THE INTERNATIONAL LAW

QUARTERLY

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Taking Evidence in International Arbitration: The New IBA Rules

By Luis M. O'Naghten and Daniel E. Vielleville, Miami

I. Introduction

A. The IBA Rules on Taking Evidence: a bridge between two legal systems

The IBA Rules on the Taking of Evidence in International Arbitration (hereinafter the "IBA Rules on Evidence" or the "IBA Rules") were first adopted by the International Bar Association in June 1999. The rules were drafted by a working group created by IBA's Arbitration Committee. This group included some of the most eminent international arbitrators from eleven countries, mostly in Europe.

The IBA Rules on Evidence (1999) soon became an indispensable tool for the handling of international arbitrations.[1] The rules were adopted with the understanding that there are intrinsic differences with respect to the basic structure of civil procedure between common law and civil code countries.[2] The purpose behind the IBA Rules on Evidence is to create

See "IBA Rules," page 42

Seventh Circuit Clarifies Standards for 28 U.S.C § 1782 Discovery Requests

Domestic Companies Face Discovery Burdens in U.S. Courts From Litigation in Foreign Tribunals

By Elenore Cotter Klingler, Atlanta

E. Klingler

Foreign litigants are increasingly using federal district courts to obtain discovery from U.S. companies through a federal statute designed to encourage other countries to liberalize their discovery procedures.

A recent opinion from the U.S. Court of Appeals for the Seventh Circuit provides an overview of the considerations and analysis applicable to discovery requests under 28 U.S.C. § 1782. *Applications of Heraeus Kulzer, Gmbh v. Biomet, Inc.* Nos. 09-2858, 10-2639 (7th Cir., Jan. 24, 2011).

Discovery Through Section 1782

28 U.S.C. § 1782 provides, in relevant part, "[t]he district court of the district in which a person resides or is found may

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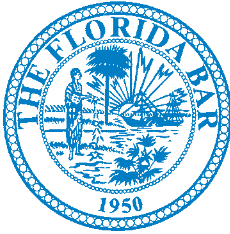

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Articles between 7 and 10 pages, double-spaced, involving the various disciplines affecting international law may be submitted on computer disk with accompanying hard copy, or via electronic format in Word **(with the use of endnotes, rather than footnotes.)** Please contact *Alvin.Lindsay@hoganlovells.com* for submissions and for any questions you may have concerning the *Quarterly*.

DEADLINE FOR NEXT ISSUE IS AUGUST 1, 2011.

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order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." The statute was narrowly interpreted by courts and infrequently used by parties until 2004, when the U.S. Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). In that case, the Supreme Court dismissed many of the restrictions placed by lower courts on the use of the statute. Since 2004, court rulings have generally been in accord with the High Court's liberal view of the law.

The Seventh Circuit's decision in *Biomet*, however, lists several "potential abuses" that district courts must be "alert for" when considering a section 1782 request. According to the court, section 1782 requests should not be used by a foreign litigant to obtain discovery that it could already obtain in the foreign jurisdiction. The court noted that an abuse also could occur when section 1782 is used to request discovery of "documents or other materials that the foreign court would not admit into evidence." Section 1782 requests should not be used to swamp foreign courts, especially those with more liberal admissibility requirements, with the "fruits of American discovery that would be inadmissible in an American court."

The court also noted that district courts should monitor section 1782 requests to ensure that the requesting party is not seeking discovery that the foreign court would disapprove because it would impose an "undue expense" on an opponent or third party. Finally, the Seventh Circuit noted that an abuse of section 1782 may result when the parties are not in "reciprocity" with each other in terms of the types of discovery procedures available to each.

The Seventh Circuit determined that none of these abuses was a factor in the case before it. The court focused on the responding party's failure to: show that its opponent could obtain the needed discovery under the

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The Florida Bar Annual Convention Gaylord Palms Resort & Convention Center Orlando/Kissimmee

Thursday, June 23

9:30 p.m. – 11:30 p.m
Chair's " After-Party" Reception -- Ed Mullins' Suite

Friday, June 24

10:30 a.m. - 11:45 a.m. **New Frontiers in Arbitration** (1214R)

This seminar will discuss hot topics in arbitration, such as Florida's new UNCITRAL law, Supreme Court law on consumer arbitrations, and recent attacks against arbitrators.

12:15 p.m.– 1:45 p.m. ILS Luncheon
2:00 p.m. – 3:00 p.m. 2011-2012 ILS Committee Meetings
3:15 p.m.– 6:00 p.m. ILS Executive Council Meeting
6:30 p.m – 8:30 p.m. Reception at Mulligan's Pub

Message from the Chair

As I reflect on our past year, I want to take this opportunity to discuss some of the Section's achievements. For starters, we can mention this publication, which made great strides this year—featuring special issues and in-depth treatment of a variety of topics. The *International Law Quarterly* is becoming a leading journal for all areas of international law.

Numerous innovations were also implemented to make the Section run more efficiently and to provide more services to members, including:

- sending a weekly e-mail newsletter, *The Weekly Gazette*, to the membership;
- organizing the Section into divisions headed by the various Section officers;
- creating new committees such as an Amicus Committee for appellate briefings, an Asia/China Committee and a Meetings Committee.

The Section for the first time hosted CLE webinar events. Our members presented the following topics, all of which are available on CD from The Florida Bar:

- the "BP Deepwater Horizon"
- "China (the New Silk Road)"
- "Service of Process Abroad"
- "Cross-Border E-Discovery"

The Section's Midyear Meeting, held in September in Miami, was preceded by a seminar presented by the Section's Travel Law Committee, entitled "Forbidden Places, Tourism and Trade." The seminar addressed a variety of regulations administered by the Office of Foreign Asset Control ("OFAC") of the U.S. Department of the Treasury in an apolitical framework.

The Section also hosted its 9th Annual International Litigation and Arbitration Conference on 4 February 2011, in Hollywood, Florida. The Conference featured speakers from around the globe—including a recently retired Justice of the Eastern Caribbean Court of Appeal—on cutting-edge topics.

The Section signed cooperative agreements with bar associations in São Paulo and Paraná, Brazil, and will soon be signing agreements with the Taipei and Kaohsiung Bar Associations. We also have helped members of the Barcelona Bar Association find internships for students.

Speaking of students, the Section held its annual Vis Pre-Moot Competition in February at the University of Miami School of Law. This year's Annual ILS Pre-Moot featured over thirty attorneys serving as arbitrators and judging students from six Florida law schools, students from Université Panthéon Assas in France, and students from Universidad Autónoma de México.

In March, the Section hosted the Florida-Quebec Forum 2011 in Fort Lauderdale. Designed to further improve relationships between Quebec and Florida, as well as inform the public, the forum optimized participation by attorneys, business people, and other professionals from Quebec and Florida. The forum focused on current issues involving business, immigration, taxes, real estate, mortgages, family law, and insurance.

Most recently, the International Bar Association (IBA) held its 2nd Conference of the Americas in Miami on 5-6 May 2011. The Section was a primary sponsor and supporter of this event which attracted over 200 attorneys from North and South America. Peter Quinter, incoming Treasurer, was the Program Chair of the IBA event.

Additionally, as it did last year, the Section will host a panel discussion at the Florida Bar Annual Meeting. This year's topic is "New Frontiers in Arbitration" (1214R).

The Section's legislative efforts continued, helping to stop passage of a Florida House bill (HB 1273) and a Senate bill (SB 1294) that threatened to radically change international law in this state by banning the use of foreign law in Florida's courts and in arbitration.

Finally, and certainly not least, the Section amassed quite a bit of financial support from our numerous generous sponsors, to whom we extend our most sincere gratitude.

Each year we get better. Makes you look forward to the Swerdloff Administration . . .

Edward M. Mullins
Astigarraga Davis Mullins & Grossman, P.A.
Miami, Florida

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foreign court's discovery procedures; identify the nature and extent of any burden it faced in responding to the discovery requests; show that the foreign court would not admit any resulting discovery into evidence; or indicate that the foreign court was "worried about being swamped" with responsive discovery. The court concluded that, although the discovery sought might be excessive, "excessiveness" must be analyzed under the traditional standards set forth in the Federal Rules of Civil Procedure.

With regard to reciprocity, the court pointedly noted that the responding party never asked the district court to condition granting the application to take discovery on the requesting party's consent to respond to reciprocal discovery. This illustrated the "weakness of [the responding party's] position," the court noted.

Understanding the Law

Additional limitations on section 1782 requests seem pointless, according to Edward M. Mullins, Chair of the International Law Section of The Florida Bar and Co-Chair of the ABA Section of Litigation's International Litigation Committee. "This is not really any more burdensome than the federal rules of discovery that companies are already familiar with," he says.

Mullins cautions against knee-jerk resistance to section 1782 requests, observing, "When people get these, it can turn into mini-litigation, and it really shouldn't." He suggests that substantive objections to the scope of the discovery can be handled in the same way as objections to domestic discovery under the Federal Rules of Civil Procedure. Mullins notes, however, that the technical requirements of the statute, such as opening an action solely to obtain discovery, might be unfamiliar to many lawyers.

Betsy P. Collins, Co-Chair of the Section of Litigation's Pretrial Practice and Discovery Committee, warns that section 1782 can create traps for the unwary. In particular, she notes that privacy laws in Europe and elsewhere are very strict, and discovery that U.S. lawyers consider to be non-controversial could be problematic if gathered from a European affiliate by a U.S. parent company. "I think a lot of lawyers are not aware of some problems that they can blindly stumble into," she says.

A Useful Tool

Both Mullins and Collins believe section 1782 requests are likely to become more common for U.S. companies with international ties. "Litigators may think this is not something they will run up against, but as the economy becomes global, more litigators, even in the most basic litigation, will run into these issues," Collins cautions. She recommends that younger lawyers lead the way in educating their firms about international discovery. "The more senior lawyers may not even have this on their radar," she advises. "This is something young lawyers can bring to the table." Mullins agrees, observing, "Certainly it's a helpful and powerful tool that anyone should know about and use."

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From the Editor . . .

A. Lindsay

The first issue of the *International Law Quarterly* was published in December 1982. And it was a great issue. Twenty-four pages long, it included articles on the Export Trading Company Act of 1982, the then-newly adopted Hague Convention on international documents, immigration by foreign investors, the attorney-client privilege in Europe, and a number of other still-relevant topics.

One of the most interesting aspects of that inaugural edition is who was involved. Then-Florida Lieutenant Governor **Wayne Mixon** (described in his bio as a "cattle rancher and peanut farmer from Jackson County") wrote the first lead article, a discussion on how he and then-governor **Bob Graham** were working hard expanding "Florida's emphasis on international trade and commerce" that had been growing "in the past few years." The late, but indelible, international-transactions expert Professor **Allan Swan** contributed an article on U.S. antitrust applicability to export trading companies. **Gilbert Sandler** was the editor, and his Sandler Travis partner **Thomas Travis**, the incoming Section chair, penned the first letter to the editor. The Chairman's Message was written by a youthful **Stephen Zack**, who our U.S. readers know is currently president of the American Bar Association. I encourage everyone to check out that, and all back issues, at *www.InternationalLawSection.org.*

The point is that this publication is not new, and—although I might like to think otherwise on this first anniversary of my involvement—it has not suddenly become "good." In fact, the nearly twenty-nine year old *International Law Quarterly* enjoys an enviable history among law journals, and is justified in its claim of being one of the world's best journals covering all areas of international law.

In each issue, we strive for a balance of scholarship and practical articles that will be useful to all international practitioners. This edition is a perfect example. In these pages you'll find articles on the new IBA rules on taking evidence, the continuing evolution of 1782 discovery, the new U.K. Bribery Act, forum-selection clauses in the international realm, anti-suit injunctions in arbitration, administrative proceedings under the Office of Foreign Assets Control, joining non-signatories to an arbitration, and Belize's Asset Protection Trust Act. These are all topics that will interest and benefit the international lawyer, and each of our authors should be proud to have made the cut.

Already, we have important topics for the upcoming summer issue.

We can look forward to Italian practitioner **Francesca Rolla**'s article on Italy's new consumer collective action law. As collective actions—or class actions—are entirely new to Europe (and often cited by Europeans as one of the problems with U.S. litigation), we will be fortunate to learn about them from one of the few lawyers on the planet to actually litigate under the new law.

In addition, we will be reporting on the U.S. Supreme Court's imminent decision in the consolidated *Goodyear Luxembourg Tires* and *J.McIntyre Machinery, Ltd.* appeals. With one of the courts below having found jurisdiction over a non-U.S. entity regarding an accident that happened in Europe, these are shaping up to be the most important jurisdictional decisions since *International Shoe*, and will likely be of critical importance to all non-U.S. entities in the business of manufacturing and selling products.

We will, of course, also review the recent big news that Miami has been chosen as the host city for the 2014 global meeting of the International Council for Commercial Arbitration. **Adam Gutin** and **Brittney Keck** discussed the importance of Miami's bid for this event in our last issue ("Florida Adopts UNCITRAL Model Law") and with an expected draw of about 1,000 attorneys from around the world, the recent award will only highlight Miami's growing role as a center for international arbitration. Indeed, the award would not have happened without the hard work of many International Law Section members including former Chair **Burton Landy** and current Executive Council member **Eduardo Palmer**. We congratulate them and look forward to providing more on this great achievement in the next edition.

As always, I encourage all our readers to submit articles, topics, news, letters and photographs for future editions. With your continued high level of input, we will surely have a lot to celebrate when the *ILQ*'s thirtieth anniversary comes around in December 2012. Safe travels.

— Alvin F. Lindsay
Editor-In-Chief
Hogan Lovells US LLP

The New U.K. Bribery Act— Legal Minefield for International Businesses

New U.K. Legislation Will Present Serious Legal Risks for Corporate Officers and Directors, Regardless of Nationality or Corporate Domicile

By Timothy Ashby, Coconut Grove

T. Ashby

The U.K. Bribery Act that will take effect on July 1, 2011, will cause many sleepless nights for executives on both sides of the Atlantic. The law is extra-territorial in scope, with broad application not only to British companies, citizens and residents, but also to public and private foreign companies doing business in Great Britain, regardless of whether the act or omission constituting bribery occurs in or outside the U.K. The burden of proof will be on the defendant, not the prosecution—a disturbing new trend in international law.

The new U.K. law will establish rules for two general offenses covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery). The Act expands the scope of regulation to include commercial bribery, not just bribery of government officials.

Companies and outside counsel involved in international transactions are generally aware of the U.S. Foreign Corrupt Practices Act ("FCPA"), which until now set the standard for global anti-bribery legislation. Yet according to research from Deloitte, three-quarters of U.S. business professionals surveyed said they were not familiar with provisions of the U.K. Bribery Act. While similar to the FCPA, the Bribery Act carries harsher penalties and is riddled with ambiguities that will be a minefield for businesses and a bonanza for law firms.

The Act holds senior executives and directors personally liable for failing to prevent bribery being committed by employees, agents or subsidiaries doing business on their behalf worldwide—a new type of criminal offence that targets inactivity rather than active participation. Individual executives can be imprisoned for up to ten years, and officers and directors may incur unlimited fines.

Executives and business entities can be held criminally liable under the Act if a person "associated" with their company pays a bribe. An "associated person" is defined as someone who "performs services" for a commercial organization. For example, consider a parent company based in New Jersey with subsidiary operations in the U.K. and Russia. One of the subsidiary's suppliers in Moscow pays the dispatcher of a private trucking company $100 to expedite shipment of a perishable product. That simple "facilitation payment"—legal under the FCPA—can make the parent's entire executive team and board subject to the jurisdiction of a British court. The company could spend millions of dollars in legal defense fees for a remote—and previously routine—act performed by someone who was not even an employee. If the parent company loses its case—and British prosecutors will aggressively pursue suspected violators—executives and board members could be imprisoned for a decade and suffer personal financial ruin.

For centuries, it has been customary in many countries to pay gratuities to stevedores loading and unloading cargo from ships—effectively an attendance allowance to turn up on time. Under the Bribery Act, this could now be considered criminal activity by the person making the payment and by the company employing him or her as an agent.

Under the Act, bribery does not simply mean money changing hands to gain a business advantage. It also involves the giving of gifts or what the British Government's Serious Fraud Office ("SFO")—the lead agency in England and Wales for investigating (jointly with the police in some cases) and prosecuting cases of overseas corruption— would consider extravagant corporate entertainment. Unfortunately, what the CEO of a Fortune 500 company may consider "reasonable and proportionate" entertainment for say, Carlos Slim, could be viewed differently by a SFO investigator making £40,000 per year.

Merger and acquisition activity also carries the risk of "successor liability." Companies can be held criminally responsible for any corrupt activity that may have previously occurred in the recently acquired entity. Furthermore, merely doing business in a jurisdiction known for corruption and failing to implement "adequate" anti-bribery procedures could be enough to justify prosecution of a senior officer for being an accessory to corruption if a bribe is paid.

The U.K.'s Serious Fraud Office has emphasized that prosecutions will focus on individuals rather than corporate entities. This follows general U.S. and U.K. policies on anti-corruption. For example, last year U.S. Attorney General Eric Holder, speaking at the

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Organisation of Economic Co-operation and Development in Paris, warned that "prosecuting individuals is the cornerstone of our enforcement strategy. . . . The risk of heading to prison for bribery is real, from the boardroom to the warehouse."

Criminal fines arising from corruption probes are not insurable under directors and officers (D&O) policies, although individuals may be able to recover some of the costs of defending bribery-related cases until the case is completed, provided they are named on the policy. Only in cases where fraud or dishonesty is proven would insurers be able to seek repayment of any defense-related monies they paid out. Violations of the Act are likely to result in very expensive litigation arising from a securities fraud or derivatives lawsuit. A failure to maintain "adequate procedures" may expose directors and officers to litigation from shareholders claiming a breach of fiduciary duty.

Regardless of the pitfalls the Bribery Act poses, it is going to be a fact of life and business. So how can companies avoid potentially devastating criminal anti-bribery liability while conducting international transactions?

Unlike the FCPA, where a compliance plan is not a defense but may support leniency at sentencing, the existence of a compliance program incorporating "adequate procedures" within a company will be considered an affirmative defense in the U.K. to the offence of failing to prevent bribery. These "procedures" embrace both bribery prevention policies and the procedures which implement them. British courts will pay close attention to "proportionality"—the principle that a company's procedures to prevent bribery by persons associated with it be proportionate to the risks it faces and the nature, scale and complexity of its activities. A robust compliance plan therefore requires (1) a thorough audit trail demonstrating the procedures and control systems introduced, and (2) the training of relevant members of staff to ensure that they are aware of and continually diligent in meeting their obligations.

