, a far as I was concerned, this looked like a *crise de croissance*, a teenager's crisis, the BIT revolution having only started some 18 years ago. Of course, the teenager is now in his twenties and should become more reasonable. In fact, in my view, he does.

It is true that some countries have manifested their discontent with recent awards or annulment decisions and that some countries—Bolivia in May 2007, Ecuador in July 2009, Venezuela in January 2012—have denounced the ICSID Convention. Also, Australia has announced that it will no longer include arbitration clauses in its future BITs, as it constrains the State's ability to legislate. This is certainly a sign of dissatisfaction but should not be overestimated.

Today, investment arbitration has become a very successful system, but this success immediately raises the question of its global coherence: the higher the number of arbitral awards, the greater the risk of apparently diverging awards. The possibility of contradictory arbitral awards has of course always existed. Indeed, far back in 1980, I wrote an article on the Libyan oil nationalizations entitled: "*Trois arbitrages, un même problème, trois solutions.*" And, some 25 years later, the leitmotiv was the same: in 2004, I was questioned on the number of ICSID arbitration cases brought against Argentina after the economic crisis that started in 2000. I responded that "you have the potential … for 20 arbitrations, one problem, and 20 solutions."! And Charles' answer to the former question is another telling illustration of divergences of interpretations, the same BIT having given rise to four different approaches by different members of the tribunals.

And we know that there are indeed diverging solutions both at the tribunals' level and at the ICSID *ad hoc* Committees level to which you referred in your question.

THC: Do you anticipate that arbitrators will eventually agree on the interpretation of such provisions where they are similarly worded across bilateral investment treaties?

BS: Of course, I am convinced—for example concerning the MFN clause discussed earlier—that the solution adopted in *Plama*, with which I generally agree—although by following a somewhat more general reasoning—will prevail, but I am sure that Charles thinks the same thing for the solution earlier inaugurated in *Maffezini*, which appears to go in the opposite direction and which he favors.

This being said, it is remarkable that on some quite innovative approaches, a consensus has emerged very quickly. On the question of arbitration without privity, that we already mentioned, the tribunal in the *Tradex Hellas v. Albania*, simply stated, based on only two awards that "… it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in national laws."

Another question where consensus emerged quite rapidly is the acceptance of *amicus curiae* briefs in investment arbitration from its first recognition by an arbitral tribunal in *Methanex* in 2001 to its inclusion in the ICSID rules in 2006.

Of course, there also remain subjects on which there is no consensus at a general level, like the meaning and scope of an umbrella clause, the scope of the FET, the existence of a state of necessity in the Argentine cases which followed the financial crisis of 2000/2001 in this country, to cite but a few … these areas of disagreement having also been pointed at by Charles.

CB: I would like to, but current experience is not encouraging, as I have just noted. It has been said that "The good awards and decisions eventually will drive out the bad ones." At present, however, each school of thought, for example, on the subject of MFN clauses, thinks its decisions are good. Numbers don't seem to be making a difference. As my dissent in the *DaimlerChrysler* case with Argentina to which I referred a moment ago recorded, as of the time that

award was being issued nine of the 11 cases decided to that point that involved the same "18 months in Argentine courts" provision as the Germany-Argentina BIT had sustained jurisdiction based on the treaties' MFN clauses. If no one is persuaded by the fact that nine out of 11 (now 12) tribunals have so found, how are the "good awards" going to drive out the "bad ones?" This is not a desirable situation, for sure, but all of the thoughts anyone so far has had about an international appellate tribunal for investment disputes have proven wanting.

THC: Professor Stern, could you say a little more about how you think agreements about treaty interpretation will come about?

BS: You never can presume how a *jurisprudence constante* will emerge. On this point, I disagree with Charles' suggestion that the good awards are necessarily the repeated awards, especially when they involve the same arbitrators. A repetition of a wrong approach does not make it magically a good approach. My view is that the good solution will not emerge by reason of authority, *i.e.* the authority of repeated awards in the same direction—there is no precedent or *stare decisis* doctrine as such in international arbitration—but from the authority of reason, *i.e.* the authority of the reasoning developed in the awards.

There is no unifying body in investment arbitration, such as the Appellate Body of WTO, for example, in trade matters, no hierarchy of international tribunals with a supreme arbitration court. But, in my view, there is a "hierarchy of reasons" and, at the end of the day, the legally sound and more rigorous solution will prevail. As you see, I am quite optimistic—contrary to Charles—as far as the future of international investment arbitration is concerned!

THC: Judge Brower, do you see a way out of disagreements on treaty interpretation generally?

CB: My main thought is that the key to a more cohesive jurisprudence where presently a few chasms exist is the proper application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, a point I have made both in the few separate and dissenting opinions I have written and in various speeches and articles. Of course all of the tribunals producing these conflicting interpretations profess that they are doing so, but as to certain cases I do not agree that they have done so. Contrary to what Brigitte has just said, I am neither pessimistic about the future of investment dispute arbitration, nor do I think that in an adjudicative system that has no supreme decider empowered to eliminate such conflicts numbers of awards and decisions going one way or the other are alone persuasive. I believe that in the end the system has a good future, simply because the great bulk of foreign investment will be made only with the protections it offers, or, alternatively, will be made nonetheless, but at potentially prohibitive costs to the host state.