The U.K. Ministry of Justice issued a guidance paper to help companies understand how to comply with the Act. The document outlines six key principles that companies should follow to "prevent bribery being committed on their behalf." These include making a top-level commitment to foster a culture in which bribery is never acceptable, conducting periodic risk assessments and applying due diligence procedures with regard to bribery prevention.

Executives and corporate counsel would be mistaken to think that an in-house FCPA compliance program is sufficient to meet the "adequate procedures" criteria of the new U.K. Bribery Act. A company should adopt a fresh compliance plan, according to the following general procedures:

(1) Fully evaluate the entire operation—how and where business is done—to assess all of the new risks being faced. Special attention must be given to countries considered "high risk" for corruption, as the U.K. authorities—through diplomatic and intelligence resources in those jurisdictions—are likely to scrutinize closely your operations there.

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(2) Provide thorough training and education to employees, subsidiaries, agents and business partners, including persons far down the supply chain. Web-based training is not recommended because it lacks the personal approach that face-to-face training can provide to higher-risk employees.

(3) Develop technologically advanced mechanisms for risk assessment and due diligence. A number of resources are available that will enable organizations to customize strategies for specific countries and business partners.

(4) Conduct ongoing monitoring examinations and reviews to assess changed circumstances and to identify new risks as they emerge. The compliance team should report to the CEO and Board on a monthly basis to meet the Bribery Act's "adequate procedures" guidelines.

The U.K. Bribery Act will undoubtedly be the harshest anti-corruption legislation ever enacted, with a legal impact far beyond the British Isles. Companies should begin planning now for compliance programs to mitigate significant criminal exposure. And CEOs would be advised to leave that $24,000 bottle of '78 *Montrachet Domaine de la Romanée-Conti* at home rather than bring it as a gift to the Chairman of Novartis—he'll understand because he also does business in the U.K. and is equally vulnerable under the new Act.

__Dr. Timothy Ashby__, CEO of Federal Regulatory Compliance Services, LLC, is a member of The Florida and D.C. Bars. A former senior official with the U.S. Commerce Department's International Trade Administration, he was also an executive with Ernst & Young's London-based International Privatization and Restructuring Services Group. He has a J.D. from Seattle University School of Law, a Ph.D. from the University of Southern California, and an M.B.A. from the University of Edinburgh, Scotland. Dr. Ashby is a Member of the U.K. Institute of Directors.

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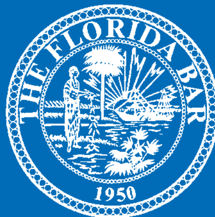

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Enforceability of Forum Selection Clauses in U.S. Court Proceedings: *What Law Applies in an International Setting?*[1]

By Peter M. Haver, West Palm Beach

I. Issues Associated with a Forum Selection Clause's Enforceability

P. Haver

A. Enforceability

The term "enforceability" as employed by U.S. courts in the context of forum selection clauses generally includes any issue pertinent to whether or not a court will exercise or refuse to exercise jurisdiction on the basis of a forum selection clause. Regardless of which law a sitting court applies in analyzing a forum selection clause's enforceability, the court must necessarily address a series of specific issues:

> Determining whether to dismiss a claim based on a forum selection clause involves a four part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement . . . . The second step requires us to classify the clause as mandatory or permissive . . . . Part three asks whether the claims and parties involved in the suit are subject to the forum selection clause . . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching [Citing *Bremen v. Zapata*]."[2]

B. Mutual Assent: Did the Parties Agree to a Forum Selection Clause?

Forum selection clauses seldom constitute a separate autonomous contract but instead usually take the form of a term encompassed in a broader commercial agreement. Some courts and commentators argue, however, that despite a forum selection clause's status as one of many terms in a multi-faceted contract, this clause still qualifies as a separate agreement autonomous from the underlying contract, much like an arbitration clause. U.S. case law has long established an arbitration clause's independence as a separate, autonomous agreement that continues to bind the parties despite the invalidity or unenforceability of the agreement containing the arbitration clause.[3] In the event forum selection clauses, like arbitration clauses, qualify as autonomous agreements, the invalidity of the contract containing the forum selection clause does not invalidate the clause itself. Although the Supreme Court has not specifically addressed the issue of whether forum selection clauses benefit from the same degree of independence attributed to arbitration clauses, the Court's treatment of an agreement to arbitrate as a specialized kind of forum selection clause suggests that forum selection clauses do enjoy a significant degree of autonomy.[4] In *U.S. Bank National Association v. Ables & Hall Builders*, a federal court in the Southern District of New York suggested that a forum selection clause can be enforceable even if the underlying contract fails to come into formation as a result of the incapacity of one of the signatories to act on behalf of the respective party.[5]

Under the assumption that forum selection clauses enjoy a special status as an autonomous agreement, some U.S. courts consider that a forum selection clause binds the parties insofar as they have received reasonable communication of the clause, even without satisfaction of the usual prerequisites for contract formation.[6] In "battle of the forms" scenarios, the enforceability of a forum selection clause often turns on whether the forum selection clause qualifies as a part of the underlying contract, since one or both parties may have referred to general terms containing a forum selection clause.[7] Where one or both parties have referred to a forum selection clause contained in documents outside of the contract, the court must then determine which, if any, clause became a part of the final contract.[8]

C. Contract Defense of Illegality

As a general rule, a contracting party can challenge contract formation on the grounds that the contract's subject matter, or one of its terms, violates applicable law or public policy. A contract involving gambling, for example, fails to bind the parties in a jurisdiction that outlaws gambling. In the case of a forum selection clause, this "illegality" defense typically goes to the issue of whether the parties' attribution of jurisdiction to one or more courts violates the sitting court's local procedural rules as to jurisdiction. Through the middle of the twentieth century, U.S. courts followed the so-called "ouster" rule whereby they systematically refused to enforce forum selection clauses on the grounds that such agreements ousted courts of those jurisdictional powers bestowed upon them by their local procedural law. Under this view, parties could not by way of contract reduce or increase a U.S. court's jurisdictional reach as set out in its procedural law.[9] In *Bre-*

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men v. Zapata Off-Shore Co., however, the Supreme Court rejected the traditional "ouster" rule and adopted the policy of per se validity in the context of admiralty cases:

> Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.
>
> . . .
>
> The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. [10]

Although the *Bremen v. Zapata* decision controls only as to matters in admiralty, most federal and state courts have adopted generally the per se validity rule articulated in that holding.

The "illegality defense" also includes grounds for invalidating a forum selection clause other than the now discarded "ouster" rationale. Most importantly, a forum selection that deprives one of the parties of fundamental rights and remedies in violation of important public policy can fall subject to the contract defense of illegality. Illegality on the grounds of such interference with fundamental rights typically arises where a party's commitment to litigate before the selected court results in the application of a different law that does not afford the respective party important rights the party would have otherwise enjoyed without the forum selection clause.[11]

A forum selection clause's failure to comply with special form requirements imposed on forum selection clauses in the respective jurisdiction can also invalidate the clause under the defense of illegality. This variant of the illegality defense has little significance in the U.S. since state and federal law do not impose special form requirements beyond the mutual assent necessary for contract formation pursuant to standard contract principles. Forum selection clauses appearing in small print on the back of form contracts, and even in general sales and purchase conditions referred to in the underlying contract, can still give rise to a binding forum selection clause.[12] In contrast, Europe has imposed form requirements that, in some instances, go beyond contract law. European Union law requires forum selection clauses to be evidenced in writing.[13] The French New Code of Civil Procedure goes even further by requiring that forum selection clauses appear in the underlying contract in large or bold type.

D. Contract Defense Based on the Distinction Between Exclusive and Permissive Forum Selection Clauses

1. Defense to Enforcement

Defendants generally assert motions to dismiss where the plaintiff commenced the proceedings before a non-designated court in apparent violation of a forum selection clause. Plaintiffs frequently oppose such motions on the grounds that the respective forum selection clause does not attribute exclusive jurisdiction to the designated court but rather contemplates only permissive jurisdiction, whereby the parties agree to submit to the jurisdiction of the selected court without restricting their ability to commence proceedings elsewhere. Where the sitting court qualifies the forum selection clause as permissive, the court can exercise jurisdiction over the respective claim since the forum selection clause, so construed, does not deprive the sitting court of jurisdiction.[14] In determining whether a forum selection clause has an exclusive or permissive effect, the sitting court must interpret the terms of the clause in order to decipher the intent of the parties.

2. Interpretation/Intent of Parties

Some U.S. state jurisdictions have developed specific rules of interpretation designed to distinguish between exclusive and permissive forum selection clauses by attributing conclusive meaning to given words and expressions where customary usage might not in the minds of most users express a clear choice between the two possibilities. The somewhat arbitrariness of these interpretive rules can catch parties off guard. For example, use of the word "venue" in forum selection clauses can make the forum selection clause exclusive.[15] Conversely, use of the word "jurisdiction" can give rise to a permissive forum selection clause. A court applying such interpretative rules qualified as permissive a forum selection clause that stated the "place of jurisdiction shall be Dresden," since that language contained the word "jurisdiction" rather than "venue." The court insisted on attributing this conclusive meaning to the term "jurisdiction," despite the presence of the language "shall be," which has a mandatory connotation supporting the interpretation that the parties intended for the courts of Dresden to have exclusive jurisdiction.[16]

U.S. courts have also relied on a legal presumption to help them in distinguishing between exclusive and mandatory forum selection clauses. Some state courts presume that a forum selection clause constitutes a permissive attribution of jurisdiction unless the parties explicitly provide the contrary.[17] The use of this non-intuitive presumption by some courts has given rise to confusion since other courts have presumed the opposite—namely, that forum selection clauses constitute an exclusive attribution of jurisdiction unless the parties expressly state otherwise. Article 23 of European Union Regulation No. 44/2001 on jurisdiction and the recognition of foreign judgments (the "Brussels Regulation") treats as exclusive all forum selection clauses that do not expressly opt for a permissive effect: "Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

E. Defense to Enforcement Based on the Scope of the Forum Selection Clause

A party wishing to challenge a forum selection clause as to a particular

claim can assert that the respective claim falls outside the scope of the forum selection clause. If the forum selection clause does not contemplate such a claim, then the forum selection clause will not apply and the designated court can exercise jurisdiction only if it has sufficient contacts with the claim to warrant an exercise of jurisdiction under the court's jurisdictional rules.[18] Conversely, a non-designated court can exercise jurisdiction over a claim that falls outside the scope of a forum selection clause to the extent the court has sufficient contacts with the claim to have jurisdiction over the matter.[19] In a case where a recording artist sued his recording company, alleging both breach of contract and copyright infringement, the sitting court addressed the issue of whether the forum selection clause contained in the recording contract covered the copyright infringement claim as well as the claim for breach of contract. There the court found that the infringement claim fell outside of the forum selection clause since the claim, in the court's opinion, did not arise out of the recording contract even though the recording company relied on the contract as a defense to the copyright infringement claim.[20]

II. Lex Fori Approach—Forum Selection Clauses Viewed as a Jurisdictional Matter

Since U.S. courts' judicial powers derive from the legislative branch, U.S. courts apply their local law (lex fori) to jurisdictional issues. Accordingly, U.S. courts do not rely on their conflicts-of-law rules in order to determine which law to apply to jurisdictional questions, in that those conflicts-of-law rules could result in the application of foreign law.[21] Given that most U.S. courts view forum selection clauses as jurisdictional in nature, insofar as forum selection clauses typically expand or restrict a court's jurisdictional reach by contractual agreement, U.S. courts typically apply their lex fori in analyzing the respective forum selection clause, a practice known as the lex fori approach.[22] For public policy reasons, such as the promotion of foreign commerce, U.S. procedural rules often recognize the parties' choice as to the forum.[23] Under the lex fori approach, however, contracting parties do not have a fundamental right to select the forum based on the freedom to contract; rather the decision to recognize parties' choice of forum belongs to the courts and their respective legislative bodies.

Under this lex fori approach, the sitting court's local law controls all issues that impact on the court's decision to exercise or decline jurisdiction on the basis of the forum selection clause, including subsidiary issues not directly related to a forum selection clause's validity but which, nevertheless, can prevent the forum selection clause's application under the given circumstances. For example, a sitting court must decide if the forum selection clause, in fact, attributes exclusive jurisdiction to the designated court or merely constitutes consent

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by both of the parties to submit to the jurisdiction of that court should the other party commence proceedings there. Similarly, the sitting court must determine if the claims asserted in the proceedings fall within the scope of the forum selection, since, to the extent they do not, the forum selection clause will not apply to them. These subsidiary issues depend on the meaning of the terms employed in the forum selection clause and, thus, their resolution requires the application of substantive principles of contract interpretation rather than procedural law. The lex fori approach calls for a sitting court to apply its local law to such subsidiary issues, despite their substantive character.[24]

Some courts and legal scholars have expressed concern over the extension of the lex fori approach to substantive legal issues in that, by its terms, the lex fori approach applies only to procedural issues involving the enforceability of forum selection clauses. To the extent the analysis of forum selection clauses turns, at least in part, on substantive legal issues, then arguably the substantive law governing the contract, not the sitting court's local law, should control as to those substantive issues. In an attempt to minimize the lex fori approach's encroachment on substantive law issues, a few U.S. courts have restricted the notion of enforceability to a very narrow set of issues concerning a forum selection clause's validity, such as absence of mutual assent, fraud, duress, unconscionability and the violation of public policy.[25] This narrow definition of enforceability serves to limit the lex fori approach to those "primary" issues directly relating to a forum selection clause's validity, leaving courts free to apply the substantive law governing the contract to those subsidiary issues which, although related to a forum selection clause's applicability, have a more substantive character.[26] This "definitional" solution for reconciling the lex fori approach with the substantive law governing the contract, however, provides courts little aid given the absence of a clear dividing line between such "primary" and "subsidiary" enforcement issues. Even those "primary" validity issues, such as the parties' mutual assent and those related concepts of duress, fraud and unconscionability, in large part depend on substantive law principles of contract.

The European Union has, to some extent, addressed the problematic nature of extending the lex fori approach to substantive issues associated with forum selection clauses by formulating autonomous statutory rules dealing with both procedural law aspects of forum selection clauses and substantive rules as to interpretative issues.[27] This comprehensive statutory treatment of forum selection clauses minimizes the need for sitting courts to rely on their local substantive law in analyzing forum selection clauses. The incoherency of invoking the lex fori approach with respect to essentially substantive issues, how-

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ever, remains insofar as this statutory treatment of forum selection clauses has, in part, a substantive character.

III. Recent Case Law Challenging the Lex Fori Approach

A. Pre-*Yavuz* Case Law

While continuing to subscribe to this lex fori approach, many U.S. courts have simultaneously begun to apply a contract analysis in reviewing a forum selection clause's enforceability. Under this contract approach, the enforceability of a forum selection clause turns on whether the forum selection clause constitutes a binding, valid and enforceable contract. In *Bremen v. Zapata Off-Shore Co.*, the United States Supreme Court embraced this contractual approach: "There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect."[28] By characterizing enforcement issues as primarily substantive, the application of contract analysis to the issue of the enforceability of forum selection clauses has discredited the underlying premise of the lexi fori approach; namely, that the inherently jurisdictional character of forum selection clauses warrants the application of the sitting court's local law to all issues related to a forum selection clause's enforceability.[29]

In light of this inconsistency between the lex fori and contract approaches, a small minority of U.S. courts and commentators have begun in recent years to question the propriety of U.S. courts' application of their local law with respect to the enforceability of forum selection clauses, particularly where enforceability turns on subsidiary issues of a substantive nature.[30] A seminal law review article appearing in 2004 launched the first categorical attack on U.S. courts' application of their lex fori in evaluating the enforceability of forum selection clauses. [31] The article argued that U.S. courts' application of their lex fori to issues concerning the enforceability of forum selection clauses resulted in bifurcating the forum selection clause from the underlying contract's other terms, insofar as the lex fori approach often times leads to the application of a different law to the forum selection clause than that chosen by the parties or specified by the applicable conflicts-of-law rules to govern the terms of the contract.[32] In turn, this disruption of the parties' expectations as to the law governing the forum selection clause introduces considerable uncertainty as to a forum selection clause's enforceability.

B. Tenth Circuit Takes on the Lex Fori Approach

Citing the above-mentioned law review article, the Tenth Circuit held in *Yavuz v. 61 MM, Ltd.*, that when an international commercial agreement contains both choice-of-law and forum selection provisions, the law chosen by the parties must govern the interpretation of the forum selection clause's terms.[33] In *Yavuz,* a Turkish investor provided funds to a Syrian businessman for investment purposes, including the purchase of property in Tulsa, Oklahoma. When the Turkish investor subsequently accused the Syrian businessman of misappropriating the invested funds, the Syrian businessman settled the dispute by having a Swiss corporation controlled by him enter into a fiduciary agreement with the Turkish investor in which the Swiss corporation recognized having received a loan from the Turkish investor in the amount of $735,000 and acknowledged that the Turkish investor had a 20% ownership interest in the acquired Tulsa property. The fiduciary agreement specified that Swiss law would govern the agreement and that "Courts in Fribourg, Switzerland" would hear any disputes arising out of the contract.

Thereafter, the Turkish investor sued the Syrian businessman, the Swiss corporation, the U.S. limited partnership used to hold the Tulsa property and other related entities in state court in Tulsa, Oklahoma, for breach of contract, fraud, and RICO racketeering violations.[34] The Syrian businessman removed the litigation to federal court and petitioned to have the claims dismissed for improper venue on the basis of the forum selection clause. The federal district court dismissed the proceedings after upholding the enforceability of the forum selection clause. The Tenth Circuit reversed, finding that in order to determine the enforceability of the forum selection clause, the district court needed to rule on three "subsidiary" issues: (1) whether the forum selection clause attributed exclusive jurisdiction to the "courts in Freibourg;"[35] (2) if so, whether all the claims asserted by the Turkish investor, including the RICO racketeering claims, came within the scope of the forum selection clause; and (3) whether the forum selection clause applied to those named defendants who did not sign the fiduciary agreement containing the forum selection clause.

In deciding which law to apply to those "subsidiary" issues, the Tenth Circuit seemed to reject outright the lex fori approach in favor of a purely contractual analysis under which the law chosen by the parties would govern:

> A forum-selection clause is part of the contract. We see no particular reason, at least in the international context, why a forum-selection clause, among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.[36]

Rather than rejecting altogether the lex fori approach, however, the *Yavuz* court suggested that it intended to fashion a narrow exception whereby the law applicable to the underlying contract governs as to issues concerning the enforceability of forum selection clauses insofar as those issues turn on the interpretation of the terms of the forum selection clause:

> [A forum selection] agreement consists of more than just the bare words in the forum-selection provision. The words may take on

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> different meanings depending on the law used to interpret them. Thus, when the contract contains a choice-of-law clause, a court can effectuate the parties' agreement concerning the forum only if it interprets the forum clause under the chosen law.[37]

Rather than rejecting the lex fori approach out of hand, the court actually relied on its lex fori— federal law—in fashioning this narrow exception permitting the application of the law chosen by the parties to questions involving the interpretation of the terms of the forum selection clause.

> In other words, just as the Supreme Court has made clear that under federal law the courts should ordinarily honor an international commercial agreement's forum-selection provision, we now hold that under federal law the courts should ordinarily honor an international commercial agreement's forum-selection provision as construed under the law specified in the agreement's choice-of-law provision.[38]

Regardless of whether the *Yavuz* decision constitutes a fundamental departure from the lex fori approach or merely a narrow exception thereto, the Tenth Circuit clearly attempted to eliminate the "bifurcation" effect caused by the lex fori approach, whereby a law different than that governing the underlying contract controls as to the interpretation of the forum selection clause's terms. Some courts and commentators, however, have found the proposed solution in *Yavuz* somewhat lacking in terms of providing a comprehensive solution to the lex fori approach's encroachment on substantive law issues.[39]

IV. Follow-up Decisions

The *Yavuz* decision has provoked numerous responses from other federal circuits as well as a follow-up decision in the Tenth Circuit. These subsequent decisions range from a re-affirmation of the lex fori approach to its outright abdication to a hybrid approach limiting courts' ability to impose their local law on substantive issues in contradiction of the parties' choice of law. Embracing the lex fori approach, the Ninth Circuit in *Doe 1, Doe 2 and Ramkissoon v. AOL*, declared: "We apply federal law to the interpretation of the forum selection clause."[40] In interpreting a forum selection clause containing the words "courts of Virginia," the Ninth Circuit relied on federal precedent and federal rules of contract interpretation (*i.e.*, the Ninth Circuit's lex fori) in concluding that such words included only Virginia state courts, not federal courts located in Virginia. At the other extreme, a federal district court in the Southern District of New York applied to issues concerning a forum selection clause's validity the law chosen by the parties to govern the contract encompassing the forum selection clause (New York state law), rather than applying the courts' lex fori (federal law).[41] In that case the enforceability of the forum selection clause turned on whether requiring the defendants (residents of Kentucky) to defend against the action in New York rendered the clause unreasonable.[42]

The majority of post-*Yavuz* decisions adopt a hybrid approach requiring courts to apply their lex fori as to the issue of a forum selection clause's validity as a matter of law but to apply the law chosen by the parties to questions concerning the interpretation of the forum selection clause's terms.[43] In *Phillips v. Audio Active Limited,* the Second Circuit favored applying the law chosen by the parties to the issue of the scope of the forum selection clause although, in the end, the Second Circuit accepted the district court's application of federal law (lex fori) to this interpretative issue because the parties had not objected.[44] In *Diesel Props S.R.L. v. Greystone Business Credit II LLC*, a federal court in the Southern District of New York (relying on *Phillips*) argued that federal law (lex fori) should apply to a forum selection clause's validity as a matter of law (in particular, whether the forum selection clause qualified as reasonable under the circumstances), and the law chosen by the parties should apply to the issue of whether the forum selection constituted an exclusive attribution of jurisdiction.[45] In *Tecserve v. Ellsworth*,[46] a federal court in the District of Utah applied federal law (lex fori) to issues of per se validity and applied the law chosen by the parties to the issue of the scope of the forum selection clause (whether a tort claim came within the scope of the forum selection clause). In *Global Link, LLC v. Karamtech Co., Ltd.*, a federal court in the Eastern District of Michigan applied the law chosen by the parties to determine if the forum selection clause attributed exclusive jurisdiction to the Korean courts, while applying its lex fori (federal law) to the issue of whether the forum selection clause over-burdened the U.S. party by requiring the latter to sue in Korea.[47] In *Standard Bank PLC v. Vero Insurance Limited*, a federal district court in Colorado looked to federal law as to the underlying question of a forum selection clause's validity, but relied on the law chosen by the parties to resolve subsidiary issues necessitating the interpretation of the terms of the forum selection clause.[48] Turning the "hybrid" approach on its head, in *Brahma Group, Inc. v. Benham Constructors, LLC*,[49] a federal court in the District of Utah applied its lex fori (federal law) to the issue of whether the forum selection constituted an exclusive attribution of jurisdiction (generally viewed as a question of interpretation), but the law chosen by the parties (Texas law) to determine the public policy standard necessary for invalidating a forum selection clause.

V. Hague Choice of Court Convention

The Hague Choice of Court Convention (the "Hague Convention") provides both rules for interpreting

a forum selection clause's terms as well as conflicts-of-law rules that tell the sitting court which law to apply to a forum selection clause.[50] Most importantly with respect to rules of interpretation, Article 3 of the Hague Convention creates a presumption that forum selection clauses attribute exclusive jurisdiction to the designated court, unless the parties provide otherwise.[51] Article 2 also indirectly addresses another issue of interpretation; namely, whether the parties intended for the forum selection clause to apply to tort claims for damages to property that do not arise from the respective contractual relationship, by deferring that issue to the law governing the contract.[52] The Hague Choice of Court Convention also contains harmonized conflicts-of-law rules that require courts of signatory states to apply the law of the selected court to issues of validity as a matter of law; in particular, whether the forum selection clause violates public policy.[53] Despite this attempt to harmonize choice-of-law rules, the Hague Convention nevertheless contains loopholes that permit courts (particularly those not designated in the forum selection clause) to apply portions of their lex fori to the issue of a forum selection clause's enforceability, despite a different law governing the respective contract.[54] The possibility that sitting courts may apply their local law (including their conflicts-of-law rules) means that parties must still take into consideration U.S. conflicts-of-law rules in an attempt to determine which law U.S. courts will apply to issues related to a forum selection clause's enforceability.

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Endnotes:

1. This text recapitulates a presentation given at the 2010 Spring Meeting of the American Bar Association Section of Business Law, Joint Cross-Border Finance and International Commercial Law Subcommittee Meeting, Denver, Colorado, 22 April 2010. For the author's summary of the presentation, see the U.C.C. Committee's Summer 2010 Newsletter at http://www.abanet.org/buslaw/committees/CL190000pub/newsletter/201006/201006.pdf.

2. *Phillips v. Audio Active Ltd.*, 494 F.3d 378 (2d Cir. 2007).

3. *See generally* Mark H. Tyson, *Review of Selected Arbitration Issues and Cases,* 61 Consumer Fin. L. Q. Rep. 230 (2007); Thomas Ishmael, *Buckeye Check Cashing v. Cardegna*: *Enforcing Arbitration Clauses Within Void Contracts, supra,* at 235.

4. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

5. 582 F. Supp 2d 605 (S.D.N.Y. 2008).

6. *See, e.g.*, *Phillips*, 494 F.3d at 383-84; *Diesel Props S.R.L. v. Greystone Bus. Credit II LLC*, 07 Civ. 9580 (HB), 2008 U.S. Dist. LEXIS 92988 (S.D.N.Y. 2008).

7. *See, e.g.*, U.C.C. § 2-207.

8. *See, e.g.*, *New Moon Shipping Co. v. Int'l Marine Investors and Mgmt. Corp*, 121 F.3d 24 (2d Cir. 1996).

9. *See, e.g.*, *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1987).

10. 407 U.S. 1 (1972).

11. *Doe 1, Doe 2 and Ramkissoon v. AOL*, 552 F.3d 1077 (9th Cir. 2009) (The court invalidated a forum selection clause by which California residents waived consumer protection claims, holding that such waivers are invalid under California law.).

12. *Lambert v. Kysar*, 983 F.2d 1110 (1st Cir. 1993).

13. Article 23(a) of the European Union Regulation (EC) 44/2011 of 22 December 2000 on jurisdiction and the recognition of foreign judgments.

14. *See, e.g.*, *K&V Scientific. Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494 (10th Cir. 2002).

15. *See, e.g.*, *id.*, at 499 ("Where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.").

16. *See, e.g.*, *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp.2d 925, 927-28 (1999).

17. *See, e.g.*, *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123 (5th Cir. 1994); *New Moon Shipping Co., Ltd. v. Man B&W Diesel AG*, 121 F.3d 24 (2d Cir. 1997).

18. *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383-84 (2d Cir. 2007).

19. *Id*.

20. *Hendricks v. Bank of America*, 408 F. 3d 1127, 1138 (9th Cir. 2004).

21. *Roby v. Corp. of Lloyd's* 996 F.2d 1353 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992); *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865 (9th Cir. 1991). *See also Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 n.1 (1st Cir. 2001; *Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095 (6th Cir. 1994).

22. *See Phillips*, 494 F.3d at 384 ("Despite the presumptive validity of choice of law clauses, our precedent indicates that federal law should be used to determine whether an otherwise mandatory and applicable forum clause is enforceable . . . while choice of law provisions generally implicate only the substantive law of the selected jurisdiction.").

23. *M/S Bremen & Unterweser Reederel, GmbH v. Zapata Off-Shore Co.*, 407 U.S. 1,9 (1972) ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on the parochial concept that all disputes must be resolved under our laws and in our courts. . . . . [T]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.") Many foreign countries take this "jurisdictional" approach when determining the enforceability of forum selection clauses.

24. The Tenth Circuit applied its lex fori to the issue of whether a forum selection clause was exclusive or permissive, in apparent disregard of a choice-of-law clause designating German law. *K & V Scientific Co. v. Bayerische Motoren Werke AG*, 314 F.3d 494 (10th Cir. 2002).

25. *Phillips,* 494 F. 3d at 378. *See also New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24 (2d Cir. 1997); *Afram Carriers, Inc. v. Moeykens*, 145 F. 3d 298 (5th Cir. 1998).

26. Such subsidiary issues having a substantive nature include, in particular, the distinction between exclusive and permissive forum selection clauses and the issue of whether claims fall within the scope of the forum selection clause.

27. Article 3 of the "Brussels Regulation" (No. 44/2001). Germany uses a similar statutory approach to forum selection clauses (§38 of the German Code of Civil Procedure), although German courts still frequently fall back on principles of German contract law in analyzing forum selection clauses.

28. 407 U.S. 1, 12-13 (1972).

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29. In the past, some courts and commentators dismissed the lex fori's encroachment on the applicable substantive law by arguing that since those affected substantive issues took a distant second place to the jurisdictional issue underlying the enforceability of forum selection clauses, the application of the lex fori to those subsidiary issues caused little prejudice to the applicable substantive law while, at the same time, affording judicial efficiency through the application of a single law to all issues associated with a forum selection clause's enforceability.

30. *See, e.g.*, *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc*., 806 F.2d 848 (8th Cir. 1987) ("Whether a contractual forum selection clause is substantive or procedural is a difficult question."); *Instrumentation Assocs. v. Madsen Elecs.*, 859 F.2d 4, 7 (3d Cir. 1988) ("It is not entirely clear why . . . the enforceability of a forum selection clause should properly be divorced from the law which in other respects governs the contract.") .

31. 9 UCLA J. Int'l L. & For. Aff. 43 (2004) ("The discussion above demonstrates that there is little inherent justification for automatically applying lex fori to questions of FSA [forum selection agreements] enforceability and validity. Lex fori is, in most circumstances and for a number of reasons, a poor choice of law to govern an international FSA.").

32. *Abbott Labs. v. Takeda Pharm. Co*., 476 F.3d 421, 423 (7th Cir. 2007) ("Simplicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears, . . . rather than making the court apply two different bodies of law in the same case.").

33. *Yavuz v. 61 MM, Ltd*., 465 F.3d 418 (10th Cir. 2006).

34. *Id.*

35. If the forum selection clause attributed only permissive jurisdiction, then the clause did not bar the Turkish investor from suing in another forum, other than the Swiss courts in Fribourg. The Tenth Circuit found the forum selection clause ambiguous as to its characterization as either permissive or exclusive. The court indicated that under U.S. law the language in the clause would probably qualify as permissive, but that the application of Swiss law might give a different result.

36. *Yavuz,* 465 F.3d at 428 (citing Restatement (Second) of Conflict of Laws § 204(a) (1971)).

37. *Id.* at 428.

38. *Id.* at 430 (Emphasis in original.)

39. *See* discussion *supra*, and *Survey: Yavuz v. 61 MM, LTD.: A New Federal Standard—Applying Contracting Parties' Choice of Law to the Analysis of Forum Selection Agreements*, 85 Denv. U. L. Rev. 597 (2008).

40. 552 F.3d 1077 (9th Cir. 2009).

41. *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*, 582 F.Supp 2d 605, 613 (S.D. N.Y. 2008). This case did not involve a party domiciled outside of the United States, but rather concerned litigation between a Minnesota bank and a Kentucky general partnership. Perhaps the lack of an international context impacted the court's analysis.

42. *Id*. at 611-12 ("Some courts have held that federal law [lex fori] should apply to the determination of the validity of the forum selection clause, even where a choice-of-law clause calls for the application of state law. (Citation omitted) Recently, however, the Second Circuit held that 'we cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole.' (Citation omitted). Here, because the Master Agreement and the Schedule to the Master Agreement contain a choice-of-law provision designating New York as the governing law, following the Second Circuit's directive . . . , I will apply New York law to determine the validity of the forum selection clause contained in the Master Agreement.").

43. This hybrid approach complicates matters considerably. While the lex fori approach can often require the court to apply two different laws, its local law with respect to the forum selection clause's validity and the law chosen by the parties to substantive issues raised by the legal claims, the hybrid complicates even further this bifurcated approach by raising the possibility that the court will need to apply both its local law and the law governing the contract in determining the enforceability of the forum selection clause. The introduction of this bifurcated approach into the court's review of the forum selection clause's enforceability presents the court with a potential conflicts-of-law problem as to each issue which the court faces in determining the forum selection clause's enforceability. In addition to the burden which the introduction of the bifurcated approach into the analysis of the forum selection clause imposes on the courts, this heightened complexity also inhibits the parties' ability to predict in advance the forum selection clause's enforceability, undermining the prime benefit associated with forum selection clauses.

44. 494 F.3d 378, 383-84 (2d Cir 2007) ("We find less to recommend the invocation of federal common law to interpret the meaning and scope of a forum clause . . . . [W]e cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole.").

45. 07 Civ. 9580 (HB), 2008 U.S. Dist. LEXIS 92988 (S.D. N.Y. 2008) ("There is no doubt that the first and fourth steps of the analysis—whether the clause was communicated to the resisting party [contract formation] and whether enforcement would be unreasonable or unjust—are procedural in nature and are analyzed under federal law. . . . However, the *Phillips* court was troubled by the application of federal law to the second and third part of the analysis, which concern the meaning and scope of the forum selection clause.").

46. 2:08-CV-144 TS, 2008 U.S. Dist. LEXIS 58929 (D. Utah, 2008).

47. No. 06-CV-14938, 2007 U.S. Dist. LEXIS 33570 (E.D. Mich., 2007).

48. 08-cv-2127-PAB-BNB, 2009 U.S. Dist. LEXIS 28821 (D. Colo. 2009) ("Generally, the analysis of a forum-selection clause can take two paths. In those instances where there is no question of the meaning of such a clause, and only its enforceability is at issue, the Supreme Court has spoken clearly and repeatedly in favor of enforcing the forum-selection clause . . . Although the Supreme Court . . . ordinarily requires courts to enforce an international commercial agreement's forum-selection clause, it does not instruct those courts on how to construe the clause itself. . . . Regarding this—the second possible path in forum-selection clause analysis—the Tenth Circuit has determined that forum-selection clauses are to be "construed under the law specified in the agreement's choice-of-law provision.").

49. 2:08-CV-970 TS, 2009 U.S. Dist. LEXIS 35310, 14 - 22 (D. Utah, 2009) (This case turns the hybrid rule on its head!).

50. www.hcch.net/index_en.php?act=**convention**s.text&cid=98

51. Article 3(b): "[A} choice of court agreement which designates the courts of one Contracting State . . . shall be deemed to be exclusive unless the parties have expressly provided otherwise."

52. Article 2(1)(k): "This convention shall not apply to . . . tort or delict claims for damage to tangible property that do not arise from a contractual relationship."

53. Article 6(a): "A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless . . . the agreement is null and void under the law of the State of the chosen court."

54. Article 6(b) and (c): "A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless . . . a party lacked the capacity to conclude the agreement under the law of the State of the court seized, [or] giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized."

Anti-Suit Injunctions Issued by the Arbitral Tribunal

By Alejandro Leáñez, London

A. Leáñez

Introduction

In current arbitration practice, there is a clear absence of coordination among jurisdictions. Such coordination is critical in a pro-arbitration environment. The role of the arbitrator is to create such environment by keeping arbitration free of malicious behavior by recalcitrant parties.

One of the methods that courts and arbitral tribunals use to preserve their own jurisdictions and the due course of the arbitral process is to issue so-called "anti-suit injunctions." These are currently used to stop parallel proceedings that are clearly contrary to the will of the parties as expressed in the arbitration clause.

This article will propose an alternative method of issuing anti-suit injunctions, in response to the recent *West Tankers* decision,[1] and shall also answer the critical question of whether arbitral tribunals should have the power to issue anti-suit injunctions.

2 Power of Arbitrators to Issue Anti-Suit Injunctions

According to numerous principles in international arbitration law, an arbitral tribunal has the jurisdiction to sanction violations of the arbitration agreement. It also has the power to take any necessary measures to avoid disturbing the process or to protect the enforceability of the final award.[2]

2.1 Principle of Competence-Competence

The courts should keep in mind the negative effect of the *competence-competence* principle. Courts may rule on the jurisdiction of the arbitral tribunal only after the tribunal has itself ruled on its own jurisdiction.[3] Such is not contrary to the domestic court's right to make a prima facie review of the existence and validity of an arbitration agreement.[4] When courts have decided that there is a valid arbitration agreement, the arbitrators will recover their full scrutiny power after the award is rendered. This principle implies that arbitrators must be the first judges of their own jurisdiction, and that the court's control is postponed to the phase of any action to enforce or to set aside the arbitral award rendered on the basis of the arbitration agreement.[5] Therefore, courts in a pro-arbitration environment should assist arbitral tribunals by issuing anti-suit injunctions.