When you examine who actually has decided cases—I refer particularly to the 12 that have dealt with the MFN clause in Argentina's BITs—you will see that they do not, as Brigitte just said, "involve the same arbitrators." Some arbitrators, myself and Brigitte included, have sat in a certain number of them, but a rather large number of persons overall have sat as arbitrators in such cases. Of course it is the quality of the reasoning in awards that should be persuasive, which in part is related to the authority, as it were, of the individual arbitrators. I do maintain that when by and large excellent arbitrators have demonstrably exercised their legal analysis and three-quarters of the tribunals have interpreted something one way, and one-quarter of them have seen things the other way, one should examine very carefully the analysis and reasoning of the one-quarter. So my answer to the question is that I don't see a quick way out of such disagreements. It will take time, but I do agree that barring the invention of a silver-bullet solution the intellectually meritorious awards and decisions ultimately will prevail.

THC: Having presided over so many arbitrations, what are some recommendations you would make to corporate counsel to control the cost of arbitration and to avoid delays in reaching an award?

BS: Personally, I think that the questions of costs and delays are fundamentally in the counsel's hands, not those of the tribunal.

Costs are essentially costs generated by counsel, witnesses and experts and to a very minimal amount by arbitrators.

As far as delays are concerned, I would say the same thing: most of the delays are the result of time extensions requested by the parties. Of course,

an arbitral tribunal can try to monitor this, but it is often difficult to reject requests for extensions, when they are based on serious reasons: illness and operation of a lead counsel, change of a law firm or change in the personnel in charge of a case after a change of government ...

The only recommendations I could make to counsel is to avoid unnecessary steps in the proceedings, such as challenges not based on real concerns related to an arbitrator, to concentrate at the jurisdictional level on serious objections to jurisdiction, as well as concentrate on the core issues related to the merits, without entering into peripheral or marginal questions. But I can see that most experienced counsel are already following these recommendations!

CB: Let me first address costs. Since "Time is money!", reducing costs means reducing time, principally the time of counsel. As between the client and its counsel, the client is the boss. It can't be an effective boss, however, unless it participates fairly intimately in the proceedings, with its in-house counsel handling the matter working hand in glove with outside counsel. I shouldn't, for example, be receiving 300-plus-page post-hearing briefs, ever, which I have. In-house counsel should have a close enough involvement to prevent that happening. There is no substitute for client involvement. That's where it begins and that's where it ends.

As regards delays in reaching an award, all the client can do is to work with its outside counsel to ensure, so far as it is within their power, that the case moves along at a proper pace. The rest is up to the other party, in part, but to the extent that that party is not cooperative, and in any event, it is up to the tribunal. Therefore counsel and their clients would do well to determine that the arbitrator they appoint, and the chairman to whom they agree, if that be the case, actually are able to devote the necessary time within a reasonable period of time to preparation and issuance of the award. This can, of course, be a problem, especially when in-house counsel and outside counsel quite understandably want to protect themselves from criticism, should the case go against the client, by choosing renowned arbitrators, who of course are most likely to have timing problems. So be as sure as you can be that the proposed arbitrator or chairman honestly has the required time available.

THC: What qualities should counsel and their clients look out for in selecting an arbitrator?

CB: That's an easy one. As counsel my basic advice to clients was "Appoint an individual who, for whatever reason, will immediately command the respect of the other members of the tribunal." That respect will ensure that the arbitrator's views will be listened to, considered with respect, and not be suspected of being biased. And never, never select as party-appointed arbitrator an advocate, a "shill," if you will. Such a person will soon be isolated and will have no useful influence on the deliberations of the tribunal. Another guideline is to choose individuals who essentially have nothing more to gain in life, hence have nothing to lose but their reputations, which they value highly. This sometimes is partly a matter of age. Really, though, a person who has risen to a certain eminence in the field necessarily has done so because of a deserved reputation for independence, impartiality, keen analysis and good judgment. Such a person values his or her reputation above all else. He or she has nothing more to gain in life, and all to lose. Therefore that person can be depended upon to act correctly, according to the law and the facts, which is the most any party can legitimately hope for.

BS: Before I answer this question, I would like to mention that I consider that counsel and their clients should preferably not select arbitrators who play at the same time the role of counsel. I know that in saying this I will upset many of my colleagues but I am deeply convinced that such situations may result in regrettable confusions and may involuntarily influence the behavior and reasoning of an arbitrator, by taking into account considerations which do not pertain to the relevant case, but to other cases. To illustrate what I see as an inappropriateness, has one ever seen a referee in a soccer game entering the playing field or the contrary? The CAS—Court of Arbitration for Sport—in the framework of which I am also performing arbitrations, acknowledging the fact, has adopted a rule by which a person who is working as a counsel in sport matters cannot sit as an arbitrator in CAS cases. This problem has not yet been seriously dealt with by the investment arbitration community.

Then, to answer your question on the qualities that should be looked for in the selection of an arbitrator, I would say, dedication, honesty and rigor in the legal reasoning, which I see as the fundamental trilogy of arbitration.

THC: Thank you both for your time.

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