Arbitral Tribunal Must Do Everything in its Power to Render an Enforceable Award

The tribunal has the power to decide on its own jurisdiction. In order to preserve this jurisdiction, it is considered a *duty* of the arbitrators to render an award that is capable of being recognized and enforced. As stated in ICC Arbitration Rules Art. 35: "In 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." For this reason, arbitral tribunals convened under the ICC Arbitration Rules preserve the due course of the proceedings as found in ICC Case No. 9593: "The Arbitral Tribunal urges both parties to refrain from taking any steps that may deprive of any purpose the Arbitral Tribunal's decision to be rendered following the hearing."[6]

Thus, in order to protect the development of the arbitration, the arbitral tribunal should have the jurisdiction to sanction all breaches of the arbitration agreement. It should also have the power to take any appropriate measures, either to avoid the aggravation of the dispute or to ensure the enforceability of the upcoming award. Nevertheless, arbitrations should guarantee that these measures do not violate a party's fundamental right to seek relief before national courts. Therefore, the conditions for granting interim measures must be strictly satisfied. The relevant measure must be urgent and aimed at preventing irreparable harm, or be necessary to facilitate the enforcement of the upcoming award.[7]

With this background, it can be concluded that arbitrators' authority to issue anti-suit injunctions is part of their power to take all the necessary measures to protect the international effectiveness of the future award.

Power to Prevent the Aggravation of the Dispute in Order to Protect the Effectiveness of the Award

There is a recognized principle in international arbitration that the parties must refrain from any conduct that may aggravate their dispute.[8]

In practice, depending on the facts of the case, the words *anti-suit* often mean anti-arbitration injunctions, since the term *suit* is used to include the arbitration procedure."[9] Moreover, the remedy sought is not always called "request for an anti-suit injunction." The same objective can be achieved with an order for an interim measure to stay the arbitration, or an order to stay that is directed to any court that interferes with the arbitration proceedings, should it intervene

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with the proceedings of another court or arbitral tribunal.

In order to prevent the aggravation of the dispute, this type of injunction will indicate that the parties are restrained from submitting a dispute covered by the arbitration agreement to local courts, eliminating the risk of such a submission.

Moreover, there is a risk of creating multiple and possibly divergent decisions in parallel proceedings initiated in a domestic court. The party engaging in this conduct will be breaching the arbitration agreement, thus undermining the effectiveness of the upcoming award.

In *Plama Consortium Limited v. Republic of Bulgaria*,[10] the tribunal provided guidance on the circumstances that justify ICSID tribunals issuing anti-suit injunctions against State courts or in administrative proceedings:

> The proceedings underway in Bulgaria may well, in a general sense aggravate the dispute between the parties. However, the Tribunal considers that the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the Tribunal more difficult. It is right to maintenance of the status quo, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief.[11]

Rationale of Arbitral Tribunal for Issuing Anti-Suit Injunctions

In issuing an anti-suit injunction, the rationale of the arbitral tribunal is to prevent any abusive behavior by the recalcitrant party, since parallel proceedings tend to hinder the arbitral proceedings as they "absorb resources in time and expense and lead to re-litigating the same issue."[12]

Moreover, anti-suit injunctions prevent cases of lis pendens,[13] where the party should show that the other parallel proceedings are identical and that it has violated the obligation to refer all matters to arbitration.[14] Also, the arbitrators should consider the impact of such measures. For instance, the restrained party may be deprived of its rights by prohibiting the initiation of proceedings before another court or arbitral tribunal.[15] Arbitrators are allowed to issue anti-suit injunctions only if the proceedings have been initiated by a party that has suffered a breach of the arbitration agreement. Moreover, in ICC Award 8307, it was stated that the arbitration agreement implies that the parties have renounced submitting to judicial courts the disputes envisaged in the arbitral claims.[16]

The role of the courts in pro-arbitration countries is to preserve the arbitral process by providing support for it. These courts do so by stopping parallel proceedings to prohibit a party from escaping the arbitration agreement. Additionally, it is the duty of the parties to comply with the obligation to act in good faith in the arbitral proceedings. This includes the obligation to desist from any measure that might aggravate the dispute, such as through parallel proceedings.

Some authors state that the arbitral tribunal does not have to follow the same rationale as the State courts in order to issue an anti-suit injunction:

> The considerations that determine whether or not a court of law may grant an anti-suit injunction are not necessarily relevant when it is an arbitral tribunal that is requested to order a party not to pursue parallel litigation before the court of law.[17]

Adequacy of Anti-Suit Injunctions Issued by Arbitrators in International Arbitrations

Courts have issued anti-suit injunctions in order to boycott the arbitral proceedings, either during the arbitral process to prevent an arbitral tribunal from hearing the claim, or at the end, to obstruct the enforcement of the arbitral award.

Anti-suit injunctions will be issued by arbitrators to protect the arbitral proceedings. In this context, the arbitrators are not trying to obstruct the jurisdiction of the courts but, rather, are looking to preserve the arbitral proceedings according to the will of the parties in the arbitral clause.

The main reason arbitrators are able to issue anti-suit injunctions in relation to other proceedings is so that the proceedings can continue their due course. Arbitrators, however, must ensure that these measures do not violate a party's fundamental right to seek relief before national courts.

Anti-suit injunctions should be used in cases where the arbitrators can ensure that the requested measures are critical—aimed at preventing irreparable harm or necessary to preserve the integrity of the arbitral proceedings.

Effectiveness of Anti-Suit Injunctions

In practice, anti-suit injunctions issued by arbitrators can be assessed only on a case-by-case basis, depending on whether such measures provide a suitable response to the parties' procedural behavior in the presence of an arbitration agreement.

Usually, anti-suit injunctions issued by arbitral tribunals are not enforceable. Still, such tribunals can compel the party to pay damages for not complying with the order of the tribunal, or may draw negative inferences against the recalcitrant party. On the other hand, the courts may order a party that has not complied with the anti-suit injunction to be held in contempt.

Power of the Arbitral Tribunal to Sanction Violations of the Arbitration Agreement

The arbitration agreement implies that its scope is wide enough to cover all the disputes that may arise out of or in connection with the binding contract. The jurisdiction of the arbitral tribunal is not limited to the

resolution of the merits of the dispute. Pursuant to the arbitration agreement, parties are compelled to submit all disputes covered by the arbitration clause to arbitration, and jurisdiction is conferred on the arbitral tribunal to hear all disputes within the scope of the arbitration agreement.

The principle of autonomy of the arbitration agreement, also known as the principle of separability, means that the validity of the arbitration clause is independent from the contract. Any decision regarding the validity of the contract will have no impact on the arbitration agreement, or on the arbitrator's jurisdiction.[18] This principle allows arbitrators to examine any challenges to their jurisdiction based on the alleged ineffectiveness of the dispute resolution clause of the contract and gives arbitrators legal grounds to resist attempts by the parties to frustrate the arbitral process.

Further, arbitrators have the jurisdiction to decide regarding breaches of the parties' obligation to arbitrate. Such control empowers them to sanction any breaches on that basis. In most national systems, when a party submits a dispute covered by the arbitration agreement to courts, or refuses to arbitrate, it amounts to a breach of the arbitration agreement. On those grounds, local courts have awarded damages, as noted *supra*.

Therefore, anti-suit injunctions must be considered as an order by the arbitral tribunal to the recalcitrant party to comply with its contractual obligations under the arbitration agreement.

5.2 Enforceability of Anti-Suit Injunctions Under the New York Convention.

According to several scholars, courts are to be expected to grant an anti-suit injunction to enforce a party's agreement to arbitrate, rather than to take action to vacate or enforce the award.[19] The philosophy of the New York Convention ("NYC") is that the same theory applies to arbitral tribunals, given that decisions by a state court and by an arbitral tribunal have the same weight.[20] Once the award is rendered, the NYC provides for enforcement, though it does not include any provision to issue foreign challenges to an award. The NYC allows for simultaneous proceedings in several jurisdictions.

Under Article 2 of the NYC, there is an obligation by all member states that have ratified the Convention to stay court proceedings in favor of the arbitration process when there is a valid arbitration clause that is not "null and void, inoperative or incapable of being performed." Consequently, courts should not be issuing injunctions to interfere with the arbitral process. However, arbitral tribunals are bound, at the very least, indirectly to the NYC, since the courts at the seat of arbitration are bound by it.[21]

Moreover, the same article of the NYC prevents possible grounds for intervention by the court but not the arbitral tribunal. The power of the arbitral tribunal to issue anti-suit injunctions is based on the principle of *competence-competence*, where

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the arbitral tribunal can determine whether the arbitration clause is valid at the same time it determines its own jurisdiction. For this reason, in order to protect such jurisdiction, the arbitral tribunal should have the power to issue an anti-suit injunction enforceable under the NYC. This power can be used to provide room for multiple effective proceedings to enforce the arbitral award in several countries, in order to make sure that the forum shopping to enforce the award is effective.

5.3 When Should an Arbitral Tribunal Issue an Anti-Suit Injunction?

Considering that these types of injunctions are designed to preserve the due course of the arbitral proceedings, they can be issued at any stage of the proceedings. Nonetheless, this could be problematic when the arbitral tribunal has not yet ruled on its own jurisdiction; an anti-suit injunction should be issued once the tribunal has established that it has full scrutiny power to decide the issue at hand.[22]

On the other hand, according to practicing lawyers in the field of international arbitration, anti-suit injunctions are generally more effective if they can be issued at an early point in the arbitration proceedings.[23] In order to avoid vexatious and oppressive litigation, the ICDR recently enacted a rule that provides for the appointment of an emergency arbitrator empowered to grant interim relief, before the arbitral tribunal is constituted.[24] Such a tribunal therefore will be able to grant ex-parte emergency anti-suit injunctions.

Reactions Against an Anti-Suit Injunction

Courts and arbitral tribunals have the right to issue anti-suit injunctions as long as they tend to protect the arbitral process. Both courts and arbitral tribunals have to realise that an endless war of anti-suit injunctions will go on indefinitely. As a result, there will not be a quick and efficient resolution of the dispute.

Moreover, in cases where the arbitral tribunal reacts against an anti-suit injunction, instead of ignoring it, a supporting or corresponding injunction could be issued by the arbitrators. By granting joint anti-suit injunctions between courts and arbitral tribunals, the purpose of the injunction will be reinforced, fulfilling the duty of the tribunal to render an enforceable award. Further, if the tribunal still believes that the anti-suit injunction is going to be ineffective, it should award damages to the recalcitrant party, in this way reinforcing the effectiveness of the injunction.[25]

Current Issues in the World of Anti-Suit Injunctions

Jurisdictions Not Friendly to Arbitration

In a jurisdiction not friendly to arbitration, arbitral tribunals are viewed by the judiciary as outsiders—the arbitration constitutes an exception to the jurisdiction of the courts. The jurisdictional function of the arbitrators is not considered to be in accordance with the sovereign power of national courts. Additionally, some civil law countries have considered anti-suit injunctions to be an unacceptable intrusion on their jurisdiction.

In the *Four Seasons v. Consorcio Barr* case, after the partial award was rendered, a Venezuelan court issued an injunction with an order that the arbitrators suspend the arbitral proceedings. The arbitral tribunal could not ignore the injunction, since a Venezuelan member of the arbitral tribunal resigned in order to avoid being held in contempt by the court.[26] With this injunction, the Venezuelan Supreme Court intended to extend its jurisdiction over the ongoing arbitration held abroad.

These jurisdictions do not realize that arbitration is now used as a common way to resolve international commercial disputes. In order to have investments in undeveloped jurisdictions, foreign investors need assurance that they can rely on arbitral tribunals to bring impartiality and efficiency to the resolution of the dispute. Courts, therefore, should not focus on their judicial sovereignty but rather seek to establish a pro-arbitration environment in which the competence-competence principle grants the arbitral tribunal the power to issue anti-suit injunctions to protect its jurisdiction.

Some lawyers look to avoid anti-suit injunctions, initially by drafting their arbitral clause at a seat of arbitration in an arbitration-friendly country. Savvy international arbitration lawyers sometimes also appoint arbitrators experienced with difficult co-arbitrators from countries known to be hostile towards arbitration. Finally, anti-suit injunctions can be avoided by structuring the transaction so that the assets against which a possible arbitral award might be enforced are located in an NYC country.

Moreover, from time to time, courts that issue anti-suit injunctions do not understand the implications of the international arbitration process itself, since they are just trying to boycott the arbitral proceedings. Therefore, arbitral institutions should be aware that arbitral proceedings may be stalled by unexpected anti-suit injunctions.

Anti-suit injunctions issued by arbitral tribunals should be known and recognized as defensive injunctions. This is especially so where arbitral tribunals consider that courts of a foreign country have limited confidence and impartiality to issue an effective anti-suit injunction.

Future of Anti-Suit Injunctions due to the *West Tankers* Decision by the European Court of Justice

On the 10th of February 2009, the European Court of Justice ("ECJ") issued the long- awaited decision in *Allianz SpA and Others v. West Tankers Inc*, prohibiting the courts of member states of the European Union

from issuing anti-suit injunctions in favour of arbitration.[27] The seat of arbitration was London, according to the arbitration clause. The decision arose out of a question brought on appeal from the House of the Lords to the ECJ, with the appellant arguing that the relevant anti-suit injunction was issued in violation of European Council (EC) Regulation No 44/2001. The anti-suit injunction was issued by a court in London in order to restrain the party from commencing future proceedings other than the arbitration and to discontinue the ongoing court proceedings in Siracusa, Italy.

The House of Lords held that, since arbitration matters are not within the scope of EC Regulation No 44/2001, an anti-suit injunction could be issued to restrain *Allianz*. In this context, the court remitted the following question to the ECJ for a preliminary ruling: "Is it consistent with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?"[28]

The ECJ found that although the proceedings did not fall within the scope of EC Regulation No 44/2001, the anti-suit injunction could have consequences that would disturb the effectiveness of the proceedings; specifically, by preventing a court of another Member State from exercising the jurisdiction recognized in the regulation, as it would attempt "the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters."[29] Based on Article 2.3 of the NYC, the ECJ held that the injunctions are incompatible on the grounds that such proceedings will be contrary to the arbitration agreement within the regulation because it will deprive the party of its right of access to the court.

As this decision undermines only the State court's jurisdiction to issue these injunctions,[30] an alternative will be for the arbitral tribunal to issue such injunctions as an order. If the recalcitrant party does not comply, the tribunal may award damages.[31]

At the present time, it appears that a new trend is beginning to emerge: the awarding of damages, instead of issuing an order that can be enforceable due to the breach of the arbitration agreement by commencing parallel proceedings. This remedy should be available to punish the recalcitrant party, as decided recently by the English Commercial Court in *CMA CGM SA v. Hyundai Mipo Dockland Ltd*.[32]

Further, regarding the recognition and enforceability of this type of award under the NYC, Gary Born and Duncan Speller have stated:

> A final and binding award of contractual damages for breach of an agreement to arbitrate should be readily enforceable under the New York Convention in the same way as any other arbitral award. The public policy exception under Article V 2(b) of the New York Convention is narrow and should not be triggered simply by a prior conflicting judgment in the state of enforcement.[33]

In the near future, arbitral tribunals seated in countries within the European Union should make a peremptory order, and if the party does not comply with it, the arbitrators should issue an anti-suit injunction and, afterward, award damages. If the order is against another arbitral tribunal, a rogatory letter, or *inhibitoria*, commonly employed in jurisdictions such as Venezuela or Argentina, could be used, with judges from one court inviting the other judge not to hear the case.

Given that arbitral tribunals have the power to rule on their own jurisdiction, an alternative would be for both arbitral panels to elect another arbitral tribunal in order to determine which of the competing arbitral tribunals has jurisdiction to hear the dispute.

Conclusion & Recommendations

Arbitrators have an inherent power to issue anti-suit injunctions in order to protect the process from recalcitrant parties that try to delay and boycott the arbitral proceedings.[34]

Further, under the German Arbitration Act of 1998, the arbitral tribunal has more than inherent power—its power extended so that it has the same power as courts to order provisional or conservatory measures. In the German model, if a party does not comply voluntarily, the other party can file a request with the State court to declare the measure enforceable, taking into account all the circumstances of the case.[35]

Anti-suit injunctions[36] have become a tool for international arbitration counsel, just as other common law imports like discovery, written witness statements, and cross examination have migrated to arbitration. As pointed out by the House of the Lords in the *West Tankers* decision, this type of injunction is important in our competitive arbitration world:

> The courts of the United Kingdom have for many years used anti-suit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. Furthermore, if the practice were also adopted by the courts in other Member States it would make the European Community more competitive vis-à-vis international arbitration centers such as New York, Bermuda and Singapore.[37]

The extent to which court intervention should be allowed with regard to issuing anti-suit injunctions in the context of international arbitration must be restricted to extreme cases, limited to supporting the arbitral process when necessary.[38] Since it clearly disrupts the principle of competence-competence, court intervention should be allowed only for the purposes of supporting arbitrators in pro-arbitral jurisdictions in order to maintain the

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due course of the arbitral proceedings.

In today's multi-judicial world, anti-suit injunctions ordered by arbitrators can be more effective than those ordered by the courts, especially if the arbitrators are issuing the injunctions against jurisdictions that are not friendly to arbitration. Arbitral tribunals should follow the course taken by the arbitrators in the *Barr* case, *supra,* where the AAA tribunal issued the anti-suit injunction in the form of a partial award ordering the recalcitrant party to arbitrate and prohibiting it from litigating in another forum. Afterward, the award will become enforceable under the NYC and, when enforced, will have the same effect as an anti-suit injunction. As previously stated, an additional solution is for arbitral tribunals to issue an anti-suit injunction order, and if the party does not comply, the arbitrators will be entitled to award damages.

Finally, the United Nations Commission on International Trade Law should create a treaty, convention or a model law in which anti-suit injunctions are regulated in specific cases. Courts are often resistant to having their jurisdiction deprived by courts in different countries, as occurred in the *West Tankers* case. The inherent power of the arbitral tribunal to issue anti-suit injunctions should be recognized and regulated in order to protect the arbitral process.

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Endnotes:

1. *Allianz SpA v. West Tankers Inc***,** C-185/07 E.C.J. (Feb. 10, 2009).

2. *Laker Airways Ltd. v. SABENA, Belgian World Airlines*, 731 F.2d at 927 (D.C. Cir. 1984) ("There are no precise rules governing the appropriateness of anti-suit injunctions.").

3. Matthias Scherer and Teresa Giovannini*, Anti-arbitration and Anti-suit injunctions in International Arbitration: Some remarks following a recent judgment of the Geneva Court, in* International Arbitration Court Decisions 1306 (Sigvard Jarvin & Annette Magnusson eds., 2008).

4. Emmanuel Gaillard, *Reflections on the Use of Anti-Suit Injunctions in International Arbitration, in* Pervasive Problems in International Arbitration 213 (Loukas Mistelis & Julian Lew eds., 2006).

5. Emmanuel Gaillard, *Anti-Suit Injunctions Issued by Arbitrators, in* ICCA Congress Series no. 13, International Arbitration 2006: Back to Basics? 242 (Albert van den Berg, ed. 2007).

6. ICC Case No. 9593, Final Award (Dec. 1998). *See also* Art. 32.2 of the LCIA Arbitration Rules.

7. Sebastien Besson, *Arbitrage International et Mesures Provisoires: Etude de Droit Comparé* 37 Schulthess Polygraphischer Verlag (1998).

8. ICC Case No. 3896 of 1982. The arbitral tribunal, composed of Pierre Lalive (President), Jacques Robert and Berthold Goldman, issued an injunction to the parties in order to ensure that the arbitral proceedings were able to follow their "normal course." The tribunal held that: "[I]t has the duty to recommend or propose to them measures which, in its view, are appropriate to prevent an aggravation of the dispute between the Parties. . . . From this point of view, the Tribunal must recall the well established principle of international arbitration law according to which: the parties must abstain from any action likely to have a prejudicial effect on the execution of the forthcoming decision and, in general, to refrain from committing any act, whatever its nature, likely to aggravate or to prolong the dispute."

9. Axel Baum, *Anti-Suit Injunctions issued by National Courts To Permit Arbitration Proceedings*, *in* Emmanuel Gaillard, Anti-Suit Injunctions in International Arbitration, IAI Seminar Paris-November 21-2003,19 (2005).

10. *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (2005).

11. *Id.*¶ 45.

12. Julian D. Lew et al., Comparative International Commercial Arbitration 15-28 (2003).

13. *Philips Med. Sys. Int'l v. Bruetman*, 8 F. 3d 600, 605 (7th Cir. 1993).

14. *Id*., at 1315 n.3.

15. Laurent Lévy, *Anti-Suit Injunctions issued by Arbitrator, in* Gaillard, *supra,* note 9.

16. ICC Award no. 8307.

17. Horacio A. Grigera Naón, *Compelling Orders between Courts of Law and Arbitral Tribunals: Latin American Experiences in* Liber Amicorum in honour of Robert Briner, ICC Dispute Resolution Library 5 (2005).

18. Art. 16.1 of the Uncitral Model Law on International Commercial Arbitration: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

19. Margaret L. Moses, Principles and Practice of International Commercial Arbitration 98 (2008). In *Four Seasons Hotels and Resorts v. Consorcio Barr*, the tribunal issued a partial award ordering the recalcitrant party to arbitrate and prohibiting it from litigating in another forum. Afterward, the award would become enforceable under the New York Convention. When enforced, it has the same effect as an anti-suit injunction.

20. Pierre A. Karrer, *Anti-Arbitration Injunctions: Theory and Practice in* van den Berg, *supra,* note 5 at 229.

21. *Id*. at 228.

22. *Id.* at 265 n.5.

23. C. Ryan Reetz, *United States Anti-Suit Injunctions in the Arbitration Context,* International Arbitration and Mediation from the Professional's Perspective 135-43 (Robert Carrow & Anita Alibekova eds., 2007).

24. Art. 37.5 of the ICDR Rules: "The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown." Moreover, the Board of the Stockholm Chamber of Commerce (SCC) also welcomes these new rules, deciding on the 15th of April of 2009 to change its arbitration rules, providing for the appointment of an Emergency Arbitrator with the power to decide on requests for interim measures before the case has been referred to the Arbitral Tribunal.

25. For instance, when a court refuses to make a notification of the foreign injunction.

26. Afterward, the AAA quickly appointed another arbitrator.

27. *Allianz SpA v. West Tankers Inc***,** C-185/07 E.C.J. (Feb. 10, 2009).

28. *Id.*

29. *Id*. ¶ 4 n.64.

30. Thomas Raphael, The Anti-Suit Injunction 12.26 (2008). "In particular, it could be

said that the principle of mutual trust only applies between the courts of member states, and not between arbitral tribunals and courts."

31. *See Id.* "If the European Court of Justice does hold that the English Court cannot grant anti-suit injunctions to enforce an arbitration clause, one obvious alternative option for the injunction claimant is to seek an analogous order from the arbitrators. Such claim will undoubtedly fall within the arbitration exception, as all proceedings before arbitrators do."

32. E.W.H.C. 2791 (2008), England. This decision was issued just three months before the *West Tankers* decision.

33. Gary Born and Duncan Speller, *Damages for the Breach of an Agreement to Arbitrate-A Useful Weapon in a Post West Tankers World?*, 5 April 2009, Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/blog/2009/04/09/damages-for-breach-of-an-agreement-to-arbitrate-—-a-useful-weapon-in-a-post-west-tankers-world/.

34. In *E – Systems Inc. v. Iran*, the Iran-United States Claims Tribunal noted its power to issue anti-suit injunctions when appropriate: "This tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective."

35. Gino Lorcher, *The New German Arbitration Act*, J. of Int'l Arb. 88 (1998).

36. The term "anti-suit injunctions" is also used to refer to "anti-arbitration injunctions" as stated in first section of the present work.

37. *Allianz SpA v. West Tankers Inc*, C-185/07 E.C.J. ¶ 17 n. 64 (Feb. 10, 2009).

38. Recognized in Art. 5 of the Unicitral Model Law on International Commercial Arbitration, which states: "In matters governed by this Law, no court shall intervene except where so provided in this Law."

Responding to an Administrative Subpoena by the Office of Foreign Assets Control (OFAC)

By Peter A. Quinter, Miami

P. Quinter

The Government of the United States has declared a "War on Terrorism." One of the primary federal agencies with responsibility to administer and enforce the economic and trade sanctions is the Office of Foreign Assets Control (hereinafter "OFAC"), an entity within the U.S. Department of the Treasury. Moving beyond general country sanctions, OFAC relies heavily on targeted measures aimed at specific individuals, key members of governments, front companies, and financial institutions. As part of its investigative processes, OFAC often will issue an "Administrative Subpoena" to individuals and companies.

The legal authority for OFAC to issue a subpoena arises from both the Trading With the Enemy Act of 1917 ("TWEA"), 5 U.S.C. sec. 5, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. sec. 1702(a)(2). Both read, in relevant part:

> [T]he President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in [the laws] either before, during, or after the completion thereof….

OFAC has specific regulatory authority to issue an administrative subpoena. The general regulations for OFAC are found at 31 C.F.R. pt. 501. The relevant section, 31 C.F.R. § 501.602, states:

> The Director may, through any person or agency, conduct investigations, hold hearings, administer oaths, examine witnesses, receive evidence, take depositions, and **require by subpoena the attendance and testimony of witnesses and the production of all books, paper, and documents relating to any matter under investigation.** [Emphasis added.]

Each OFAC Administrative Subpoena will clearly state at the top of the letter in bold, large print the words "**ADMINISTRATIVE SUBPOENA.**" Moreover, each such subpoena will have an Enforcement Case Number assigned to it with the designation "ENF." The subpoenas are usually mailed to an individual by name either in the individual's personal capacity or to the President or CEO of a company. The subpoena always cites 31 C.F.R. §501.602 to remind the addressee that a written response is required, and that it must be filed "no later than 30 calendar days from the date of the Administrative Subpoena." The written response should be directed to the particular named "Enforcement Investigations Officer" in the letter, whose telephone number and e-mail address are also provided. The response is always mailed to that person at the U.S. Department of the Treasury, Office of Foreign Assets Control, Office of Enforcement, 1500 Pennsylvania Ave., N.W., Washington, D.C.

The Administrative Subpoena not only restates the law that a written response is required, it also reminds the addressee that the response must be accurate. The standard language in every such OFAC Administrative Subpoena is:

> You should be aware that failure to respond to this Administrative Subpoena may result in the imposition of civil penalties by OFAC and that, under 18 U.S.C. Sec. 1001, knowingly and willfully falsifying or concealing a material fact in your response to this Administrative Subpoena may result in criminal fines, imprisonment, or both.

As to the content of the request by

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RESPONDING TO SUBPOENA
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OFAC in the Administrative Subpoena, it typically asks for detailed information regarding payments or other transactions by the addressee, an explanation for such payments or transactions by the addressee, and all supporting documents regarding the payments or transactions. Documents typically are air waybills or other shipping documents, financing and payment documents, and correspondence, including e-mails. OFAC always demands, "A description of the relationship between or among all parties involved in the transaction(s)" and may ask whether such persons are U.S. citizens or permanent resident aliens.

When responding in writing to an OFAC Administrative Subpoena, my practice is to provide the response on my law firm's letterhead, stating clearly that I am the attorney assisting the addressee. Nevertheless, that same response or an attachment thereto should contain a "Certificate of Compliance" signed by the addressee which states:

> I hereby certify that, to the best of my knowledge and belief, the records and written answers produced in response to the Administrative Subpoena issued by the Department of the Treasury, Office of Foreign Assets Control, are genuine, accurate, and complete, and in full compliance with the demand made in the Administrative Subpoena for the records and written answers specified therein.

Sometimes, the Administrative Subpoena refers to OFAC's Sanctions Enforcement Guidelines, which set forth the general factors that OFAC will consider in determining the appropriate administrative action in response to an apparent violation of U.S. sanctions. **Be advised that the base penalty statutory maximum under IEEPA is $250,000 or twice the value of the transaction, whichever is greater**.

The addressee of the Administrative Subpoena should never have direct communication with OFAC unless an OFAC officer wants to interview the client and then only with legal counsel's active participation and, preferably, at legal counsel's office. Although OFAC has publicly stated that it is attempting to expedite the closure of cases regarding an Administrative Subpoena, sometimes the final action after an extensive review by OFAC takes many months.

***Peter A. Quinter** is a shareholder in the international law firm of Becker and Poliakoff, P.A. Since May 1994, he has been in charge of the firm's Customs and International Trade Department. Mr. Quinter principally represents persons and companies involved in international trade and transportation. His practice includes litigation in federal courts located in Florida and in the U.S. Court of International Trade in New York.*

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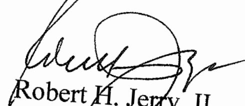

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Former ILS Chair Ed Davis signs the cooperative agreement on behalf of the Section.

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ILS member Quinn Smith speaks to the attendees.

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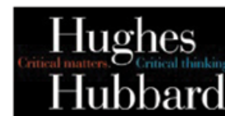

Belize Asset Protection Trust Act: Its Origins, Design and Purpose

By Glenn D. Godfrey, Belize

G. Godfrey

The enactment of the Belize Asset Protection Trust Act of 1992 was much anticipated. Word had gotten around that a new piece of trust legislation was in the works in Belize, and a great deal of enthusiasm was generated internationally by the prestigious names associated with its creation. Mr. Milton Grundy, President of the International Tax Planners Association, and Dr. Phillip Baker of Gray's Inn Chambers in London, led a blue-ribbon panel of drafters—including Allen & Overy in London and several tax and estate planners in the United States—in designing the Act.

The Trust Act itself was well received. Reviewers were enthusiastic. One review described it as "perhaps the most advanced trust legislation in the world," and for many practitioners, Belize became the jurisdiction of choice for domiciling asset protection trusts. For all its apparent success, however, the Act remains in its technical aspects—particularly its offshore asset protection provisions—largely misunderstood by practitioners. It is not uncommon, for instance, for commentators, especially those doing fairly superficial reviews such as multi-jurisdictional comparisons, to list Belize as a jurisdiction that has not repealed the so-called "law of fraudulent conveyances" as it relates to trusts created in Belize. In fact, the exact opposite is true: the Belize Trust Act expressly excludes the operation of this law. This is just one of the many misconceptions that has gained currency regarding the Act and its operations; other examples abound.

The misconceptions are, however, entirely understandable arising, as they do, out of two complicating circumstances. The first is that the Trust Act presupposes an intimate familiarity with the common law and statutory background against which it was enacted. The second is that the innovative approach adopted by the drafters is actually so straightforward, it disorients many practitioners.

To understand, for example, how the act deals with the issue of fraudulent conveyances, it is necessary first to appreciate that the law of fraudulent conveyances is not now, nor ever was, a part of English Common Law as it was received in Belize. The law of fraudulent conveyances is entirely a creature of statute. At Common Law, a transfer of property could not be set aside on the grounds that it was effected to defeat the claims of creditors. It took an Act of Parliament, acting under the persuasion (some would say duress) of powerful banking interests, to grant creditors this remedy. The Statute of Elizabeth, as it is now called, created the first fraudulent conveyance law in 1571.

To exclude the operations of the law of fraudulent conveyances, therefore, it is not necessary to amend or exclude any of the common law; it is necessary to exclude only the operations of this particular statute. In Belize, the relevant provisions of the Statute of Elizabeth were re-enacted into Belize law by Section 149 of the Law of Property Act. The Belize Trust Act expressly excludes trusts created in Belize from the operations of this Section. Subsections (6) and (7) of Section 7 of the Asset Protection Trust Act provide:

> (6) where a trust is created under the law of Belize, the court shall not vary it or set it aside or recognize the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction in respect of:
>
> the personal and proprietary consequences of marriage or the termination of marriage; succession right (whether testate or in-testate) including the fixed shares of spouses or relatives; or the claims of creditors in an insolvency.
>
> (7) Subsection (6) above shall have effect notwithstanding the provisions of Section 149 of the Law of Property Act, Section 42 of the Bankruptcy Act and the provisions of the Reciprocal Enforcement for Judgments Act.

As noted earlier, Section 149 of the Belize Law of Property Act (which is excluded by Section 7(7) of the Asset Protection Trust Act) re-enacts the provisions of the Statute of Elizabeth. To a reader familiar with the statutory and common law background against which the Belize Trust Act was enacted, it is immediately obvious that a trust created under the law of Belize is excluded from the provisions of the law of fraudulent conveyances (as regards claims arising under any foreign law).

Subsection (2) of Section 7 of the Asset Protection Trust Act is a further source of confusion for practitioners. This section provides that a trust shall be invalid and unenforceable to the extent that the court declares that the trust was established by duress, fraud, mistake, undue influence or misrepresentation. A reader familiar with the law of Belize will recognize that "fraud" in this context means "an action of deceit at common law." It is distinct from the statutory provisions originally enacted in the Statute of Elizabeth and now contained in the Belize Law of Property Act, which

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BELIZE
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render voidable voluntary conveyances made with intent to defeat creditors.

The other circumstance that has resulted in misconceptions regarding the Belize Trust Act is, as noted, the radical and innovative approach of the drafters of the Act. Practitioners who are familiar with having particular issues addressed in a particular way in the trust legislation of other jurisdictions are confounded by Belize's departure from traditional solutions.

Thus, for example, most offshore asset protection trust jurisdictions attempt to deal with fraudulent conveyance claims by mandating a statutory limitation period and imposing other procedural requirements for the prosecution of such claims. The period may vary from six years (the standard limitation period for most actions) to two years in the case of more aggressive offshore asset protection jurisdictions such as Nevis, the Turks & Caicos and the Cook Islands. In effect, in these jurisdictions the law of fraudulent conveyances continues to apply to trusts created in the jurisdiction, subject, however, to time constraints—in effect a halfway house approach.

Recent judicial decisions in the Cook Islands and the Commonwealth of the Bahamas have demonstrated the hazards of this approach. In 515 *S. Orange Grove Owners Association v. Orange Grove Partners*, the Cook Islands Court interpreted the limitation of actions provisions in its so-called "Statute of Elizabeth Override Legislation," (i.e., the International Trusts Act of 1984) in a way that stunned practitioners.

The case turned on the question of whether the relevant statutory limitation period began to run (a) from the date the trust was created, or (b) from the date the judgment from which enforcement was sought against the settlor was issued. The court, on a preliminary application for an interim injunction, held that the limitation period started to run from the latter date (enforcement action). After reversal by the high court, this decision was confirmed by the court of appeal. In delivering the decision of the court of appeal, Sir Duncan McMullin said, "It should not be lightly assumed that Parliament intended to defeat the claims of creditors by allowing international trust to be used to perpetuate a fraud against a creditor."

The court also commented: "We would be loathe to interpret the International Trusts Act as a statute which was intended to give succor to cheats and fraudsters by totally excluding the legitimate claims of overseas creditors. We cannot think that Parliament ever intended that by passing the International Trusts Act the Cook Islands should become the Alsatia in the South Pacific from which the commercial comity of nations was completely ousted." This dicta, particularly the reference to "cheats and fraudsters," suggests that the learned judge of appeal failed to distinguish in his mind between common law fraud, i.e., deceit, on the one hand, and a transfer to defeat the claims of creditors on the other. This failure resulted, in great measure, from the halfway house approach adopted by the drafters of the (Cook Islands) International Trusts Act.

One commentator noted that, "This holding goes a long way towards gutting the Cook Islands legislative scheme, because it gives creditors who first obtained a judgment in the United States the ability to sue on the judgment in the Cook Islands, without being barred by the 'Statute of Elizabeth Override.'" The effect of this decision has been considerably mitigated by subsequent legislative events in the Cooks. Nonetheless, the case does illustrate the hazards of adopting the traditional statutory limitation period solution to the

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fraudulent conveyance issue.

A similar problem arose in the Bahamas, which has also adopted a halfway house approach to the Statute of Elizabeth. In *Grupe Tomas v. S.F.M. Al – Sabal, Chemical Bank & Trust (Bahamas) and Private Trust Corporation*, the case turned on the same question: whether the statutory limitation period had expired before action was brought. In refusing to discharge an interlocutory Mareva injunction against the assets of the "Bluebird Trust" (a trust created under the law of the Bahamas by one Sheikh Fahad), senior Justice Joan Sawyer said:

> Aside from the fact that there is no evidence that the Bluebird Trust was established to avoid or minimize Sheikh Fahad's or his family's exposure to taxes either in England or in Kuwait, it seems to me that it is one thing to ascribe to the Parliament of the Bahamas an intention to make the Bahamas more attractive as a "tax haven" by encouraging the establishment in this jurisdiction of what is referred to in some commercial circles as "offshore asset protection trust." But it is quite a different matter to attribute to Parliament an intention of allowing the Bahamas' position as a legitimate tax haven to be used as a cover for fraudulent activity which has little or nothing to do with a minimization of taxes or the protection of honestly acquired assets from the sometimes unreasonable demands placed on those assets, e.g., as a result of an award of damages against a professional person.

While senior Justice Sawyer comes much closer than does Sir Duncan to recognizing the distinction between fraud at common law and statutory conveyances, i.e., transfers to defeat the claims of creditors, the distinction is still not clearly drawn. Here, too, the failure to make this distinction plain arises from the decision of the Bahamas Parliament merely to limit, rather than to exclude altogether, the operations of the Statute of Elizabeth as it relates to trusts.

Belize, on the other hand, takes an entirely different approach. Rather than applying a statutory limitation period to the Statute of Elizabeth provisions, it excludes these provisions altogether. In this context the question of whether the settlor intended to defeat the claims of the creditor is irrelevant. In the absence of actual fraud, i.e., deceit, in the establishment of the asset protection trust, the assets of a Belize trust cannot be attached to satisfy the judgment of a foreign court based on any foreign law. This is so even if the transfer is done with specific intent to defeat the claims of creditors, and whether the claim and/or the judgment arose before or after the trust was created. This unequivocal position of the Belize Legislature is of great assistance to judges who have to consider specific applications of the Belize Asset Protection Trust Act.

In *Securities and Exchange Commission v. Banner Fund International*, the U.S. SEC applied for an order to compel the trustee for a Belize trust to disclose information and surrender certain assets of the trust. On the substantive hearing of the application, the Supreme Court of Belize refused the order on the ground, inter alia, that the application contravened the relevant provisions of the Belize Asset Protection Trust Act. Justice Traodio J. Gonzales noted:

> [T]he Asset Protection Trust Act goes to great lengths to reserve jurisdiction over Belize trust to the Belize courts. Section 7(2) of the act provides that only a Belize court has the power to declare a Belize trust invalid. By Section 7(6), Belizean trusts are granted specific immunity against the judgments of foreign courts or claims based on the law of any foreign jurisdiction. In a jurisdiction such as Belize, which offers international investors confidentiality and protection of their assets against foreign litigants and which has passed law towards those ends, it is important that judges, mindful of the Legislature's intention as set out in the law, support these principles of confidentiality, inviolability and exclusivity of jurisdiction.

Clearly, a Belize judge, buoyed by the unequivocal exclusions of the operations of the Statute of Elizabeth that obtains in the Belize Act, can afford to be bolder in rejecting "fraudulent conveyance" claims based on foreign law than can a colleague in jurisdictions that merely limit rather than exclude the statute.

Understanding the operations of the Belize Asset Protection Trust Act, particularly its asset protection features, requires both detailed knowledge of the legal background against which the legislation was enacted and the careful study of those features of the Act that depart from traditional solutions. As recent judicial decisions have demonstrated, however, the advantages conferred by the Belize Asset Protection Trust Act may well be worth a detailed study of its innovations.

Glenn D. Godfrey, SC*, is a former attorney general and minister of tourism and environment for the government of Belize. He also has served as senior counsel to the Supreme Court of Belize and as a parliamentary member of the National Assembly of Belize. He is the founder of Glenn D. Godfrey & Co. LLP, Attorneys at Law (www.godfreylaw.net), a full-service law firm in Belize City with special expertise in the fields of copyright; patents; trademarks and other intellectual property; domestic, international and offshore banking; multi-jurisdictional finance; international insurance (including captive insurance); corporate and commercial matters; asset protection; trust formation; fiduciary services; and real estate transactions.*

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Tension in International Arbitration over Joinder of Non-Signatories:

Paris Court of Appeal Decides *Dallah Real Estate and Tourism Holding Co. v. Republic of Pakistan*[1]

By Anna V. Tumpovskiy, Miami

A. Tumpovskiy

I. Introduction

Arbitration, essentially, is where parties to a contract freely agree to bring their present and future disputes to a non-judicial forum. Arbitration therefore rests on consent.[2] A party cannot be required to submit to arbitration a dispute that he or she has not agreed to submit.[3] Due to the complexity of many international contracts, deals and transactions, the identity of the parties to such agreements is an issue that recurs in connection with the enforcement of international arbitration agreements.[4] It is not uncommon for arbitrators to hear cases involving entities or individuals not parties to a contract containing an arbitration agreement.

A handful of international arbitration rules expressly provide for the joinder of third parties, and a few national arbitration laws have been updated to deal with the question, although the solutions adopted have not been uniform.[5] Continental scholars sometimes refer to the joinder of third parties as "extending" an arbitration clause, whereas lawyers in Anglo-American legal systems tend to refer to it as "joining non-signatories."[6]

Neither expression is accurate enough to describe a joinder of "less than an obvious" party. For example, "extension" of an arbitration clause can suggest imposing a duty beyond the circle of those who have agreed to arbitrate, thereby ignoring the consent requirement.[7] On the other hand, the term "joining non-signatories" can suggest that a party's signature is required to bind that party to an arbitration agreement when it is widely accepted that an arbitration agreement can be contained in an exchange of emails or that a party's consent can be implied from the circumstances.[8] The difference in terminology also suggests a difference in the understanding and application of the joinder-of-less-than-an-obvious-party concept in different legal systems.

So, what happens when two different legal systems collide in one international arbitration case as they did in *Dallah v. Pakistan*? Well, we know that the English and the French do not drive on the same side of the road, and that the Hundred Years' War probably left them a little bitter. We now also know that, when looking at the same evidence, the English and the French courts reach opposite conclusions, and the impact of the contradictory judgments is far reaching. Heated debate arose worldwide over the international importance of the judgments delivered by the courts in two different jurisdictions—one a common law legal system and the other a civil law legal system—and over the doctrine of *competence-competence* and the enforcement of arbitral awards under the New York Convention.

Undeniably, the core issue of this case is the effect of an arbitration agreement on a non-signatory. Quite possibly the most controversial aspect is the how the courts differed in their analysis of this issue. While the decision to join a non-signatory often rests on *un faisceau d'indice* (a bundle of criteria), rather than just one factor, that bundle of criteria may vary greatly depending on the factual circumstances of the case and the applicable law.[9] The problem is that it might be challenging for arbitrators and judges from different jurisdictions to identify and apply the requisite bundle of criteria properly.

At least this is the lesson of reading together the judgments of the Paris Court of Appeal and the UK Supreme Court in *Dallah v. Pakistan*. Both courts wondered whether the government of Pakistan, though not a party to the arbitration agreement ("Agreement") concluded between Dallah Real Estate and Tourism Holding Co. ("Dallah") and the Awami Hajj Trust ("Trust"), ought to be bound by the Agreement. After looking at the same evidence, the English court concluded that it was not bound, while the French court concluded that it was. The modest goal of this paper is to analyze these controversial judgments and their differences, and find some common ground for future practical considerations.

II. Facts and Judicial Findings

Dallah v. Pakistan is a prime example that "a case depends 80% on the facts and 20% on the law." The caveat: what if you view the same facts differently?

On 3 November 2010, the UK Supreme Court rendered a judgment refusing to enforce a final ICC award ordering the government of Pakistan ("Government") to pay Dallah the sum of $20,588,040.[10] On 17 February 2011, however, in *Gouvernement*

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JOINDER OF NON-SIGNATORIES
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du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company, the *Paris Cour d'Appel* ("Paris Court of Appeal") rejected an application by the Government to set aside all three ICC awards, holding that the arbitral tribunal was correct in finding jurisdiction over the Government despite it not being a signatory to the arbitration agreement.[11] The Paris Court of Appeal further awarded legal costs to Dallah in the amount of €100,000 as permitted by Article 700 of the French New Civil Code of Procedure ("NCPC").

The two judgments cannot be compared and contrasted in many respects because the Paris Court of Appeal does not discuss many issues that the UK Supreme Court does, such as the doctrine of competence-competence, the enforcement of arbitration agreements against non-signatories, and the enforcement of arbitral awards under the New York Convention. The Paris Court of Appeal simply entertained the annulment proceedings and focused its attention on the facts to determine the Government's involvement. While the two judgments are not easy to compare and contrast, their factual findings can be summarized as follows.

Pre-Contractual History

Dallah was a member of a group providing services for the Holy Places in Saudi Arabia. It had long-standing commercial relations with the Government.[12] By letter dated 15 February 1995, a senior director of Dallah made a proposal to the Government to provide housing for pilgrims on a fifty-five-year lease with associated financing. The Government approved the proposal in principle, and a Memorandum of Understanding ("MOU") was concluded on 24 July 1995.[13] Land was to be purchased and housing facilities were to be constructed at a total cost not exceeding $242 million, and the Government was to take a ninety-nine-year lease subject to Dallah arranging the necessary financing to be "secured by the Borrower designated by the Government under the Sovereign Guarantee of the Government."[14] The lease and financing terms were to be communicated to the Government within thirty days for approval, and Dallah was to supply detailed specifications within sixty days of the date of such approval. In November of 1995, Dallah acquired a larger and more expensive plot of land than the MOU contemplated, and also failed to maintain the specified timeline.

Despite Dallah's failure to comply with the MOU, on 21 January 1996, the President of Pakistan promulgated Ordinance VII establishing the Trust, and subsequently Ordinances XLIX and LXXXI legally extended its time of existence.[15] Under each Ordinance, the Trust was to maintain a fund to be financed from contributions by pilgrims and income from investments or property. The Ordinances also assigned functions within the Trust to various public officers. They prescribed, in particular, that the Secretary of the Pakistani Ministry of Religious Affairs should act as the Managing Trustee of the Trust's Board of Trustees. On the other hand, on 30 July 1996, Dallah was advised that it was for the Government, specifically the Prime Minister of Pakistan, to approve the contemplated economic operations of the project. In fact, on 17 July 1996, a newspaper article gave an account of the meeting of the Trust's Board of Trustees chaired by the Prime Minister, who was not, however, a member of the Board of Trustees.[16] Therefore, before the Contract was signed, Dallah had negotiated and dealt exclusively with the Government.

The courts viewed these facts differently. For the Paris Court of Appeal, this was evidence of the involvement of the Government from the beginning.[17] For the UK Supreme Court, this was evidence that Dallah and the Government had a clear understanding that although the Government negotiated the Contract and executed the MOU, it was not a party to the Contract, and Dallah was well aware of that.[18] Lord Collins further noted that the MOU to which the Government was a party did contain a separate arbitration clause, which was not invoked by either party.[19]

Contract and the Government's Involvement

On 10 September 1996, after further negotiations with the Government, Dallah and the Trust signed the contract containing an arbitration agreement under the the rules of the ICC seated in Paris ("Arbitration Agreement" or "Agreement"). The Agreement was a standard ICC arbitration clause, with one deviation: the names of the parties to the Agreement were spelled out as "Dallah" and "the Trust." Under the Contract, the Government was the sole guarantor of the Trust, and the Trust could assign or transfer its rights to the Government without prior approval by Dallah.

One of the key disputed events was the Trust's termination. During the short-lived existence of the Trust, members of the Government of Pakistan changed, and the new members did not approve of the project. On 19 January 1997, Mr. Lutfullah Mufti, in his capacity as a member of the Pakistani Ministry of Religious Affairs, sent the letter terminating the Contract on the grounds that Dallah failed to comply with specifications and timelines contained in the Contract.[20] Mr. Mufti, however, was also either the Secretary or the Managing Trustee of the Trust. It must be noted that Mr. Mufti sent the letter of termination one month after the Trust had legally ceased to exist.[21] Shortly after the letter of termination, the Trust—not the Government—initiated court proceedings in Islamabad requesting a declaratory judgment.[22] This evidence was contradictory, and the courts interpreted it differently.

For the Paris Court of Appeal, the letter sent by the Government's employee on Government letterhead was crucial. In discussing these facts, the

court concluded:

> [E]verything in that letter indicates that [Mr. Mufti] was acting on behalf of the Ministry in accepting the repudiation of the [Contract]. . . . [I]t is a matter of indifference that [Mr. Mufti] instituted proceedings in the Islamabad court on behalf of the Trust because, in having that senior official denounce Dallah's breach of the Contract on 19 January 1997, the Government of Pakistan, Ministry of Religious Affairs was acting as if the Agreement was its own.[23]

Evidently, the fact that proceedings were shortly thereafter initiated by the Trust was of little importance to the French court.

On the contrary, Lord Mance offered a different explanation of the facts:

> The letter dated 19 January 1997 and faxed on 20 January 1997 cannot be read in a vacuum, particularly when the issue is whether the parties shared a common intention, manifested objectively, to treat the Government as a or the real party to the [Contract] and arbitration clause. Read in the objectively established context . . . it is clear that it was written and intended as a letter setting out the Trust's position by someone who believed that the Trust continued . . . to have a sufficient existence in law.[24]

The letter of termination, however, was not the only one that the Government officials sent to Dallah during the performance of the Contract. There were two other letters that contained instructions on how to perform the Contract (i.e., setting up a saving scheme for the pilgrims and publicizing such scheme). For the French court, these directives showed constant involvement by the Government in the performance of the Contract. The court noted: "There were no reasons to justify the intervention by those two State officials."[25] The court concluded: "This involvement of the [Government], like its conduct during the pre-contractual negotiations, confirms that the creation of the Trust was purely formal. . . . . [The Government], as Dallah acknowledged, behaved as if it were the real Pakistani party during the economic operation."[26]

Eventually, in 1997, a judge in the Islamabad court dismissed the Trust's claims reasoning that since the Trust ceased to exist, it was no longer a legal entity and thus was precluded from initiating a court action. Subsequently, however, the Government filed second Islamabad court proceedings in its own name, excluding the Trust as a claimant, but dismissed the proceedings shortly thereafter. Again, for the French court, the fact that the Government filed second Islamabad proceedings in its own name was weighty evidence of the Government's direct involvement. Lord Collins offered a different explanation: "That was because, when the 1997 Pakistan Proceedings were dismissed by the Pakistan court on the ground that the Trust had ceased to exist . . . the judge said that, on dissolution of the Trust suit should have been filed by the [Government], apparently on the basis that the Government had succeeded to the rights and obligations of the Trust."[27] On 18 September 1998, the Islamabad judge ruled the Government was not the legal successor of the Trust and was not bound by the Agreement. On 14 January 1999, the Government voluntarily dismissed the proceedings.

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ICC Arbitral Proceedings

In May of 1998, Dallah commenced ICC arbitration proceedings against the Government seeking to recover damages for the substantial costs it had incurred in connection with the Contract and its performance. The Government resisted, arguing that it was not a party to the Agreement contained in the Contract and contesting the arbitral tribunal's jurisdiction over the Government. In June of 2001, an arbitral tribunal ("Tribunal") composed of Lord Michael Mustill, Nassim Hasan Shah and Ghaleb Mahmassani[28] issued a jurisdictional award. The Tribunal, after careful review of the facts and not without hesitation, concluded that the Trust was the alter ego of the Government and, as such, the Government was bound by the Arbitration Agreement.[29]

The Tribunal concluded that there was enough evidence to suggest that the Government's intent could have been implied through its conduct.[30] What is more, the Tribunal stressed that it applied "**the transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in international business**."[31] The Tribunal subsequently found the Government liable and awarded Dallah the sum of $18,907,603 in damages and $1,680,437 in arbitration costs.

Dallah sought enforcement of the award in England under the New York Convention and the English Arbitration Act and also sought exequatur of the award in France. For its part, the Government resisted enforcement of the award in England, arguing, under Article V(1)(a) of the New York Convention, that there was no valid arbitration agreement between the Government and Dallah. On 24 August 2009, the *Tribunal de Grande Instance de Paris* granted exequatur of the award in France, while the English enforcement proceedings lasted until November 2010, when the UK Supreme Court denied enforcement of the award. The Government also filed an application for annulment of the three respective arbitral awards[32] on the basis of Article 1502(1) of the NCPC. On 17 February 2011, the Paris Court of Appeal adjudged that the Government acted as if it were a real party to the Contract (and the Agreement) and dismissed the application for the annulment of awards.

III. Finding "Common Ground"

When comparing these judgments it might be shocking at first that two courts so reputable and advanced in the field of international arbitration would render two completely different judgments. Of course, as shown above, the courts' different factual findings shed a lot of light on their different decisions. Yet, the very reason why the courts rendered different judgments just might revolve around the issue that the UK Supreme Court characterized as "common ground"—the applicable law.[33]

Despite the "common ground" premise that the lex arbitri (the law of arbitration) must be determined with deference to the law of the seat of arbitration,[34] identifying this law becomes a problem when a non-signatory denies having consented to an arbitration agreement, which remains at the heart of the parties' dispute. While, in this situation, the courts generally seek guidance from their national arbitration laws and the New York Convention (where applicable), an arbitral tribunal is faced with a dilemma, as described by Professor William W. Park: "An arbitrator whose decision rests on a single version of contested facts (the assertion that "X" agreed to arbitrate) would . . . engage in a circular exercise, presuming the very fact that remains open for determination and starting from the contested conclusion whose truth must be evaluated."[35] Indeed, if "X" never accepted the contract, it would not have consented to its applicable law or the law of the arbitral seat.[36] In such circumstances, although each legal system might affect an arbitral award enforcement, neither the law of the arbitral seat—nor the law of the underlying contract—would be suitable to determine whether a non-signatory assented to arbitrate.

Professor Park suggests that the way out of the dilemma lies in seeking notions of "agreement" divorced from any particular national legal system.[37] In a footnote, Professor Park clarifies that "on a provisional basis, some arbitrators might consider the law of the arbitral seat, but should test their conclusions against the winnowing principles of transnational norms that emphasize true intent of the parties as the touchstone to determining consent."[38] Such norms can be found in arbitral awards and scholarly commentary that constitute part of a larger corpus of emerging principles referred to as lex mercatoria, commanding broader application than trade practices derived from specific professions and remaining distinct from general principles of law.[39] For arbitrators, this creates a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness. The first goal seeks application of generally accepted notions of fairness in international business dealings whereas the latter commands application of the law of the arbitral seat.[40]

This is precisely what the Tribunal was concerned with in the *Dallah*'s jurisdictional award. The Tribunal was well aware of the issue at hand, not to mention that Lord Mustill was an expert in this field and even wrote extensively on the issue of lex mercatoria in international commercial arbitrations.[41] So which law did the Tribunal apply to determine whether the Government, through its conduct, assented to the Agreement and the Contract? Lord Mance explained the Tribunal's decision:

> By reason of the international character of the Arbitration

> Agreement coupled with the choice, under the main [Contract], of institutional arbitration under the ICC Rules without any reference in such [Contract] to any national law, the Tribunal will decide on the matter of its jurisdiction and on all issues relating to the validity and scope of the Arbitration Agreement and therefore on whether the [Government] is a party to such [Contract] and to this Arbitration, by reference to those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business.[42]

The Tribunal's decision to apply general principles of transnational law is well supported by the ICC Rules, specifically Article 17.[43] Moreover, many modern arbitration statutes—and specifically Article 1494 of the NCPC—do not oblige the arbitrators to choose a particular national law but instead allow them to give preference to some of the components of lex mercatoria.[44]

Professor Park further suggests that in order to maintain arbitration's consensual nature and maximize an arbitral award's effectiveness, arbitrators may apply general principles of either the doctrine of implied consent or the doctrine of disregard of corporate personality.[45] He explains that, traditionally, joinder of an additional party to arbitral proceedings is justified on grounds such as apparent agency, veil-piercing, alter ego, and estoppel, and can be sought by either signatories or non-signatories.[46] In practice, however, these arguments overlap.[47] A single fact pattern might lend itself both to disregard of the corporate form and to finding implied consent. For example, in the *Orri* case (ICC Case No.5730) a parent company's manipulation of an undercapitalized subsidiary justified disregard of the corporate form, as well as a finding that the subsidiary acted merely as agent for the parent company, which was the true contracting party.[48]

The Tribunal closely examined the facts of the case and the actions of the parties before, during and after the Contract implementation. Applying the alter-ego doctrine, the Tribunal found that the Government's actions justified a finding that the Government was an active party to the Contract and the Agreement. As such, the Government's consent could have been implied through its actions. "The control exercised by the [Government] over the Trust becomes, within that framework, an element of evidence of the interest and the role that the party exercising such control has in the performance of the agreement concluded by the Trust, and provides the backdrop for understanding the true intentions of the parties."[49] The Tribunal applied the general principles of transnational law but did so within the framework of French law.[50] Finding that the Government negotiated the Contract, exercised full control over its performance and was fully and solely responsible for the implementation and termination of the Trust, the Tribunal concluded that the Trust was an alter ego of the Government.

Undeniably, the UK Supreme Court did not employ the same considerations as the Tribunal in determining the law applicable to the question of joinder. The reason is that a court faced with the enforcement of an arbitral award action has a guiding light—the New York Convention. Relying on the New York Convention's Article V(1)(a)[51] and Section 103(2)(b) of the English Arbitration Act,[52] the court concluded that the applicable law was the law of the arbitral seat—French law.[53] For the UK Supreme Court, however, applying French law became a struggle.

The court carefully examined whether or not French law embodies the principles of transnational law. It seems the court wanted an explana-

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tion from the parties' experts of what the transnational norms in international arbitration are and how, if at all, they affect application of French law. Finding the experts' testimony conflicting, Lord Collins determined that French law does distinguish between domestic arbitration cases and international arbitration cases and applies transnational rules to the latter.[54] Lord Collins, however, concluded that: "[Application of the transnational norms] makes no difference because . . . French law does not refer to any other legal system."[55]

Further, the Lords were perplexed as to whether there is any distinction between the application of French law to the concept of joinder in domestic arbitration cases and international arbitration cases.[56] Finding no satisfactory answer,[57] the court concluded that the test to determine whether or not to join a non-signatory would be the same in both domestic and international arbitration cases because, under French law, the emphasis was on the "common intent" of the parties.[58]

In order to determine how to apply the "common intent" analysis under French law, the UK Supreme Court looked at the Paris Court of Appeal's decision in the *Orri* case (ICC tribunal's decision discussed above).[59] In that case, the French court reasoned that:

> According to the customary practices of international trade, the arbitration clause inserted into an international contract has its own validity and effectiveness which require that its application be extended to the parties directly involved in the performance of the contract . . . provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope, even though they were not signatories of the contract containing it.[60]

But, the UK Supreme Court was uncomfortable applying this test. This is evidenced by Lord Mance's critique of the Paris Court of Appeal's decision in the *Orri* case: "This then is the test which must be satisfied before the French court will conclude that a third person is an unnamed party to an international arbitration agreement. It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied."[61]

Denouncing transnational norms as irrelevant, the UK Supreme Court applied French law narrowly. The court focused on the formalities of the Government setting up the Trust and Dallah's awareness of that at the time of the execution of the Contract. The court concluded that the Government and Dallah did not have a common intent to be bound by the Contract and the Arbitration Agreement contained within it. The court found further support in the facts that the MOU (concluded between Dallah and the Government) contained a separate arbitration agreement between the Government and Dallah (ad hoc arbitration in Jeddah), but the Arbitration Agreement contained in the Contract was different. In the Agreement, the parties changed the general wording of the ICC arbitration clause specifically to reflect the names of the parties—Dallah and the Trust.[62] As such, the court affirmed the lower court's judgment and refused to enforce the award.

The Paris Court of Appeal took a different view. The Government sought annulment of the award under Article 1502(1) of the NCPC on the basis that the Tribunal had ruled in the absence of an arbitration agreement. Thus, despite the difference between the enforcement and annulment proceedings, the court essentially had the same task as the UK Supreme Court which was to determine whether or not the Arbitration Agreement was valid as applied to the Government.

The Paris Court of Appeal's judgment is short and limited to the examination of facts. The court found that: Dallah negotiated the Contract only with the Government and no one else; the Government set up the Trust and also terminated it; and the Government officials were controlling Dallah's performance under the Contract. The court determined that the Government's actions demonstrated that the Trust was a simple instrumentality in the hands of the Government.[63] The Paris Court of Appeal found that the Tribunal did not err in extending the Arbitration Agreement to the Government. Intentionally or not, the judgment is silent on the issue of applicable law which, of course, can be due to a number of reasons.

It can only be speculated that the Paris Court of Appeal, as the court of civil law jurisdiction, simply had no need to reaffirm the *Cour de Cassation*'s previous interpretation of the law. The *Cour de Cassation* had already taken a position on the transnational approach in the *Dalico* case, where it stated the arbitration clause was "legally independent of the principal contract in which it is contained . . . and its existence is to be determined by the common will of the parties without the necessity of a reference to any national law."[64] Could it be that the Paris Court of Appeal understood the Tribunal's reasons for applying transnational norms to determine the issue of joinder and felt no need to interfere with the Tribunal's consideration?

IV. Defying Differences

Some scholars and practitioners have taken the approach that the English and the French courts intentionally issued different judgments as a part of a wider UK-French struggle to be the most popular international arbitration forum. While the judgments are completely different, the courts' decisions are hardly grounds for such an inference. For example,

the UK Supreme Court heavily relied on the Paris Court of Appeal's decision in the infamous *Pyramids* case, which has many similarities to the *Dallah* case.[65]

In the *Pyramids* case, the Paris Court of Appeal analyzed whether or not Egypt could be bound by an arbitration agreement (under the ICC rules seated in Paris) contained in the supplemental agreement concerning development and construction of a tourist village near the Pyramids.[66] The supplemental agreement was signed by the Southern Pacific Properties ("SPP") and the Egyptian General Organization for Tourism and Hotels ("EGOTH").[67] Throughout the negotiation of the project terms, Egypt had committed itself to do the work necessary to acquire property, while EGOTH and SPP undertook to form a company to develop a tourist centre on such property. Egypt's officials did not sign the supplemental agreement, but the Minister of Tourism placed the words "approved, agreed and ratified by the Minister of Tourism" above his signature. The Paris Court of Appeal set aside an arbitral award against Egypt, holding that the words and the signature were added because the Ministry was responsible for supervising tourist sites and approving the creation, operation and management of hotels, and SPP had specifically contemplated that the supplemental agreement would be subject to such approval.[68]

The UK Supreme Court's care in properly applying French law is well understood. The court at all times emphasized the fact that it was dealing with the sovereign state which did not formally execute the Contract (and the Arbitration Agreement) with Dallah. Throughout the judgment, the Lords' concern over interpreting French law in a manner different than the French courts would and extending an arbitration clause to a non-signatory sovereign state is well-evidenced. Remarkably, Lord Mance even commented: "It does not appear that a French court would adopt any different attitude to governmental interest and involvement in the affairs of a state entity."[69]

What is more, both courts started afresh and conducted a de novo review of the facts, as they undoubtedly were entitled to under both French and English laws.[70] Why then does there appear to be such a significant difference in the form of that review? Did the courts really apply the same standard of review?

Well, Lord Mance referred to the Tribunal's finding on jurisdiction as having "no legal or evidential value,"[71] and Lord Saville believed that to give the Tribunal's finding on jurisdiction some special status was "to beg the question at issue."[72] On the other hand, the UK Supreme Court went too far analyzing applicable law and reviewing the Tribunal's award to that effect. The UK Supreme Court was so adamant about applying French law correctly that the court's inquiry into the Tribunal's application of the law went far beyond that contemplated under the New York Convention.

Article V(1)(a) of the New York Convention provides, in relevant part, that where the parties fail to agree on the applicable law, the validity of an arbitration agreement should be examined under the law of the country where the award was made.[73] The plain and simple meaning of the article is that a court's task is to examine the validity of the arbitration agreement under the law of the country of the award's origin, nothing more. The UK Supreme Court, however, reviewed the entire award to determine whether or not, in its opinion, the Tribunal applied the correct law. Specifically, Lord Collins stated:

> To avoid any misunderstanding, it is important to dispel at once the mistaken notion (which has, it would appear, gained currency in the international arbitration world) that this is a case in which the courts below have recognized that the arbitral tribunal had correctly applied the correct legal test under French law. On the contrary, one of the principal questions before all courts in this jurisdiction has been whether the tribunal had applied French law principles correctly or at all.[74]

The problem with such inquiry is that it is unnecessary unless the court is willing to give some deferential value to the Tribunal's findings. It also appears as if the court wanted to give a directive to future arbitrators or criticize the Tribunal for the decision to apply transnational norms. Clearly, that is not something the founders of the New York Convention contemplated and is not what Article V of the New York Convention provides.

Notwithstanding the difference between the enforcement and annulment proceedings, the Paris Court of Appeal essentially had the same fact-finding function under Article 1502(1) of the NCPC as the one set out in Article V(1)(a) of the New York Convention. The court had to determine whether the Arbitration Agreement was valid as applied to the Government.[75] The Paris Court of Appeal made no reference to the Tribunal's findings to that effect and simply reexamined the facts.[76] It must be noted that Article 1502(1) of the NCPC does not refer the court to any specific law.[77] Plainly, however, the French court will apply French law to an award that originated in France. Nevertheless, Article 1495 of the NCPC directs the arbitrators, in the absence of a choice of law by the parties, to apply the law that he or she chooses to be appropriate, taking trade usages into account.[78] Therefore, while the Paris Court of Appeal conducted de novo review of the facts, the court did not have to engage in the examination of the law applied by the Tribunal as this function was reserved specifically for the arbitrators.[79]

It appears that the courts applied different standards of review. The Paris Court of Appeal examined the facts de novo, but left the issue of applicable law untouched. The UK Supreme Court, on the other hand, not only conducted a de novo review of the facts, but also reviewed and reexamined the law applied by the Tribunal. The differences between

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the judicial and arbitral findings thus can be explained when one realizes that the courts and the Tribunal simply had different considerations, conducted different reviews and, as such, applied different standards of the seemingly same applicable law in approaching their end results.

V. Conclusion

It begs the question whether the UK Supreme Court erred in not providing deference to the Tribunal's consideration in applying general principles of transnational law. While the UK Supreme Court did not err in the application of the New York Convention (except for the overzealous inquiry into the Tribunal's findings) as well as the English Arbitration Act, the court could have considered the challenges the arbitrators face when dealing with the controversial issue of joining a non-signatory. In the author's opinion, applying transnational norms of fair dealing in conjunction with lex loci arbitri would have made all the difference because these norms allow stretching national law in the broadest way possible for the sake of the notion of basic fairness in commercial dealings between international parties.

In a study co-authored by Richard W. Naimark and Stephanie E. Keer, certain surprises were uncovered.[80] The "fairness and justice of the international arbitration process" compared to other traditional key characteristics of international commercial arbitration were of the utmost importance for attorneys and business people.[81] In fact, the vast majority of survey participants ranked "a fair and just result" as the single most important attribute of the process, nearly twice as important as the closest-ranked attribute.[82] That is not to say that a court's review of an international commercial arbitral award is not fair. On the contrary, the New York Convention provides for such a review to serve as a safeguard of fairness in the international arbitration process. A court reviewing an arbitral award, however, should not "fear things in proportion" to the point of losing the bigger picture of basic fairness that the parties in international commercial relations so often seek in the arbitration process.

From a practical standpoint, *Dallah v. Pakistan* highlights a number of important factors that should be considered when entering into transnational commercial contracts with a party that controls the assets and is potentially controlled by another corporate or governmental entity. In particular, the case exposes the difficulties involved in attaining an enforceable arbitral award against a non-signatory even when a non-signatory is a guarantor, a successor in interest or has exclusive accession rights. In some jurisdictions, even where a very close connection exists between the non-signatory and the contracting party, it might not be sufficient to justify an arbitral tribunal's jurisdiction over a non-signatory.

What if such a situation arises and the non-signatory challenges the jurisdiction of an arbitral tribunal? It might be wise for a non-signatory to seek an immediate stay of arbitral proceedings pending the court's determination of that issue. If a non-signatory fails to do so, in some jurisdictions it might serve as evidence of the non-signatory's failure to raise timely jurisdictional challenges. On the other hand, if a party seeks to enforce an arbitral award rendered against a non-signatory, it should first seek exequatur of an arbitral award in the country of origin. While there is no double exequatur requirement under the New York Convention,[83] under these particular circumstances, enforcing the award first in the country of origin might spare the parties from inconsistent judicial findings and save a load on legal fees.

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Endnotes:

1. Hereinafter *Dallah v. Pakistan,* or *Dallah*
2. William Park, *Non-Signatories in International Contracts: The Arbitrators' Dilemma, in* Multiple Party Actions in International Arbitration, 1 (Macmahon, Permanent Court of Arbitration ed., 2009).
3. *United Steelworkers* v. *Warrior & Gulf Navigation Co*., 363 U.S. 574, 582 (1960).
4. Bernard Hanotiau, *Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law*, *in* ICCA Congress Series no. 13, International Arbitration 2006: Back to Basics? 341 (Albert van den Berg, ed. 2007).
5. *See generally*, Thomas Bevilacqua, *Voluntary Intervention and Other Participation of Third Parties in Ongoing International Arbitrations: A survey of the Current State of Play*, in World Mediation and Arb. Rev. 508, *available at* http://www.winston.com/siteFiles/publications/V1-no4_Bevilacqua.pdf.
6. Park, *supra* note 2, at 6.
7. *Id.*
8. *Id.*
9. *Id.*, at 8.
10. *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, (on appeal from the Court of Appeal) (hereinafter "UK Supreme Court").
11. *Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Co., Cour d' Appel de Paris,* Pôle 1 – Ch. 1, n° 09/28533 (17 Feb. 2011) (hereinafter "Paris Court of Appeal").
12. UK Supreme Court, per Lord Mance ¶ 3.
13. *Id.*
14. *Id.*
15. *Id.* ¶ 4.
16. Paris Court of Appeal.
17. *Id.*, at 6-7.
18. UK Supreme Court, per Lord Collins ¶¶ 132-37.
19. *Id.*
20. *Id.* ¶ 137.
21. "Moreover, after the Trust had ceased to have any legal existence as of 12 December 1996 in the absence of a new promulgation of the Presidential decree, Mr Luftallah Mufti

notified Dallah on 19 January 1997 . . . of the termination." Paris Court of Appeal at 6.

22. UK Supreme Court ¶ 137.

23. Paris Court of Appeal, at 6.

24. UK Supreme Court, at 31.

25. Paris Court of Appeal, at 6.

26. *Id.*

27. UK Supreme Court, at 56.

28. As described by Lord Collins, the Tribunal was composed of highly regarded legal practitioners: "a former Law Lord and a doyen of international arbitration, a former Chief Justice of Pakistan and an eminent Lebanese lawyer." UK Supreme Court, at 43.

29. *Id.*

30. *Id*.

31. *Id.* (Emphasis added).

32. There were, in total, three ICC awards relating to this case. The Tribunal issued a jurisdictional award in 2001 and the final award in 2006.

33. UK Supreme Court, ¶ 16.

34. See Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 92 (4th ed. 2004).

35. Park, *supra* note 2, at 11.

36. *Id*.

37. *Id*.

38. *Id.*, at n.27.

39. *Id.* at 11, *citing to* Emmanuel Gaillard, *La Distinction des Principes Généraux du Droit et des Usages du Commerce International*, *in Etudes Offertes à Pierre Bellet* (1991). *See generally*, W. Laurence Craig, William W. Park & Jan Paulsson, International Chamber of Commerce Arbitration 633–639 (3d ed. 2000); Yves Derains & Eric Schwartz, Guide to New ICC Rules of Arbitration 242–244 (2d ed. 2005); Michael Mustill, *The New Lex Mercatoria*, 4 Arb. Int'l. 86 (1988); Klaus Peter Berger, The Creeping Codification of the Lex Mercatoria 102–112 (1999); Filip De Ly, International Business Law and Lex Mercatoria 134–51 (1992).

40. *Id.*

41. *See generally*, Mustill, *supra* note 39 at n. 40.

42. UK Supreme Court, at 18.

43. Article 17 (1) provides that where the parties fail to agree on the choice of law to govern arbitral proceedings, "the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate." Further, Article 17(2) provides: "In all cases the Arbitral Tribunal shall take account of . . . the relevant trade usages." ICC Rules, art. 17(2011).

44. Emmanuel Gaillard & John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration 32 (1999).

45. Park, *supra* note 2, at 3.

46. *Id.*, at 4.

47. *See* ICC Case No. 5730.

48. Greek shipping magnate that engaged in willful misrepresentation by organizing personal activities in several corporate entities was bound by the arbitration agreement. In addition, the non-signatory was actually mentioned in the relevant contract. *Id.*

49. UK Supreme Court ¶ 36.

50. "This can be deduced from the Tribunal's reference to the Cour de cassation decision in the *Dalico* case. 'Judicial as well as Arbitral case law now clearly recognize that . . . the rules of law, applicable to an arbitration agreement, may differ from those governing the main contract, and that, in the absence of specific indication by the parties, such rules need not be linked to a particular national law (French Cour de cassation, 1er civ., Dec. 20, 1993, Dalico)." UK Supreme Court, per Lord Mance, at 17.

51. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, art. V (1)(a), June 10, 1958, 575 U.N.T.S. 159 (hereinafter "New York Convention").

52. English Arbitration Act of 1996 §103(2)(b).

53. UK Supreme Court ¶ 78.

54. UK Supreme Court, at 52.

55. *Id.,* at 53.

56. "One of the odd features of this case is that there is nothing in the experts' reports which suggests that there is any relevant difference between French arbitration law in non-international cases and the principle in such cases as *Dalico.*" UK Supreme Court, per Lord Collins, at 49-50.

57. "When counsel was asked at the hearing of this appeal what difference it made, there was no satisfactory answer." *Id.*

58. *Id.*

59. UK Supreme Court, per Lord Mance, p. 10, *citing to Orri v. Société des Lubrifiants Elf Aquitaine* (Paris Court of Appeal, 11 Jan. 1990) [1992] Jur. Fr. 95.

60. *Id.*

61. *Id.*

62. UK Supreme Court ¶¶ 132-49

63. Paris Court of Appeal, at 5-7. It is important to note that in French law piercing the corporate veil does not disregard the corporate entity. The notion instead relates to shareholder abuse of the corporate form through misuse of "*un droit*"—the right of limited liability. Park, *supra,* note 2, at n. 51.

64. *Muncipalité de El Mergeb v. Dalico*, Cass. 1e civ., 20 Dec. 1993, Rev. Arb. 116 (1994).

65. UK Supreme Court, per Lord Mance, at 23, *citing to* the *Pyramids* case, *infra,* note 66.

66. *See generally République arabe d'Egypte v. S. Pac. Props. Ltd.,* [1986] Ju. Fr. 75; [1987] Ju. Fr. 469 (12 July 1984, Paris Court of Appeal and 6 Jan. 1987, Cour de Cassation) (hereinafter the *Pyramids* case).

67. *Id.*

68. *Id.*

69. UK Supreme Court, at 23

70. Concerning international awards in French law, recognition and enforcement will be rejected "[i]f there is no valid arbitration agreement or the arbitrator ruled on the basis of a void or expired agreement. . . ." French Civil Code of Procedure (2010), art. 1052 (Fr.), *reprinted in* Jean-Louis Devolve, Arbitration In France: The French Law Of National And International Arbitration 86 (1982). *See also* the *Pyramids* case *supra* note 66 (setting aside an award because the court found de novo that Egypt was not a party to the arbitration agreement). *See also* the New York Convention, art. V(1)(a); English Arbitration Act of 1996, Sec 103.

71. UK Supreme Court, at 16

72. *Id.,* per Lord Saville, at 61.

73. New York Convention art. V(1)(a).

74. UK Supreme Court ¶ 73 (Emphasis added.)

75. Article 1502(1) of the New French Civil Code of Procedure (2010) (hereinafter "NCPC").

76. *See generally,* Paris Court of Appeal.

77. NCPC art. 1502.

78. NCPC art. 1495.

79. While this statement might be true under the combined effect of Articles 1495 and 1502 of the NCPC, this might no longer be the law in France as the wording of Article 1502(1) of the NCPC was recently repealed. The new Article 1502(1) that became effective on 1 May 2011 provides: "An award may **only** be set aside **where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction."** (Emphasis added.) According to Emmanuel Gaillard, this provision was created to cover both the situation where there is no valid arbitration agreement and the situation that could be referred to as one of "negative excess of power" on the part of the tribunal; i.e., where the tribunal has jurisdiction but declines to exercise it. Discussion *available at* http://www.linkedin.com/groupItem?view=&gid=129101&type=member&item=52693520&qid=26586e58-d19a-4625-85a3-9f07e8cf7aca&goback=%2Egmp_129101.

80. Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People A Forced Rank Analysis*, 30 Int'l Bus. Law 203 (2002) (simple, forced-rank analysis of factors of importance to attorneys and clients in AAA international arbitration cases).

81. *Id.*

82. *Id.*

83. Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 7(1981).

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a bridge between these two systems and, at the same time, provide both arbitrators and parties the ability to manage the discovery and use of evidence in an efficient and economical manner.[3]

The IBA Rules on Evidence can be adopted during the course[4] of an arbitration or can be included at the time of drafting the arbitration agreement. The Foreword to the IBA Rules suggests language[5] that can be incorporated for purposes of showing the parties' clear intent to apply the IBA Rules jointly with the institutional or ad hoc rules applicable to the arbitration.[6] In each of these instances, the cardinal principle is the parties' freedom to agree upon the arbitral procedure.[7]

B. The New IBA Rules on Evidence (2010)

The IBA Rules on Evidence (1999) were extremely successful in terms of their acceptance within the international arbitration community and application to disputes.[8] Reflecting on the practical experience achieved in the first ten years of their use, the IBA concluded that the Rules could be improved, although those tasked with the revision of the rules were guided by the adage, "If it ain't broke, don't fix it." This desire to improve the IBA Rules based on prior experience resulted in the new IBA Rules on Evidence adopted on May 29, 2010.[9]

The Foreword to the new IBA Rules on Evidence (2010) states that they are an attempt to provide an efficient, economical and equitable procedure for the taking of evidence in international arbitration. As with the 1999 version, the IBA Rules on Evidence (2010) establish mechanisms for the introduction of documents, witnesses, experts, and inspections, as well as the correct management of evidentiary and final hearings. They are still intended to be used in ad hoc arbitrations or jointly with the institutional arbitration rules adopted by the parties in the arbitration agreement.[10]

As will be discussed below, the revised IBA Rules include several important changes that provide for a more restricted approach in the taking of evidence in arbitration. These changes are grounded on the promotion of efficiency and the reduction of cost in international arbitrations, a topic that has created significant discussion.[11]

Two changes merit highlighting at this juncture. First, the IBA Rules on Evidence (2010) now adopts "good faith" as the fundamental principle controlling the conduct of parties in taking evidence.[12] Pursuant to the IBA Rules, arbitral tribunals are expressly authorized to consider a party's lack of good faith in the discovery and production of evidence when resolving how to adjudicate arbitration costs in an award.[13]

Second, one of the fundamental concepts of the old IBA Rules—the requirement in Article 3.3 that the requested documents be "relevant and material to the outcome of the case"—has been revised, although this revision does not appear to be intended to modify the conditions to secure documents in arbitration but simply to provide clarity in their application.

With respect to the changes adopted in the new rules, the Arbitration Committee explains some of the most important revisions:[14]

- The arbitral tribunal's obligation to consult with the parties as soon as practicable for purposes of agreeing on an efficient, economical and just procedure for the taking of evidence.[15] In this regard, the IBA Rules also provide a non-exhaustive list of the aspects that this initial consultation should include.
- More guidance to the arbitral tribunal with respect to how to deal with document and electronic information requests—the so-called "e-disclosure." In this same vein, the revisions provide more guidance with respect to requests for documents in the possession of third parties.
- The expansion of confidentiality protections regarding documents produced in response to a document request, documents submitted by a party in support of that party's case, and documents introduced by third parties.
- A greater clarity with respect to the content of expert opinions. In particular, instructions given to experts must now be explained and a statement of independence from the parties, counsel and the arbitral tribunal must be provided. The new IBA Rules also allow the submission of evidence in response to an expert report.
- The attendance of fact witnesses is required only if such attendance has been requested by a party or the arbitral tribunal; the revised IBA Rules also allow the use of video conference or similar technology.
- More specific guidance with respect to aspects of legal impediment or privilege, including the need to maintain equity and fairness especially if the parties are subject to different legal or ethical rules.
- The elimination of the word "commercial" from the IBA Rules' title, as an acknowledgement of their potential application to "non commercial" arbitrations, *e.g.*, Investment State Arbitration.[16]

II. The Structure of the IBA Rules on Evidence (2010)

The revised IBA Rules propose a comprehensive system for the parties to secure evidence from other parties or submit evidence in an arbitration proceeding.[17] The remainder of this article will examine the specific provisions of the IBA Rules and how they work, paying special attention to the changes recently adopted.

A. Consultation on evidentiary issues (Article 2)

Recognizing that international arbitrations become more complex every

day, and that the amounts in dispute and the cost of legal counsel have increased, a new Article 2 requires the arbitral tribunal to consult with the parties as soon as practicable for the purpose of devising an efficient, economical and just procedure for the taking of evidence. This consultation shall address the parties' expectations as to the scope of the evidence in the case and the deadlines and mechanisms for completing the taking of evidence.[18]

To this end, the arbitral tribunal should identify, at an early stage, any issues that might be relevant with respect to the dispute, as well as those aspects for which the arbitral tribunal potentially could make a preliminary determination.[19] Should the arbitral tribunal deem it proper to determine a specific issue preliminarily, the tribunal should resolve that issue for purposes of avoiding unnecessary and superfluous work and costs.[20]

At the same time, the revised IBA Rules allow for the management of the proceeding by issues or phases (i.e., jurisdiction, interim measures, preliminary issues, liability, or damages, etc.). Accordingly, the new IBA Rules provide that the arbitral tribunal may schedule different deadlines for the submission of documents, request for documents, witness statements or oral testimony with respect to each issue or phase of the arbitration.[21]

B. Submission and Request of Documents (Article 3)

(1) In General

Article 3 of the IBA Rules addresses documents that parties seek to introduce as evidence in the arbitral proceeding. Article 3.1 contains a provision common in civil law countries that requires the parties to present to the arbitral tribunal all documents upon which they base their claims.[22]

The new IBA Rules also contain new suggestions with respect to electronic documents, which must be submitted in the most convenient or economical manner allowing their use unless the parties decide otherwise. The new IBA Rules, however, do not contain detailed procedures with respect to the discovery of electronic information. This position is hardly surprising in light of the heated debate underlying the use of e-discovery in international arbitration.

Although it is generally acknowledged that documentary evidence is the most reliable evidence in arbitration, the revised IBA Rules recognize that the extensive discovery of documents, which is typical in U.S. practice, is not appropriate in international arbitration.[23] Therefore, the IBA Rules on Evidence (2010) require that requests for production of documents shall be drafted to illustrate clearly the relevance of the requested document with respect to the party's claims and to facilitate the identification of these documents.

(2) Request for Documents

Articles 3.2 thru 3.8 cover requests for the production of documents from one party to the other.[24] With respect to document requests, the IBA Rules require that the parties request specific documents or provide a sufficiently detailed description of the categories of requested documents that the parties reasonably believe to exist. In addition, the request must state that the documents are not in the "possession, custody or control" of the requesting party and are likely in possession of the other party.[25] Significantly, objections to the production of documents must be based on the same circumstances set forth in Article 9.2 for purposes of excluding evidence.[26] These circumstances include lack relevancy; legal impediment or privilege; loss or destruction of documents; trade or technical secrets; and justice or fairness considerations.[27]

Article 3.7 makes clear that in ordering the production of any documents, the arbitral tribunal must determine that (1) the issues that the requesting party wishes to prove are relevant and material to the outcome of the dispute; and (2) none of the circumstances identified in Article 9.2 is present. Depending on the answer to these queries, the arbitral tribunal may order the other party to produce the requested documents.[28]

In exceptional circumstances, if the propriety of an objection can be resolved only by reviewing the document, the arbitral tribunal may, after consulting with the parties, appoint an independent expert to review documents and submit an opinion as to the validity of the objection.[29] Further, Article 3.9 authorizes the arbitral tribunal to take any legal measures to obtain the documents from third parties. Finally, Article 3.10 states that the arbitral tribunal may require that a party produce documents at any time prior to the conclusion of the arbitration.

Taken together, Articles 3 and 9 contain a balanced approach to document exchanges, conferring on the arbitral tribunal ample discretion whether to grant a request for production of documents. The arbitral tribunal's wide margin of discretion is confirmed by Article 9.2(c) which establishes that the arbitral tribunal has the right to deny a document request where compliance would result in an unreasonable burden for the producing party.

(3) Changes to the definition of documents "relevant and material to the outcome of the case"

As previously mentioned, one the fundamental principles of the IBA Rules on Evidence (1999) was the requirement of replaced Article 3.3(b), stating that the evidence must be "relevant and material to the outcome of the case," as well as the related duty set forth in Article 9.2(a) that the arbitral tribunal must exclude evidence lacking "relevance or materiality." These requirements were intended to limit the scope of document production[30] and exclude "fishing expeditions."[31] The requirements also constituted a significant departure from U.S.-style document production in that proving relevance was not enough to require production; the party also had to prove that the requested document was "material to the outcome" of the arbitration. Thus, the IBA Rules intended to limit

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significantly the type of documents a tribunal would order to be produced.[32]

The new IBA Rules have modified the language used in those provisions so that Article 3.3(b) now demands a statement from the requesting party representing that the requested documents are "relevant to the case and material to its outcome." Likewise, Article 9.2(a) adopted this language and provides that the arbitral tribunal must exclude evidence or deny a document request because of "lack of sufficient relevance to the case or materiality to its outcome."[33] These changes do not change the intent of the IBA Rules on Evidence (1999), but rather appear to be an attempt simply to clarify their meaning.

(4) Electronic evidence

The IBA Rules on Evidence (2010) define "document" as "a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means."[34] This definition leaves no doubt that electronically stored information is included within the application of Article 3.[35]

The scope of "e-disclosure"—the request of communications or information contained in an electronic or digital format (such as email, Excel spreadsheets, and even information stored in mobile telephones)—has become a hotly debated subject within international arbitration because of its potential impact on costs and efficiency.[36] The new IBA Rules introduce specific concepts related to requests for productions of "documents stored or kept . . . by electronic means" (although it is important to mention that this concept is not completely defined in the IBA Rules).[37] Under the new rules, parties may request electronic documents "relevant to the case and material to its outcome," by identifying specific folders, search terms or any other means to locate the electronic documents in a cost-efficient manner.[38] This new provision is intended to assist in the avoidance of "fishing expeditions," while allowing parties to obtain electronic documents that are actually relevant and material to the dispute and that can be reasonably located by the other parties.

(5) Documents in possession of a third party

The new IBA Rules contain an important clarification with respect to requests for production of documents in the possession of persons who are not parties to the arbitration. Under the replaced Article 3.8, a party wishing to obtain documents from a third party would have to identify what documents it wished to obtain, show that the documents were relevant and material to the outcome of the case, and request the arbitral tribunal to take necessary steps legally available to obtain the requested documents. At the time that the 1999 IBA Rules were adopted, however, the issue of whether a party to an arbitration outside the U.S. could unilaterally seek discovery from third parties in the U.S. by means 28 U.S.C. § 1782, was untested.[39] Although the issue is still not completely settled, this type of petition became increasingly popular after the U.S. Supreme Court decision in *Intel Corp. v. Advanced Micro Devices, Inc*.[40]

New Article 3.9 incorporates several changes with respect to the taking of evidence from third parties. First, it provides that a party may "seek leave from the Arbitral Tribunal to take such steps. . . ." Second, it gives the arbitral tribunal the discre-

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tion to decide whether to allow the requesting party to obtain evidence from third parties. Third, it provides guidance to the arbitral tribunal for making a determination on whether to *authorize* a party to take evidence from third parties. Accordingly, the new IBA Rules appear to restrict the ability of a party to circumvent the arbitral tribunal's control over the evidentiary process, but, at the same time, provide a mechanism for the arbitral tribunal to entertain and allow requests for the taking evidence directed to third parties.

As illustrated by a recent decision from a U.S. circuit court,[41] the adoption of the IBA Rules on Evidence (2010) can play an important role in limiting the ability of a party to seek discovery (or the ability to abuse the discovery process) in aid of arbitration pursuant to 28 U.S.C. § 1782 without first obtaining leave from the arbitral tribunal.

C. Fact Witnesses (Article 4)

Article 4 of the IBA Rules on Evidence (2010) deals with the presentation of fact witnesses. The arbitral tribunal must fix a deadline for each party to identify witnesses upon whose testimony the party seeks to rely and the content of such testimony.[42] Witnesses may include company officials or employees or any party representative.[43] Article 4.3 provides that the parties or their counsel may consult with their witnesses with respect to their testimony—resolving a conflict resulting from certain jurisdictions that do not permit parties or counsel to discuss with witnesses the content of their testimony.[44]

Article 4 also sets forth the information that must be included in witness statements used in international arbitration. Each witness statement must include the complete name and address of the witness, the past and present relationship with the parties, a complete and detailed presentation of the facts and the source of knowledge with respect to them, a statement of truthfulness and the signature and date and place of execution of the statement.[45] Further, Article 4.6 allows for corrected and additional witness statements provided they have been submitted within the term fixed by the arbitral tribunal and respond only to issues contained in the witness or expert statements submitted by the other parties, and that such issues have not already been submitted in the arbitration.

A new Article 4.7, jointly with Article 8.1, provides that only witnesses requested by a party or the arbitral tribunal must appear to testify at the evidentiary hearing. This represents a change from the 1999 IBA Rules, which required the appearance of each witness who submitted a witness statement. This change presents parties with interesting tactical decisions as they may decide not to request the attendance at the hearing of an adverse witness and, consequently, avoid that witness providing live testimony before the arbitral tribunal.

D. Experts Appointed by the Parties or the Arbitral Tribunal (Articles 5 and 6)

Article 5 regulates party-appointed experts while Article 6 deals with experts designated by the arbitral tribunal. The IBA Rules on Evidence (2010) recognize that the parties can use experts as means of proof and that each expert can submit a report within the term set forth by the arbitral tribunal.[46] Article 5.4 gives the arbitral tribunal discretion to order party-appointed experts who have submitted a report on the same issues to meet and deliberate on those common aspects. During this meeting, the experts should attempt to reach agreement on those issues where there exists a difference of opinion and shall memorialize those issues on which they reach agreement. This provision recognizes the gaining popularity of expert witness conferences in international arbitration.

A new and important feature of the IBA Rules on Evidence (2010) relates to the content of expert reports submitted by party-appointed experts. Under the new IBA Rules, an expert report must include a declaration of independence of the expert with respect to the parties, their counsel and the arbitral tribunal.[47] If the expert report has been translated from a language different than the arbitration's, it must then contain a declaration of the language in which initially prepared and the language in which the expert expects to provide oral testimony at the hearing.[48]

The new emphasis on expert independence indicates an effort by the IBA to encourage, although not require, party-appointed experts to maintain a level of independence similar to that of arbitrators. The IBA also appears to promote, but not require, ample disclosure by the expert of prior commercial or personal dealings with the parties, counsel or the member of the arbitral tribunal.[49] Clearly, parties and their counsel must assess the wisdom of selecting

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an expert who may submit a qualified declaration of independence. Nonetheless, it is probable that counsel will continue retaining experts from consulting firms they have used successfully in the past because the opinions of their members are respected for their objectivity, notwithstanding that the experts previously had worked with the same law firm in other disputes.

Article 6.1 authorizes the arbitral tribunal to appoint an expert after having consulted with the parties. This provision mirrors the ICC Rules of Arbitration.[50] As is the case in Article 20.4 of the ICC Rules, the arbitral tribunal shall prepare and adopt the terms of reference of any expert report ordered by the arbitrators. Article 6 details matters applicable to experts appointed by the arbitral tribunal: (1) the independence of the expert;[51] (2) the ability of the expert to require information and documents from any party;[52] (3) the content of the expert report;[53] (4) the right of the parties to challenge the expert report;[54] (5) the expert's obligation to appear at the hearing;[55] (6) the arbitral tribunal's duty to weigh the expert's report and expert's conclusions;[56] and (7) the fees and expenses of the expert appointed by the arbitral tribunal.[57]

E. Site Inspection (Article 7)

Article 7 grants the arbitral tribunal authority, whether pursuant to a party's request or on its own initiative, to inspect or request the inspection by an expert of any site, property, equipment or any goods, process or documents that the arbitral tribunal deems necessary. This provision did not undergo any changes from the 1999 version, although it is worth pointing out that the new IBA Rules eliminated the word "Site" from the title of Article 7 which is now titled "Inspection."

F. Evidentiary Hearing (Article 8)

It is recognized that the final hearing or evidentiary hearing is a fundamental stage of the arbitration proceeding. Keeping this in mind, Article 8 details the arbitral tribunal's powers with respect to this hearing.

The fundamental principle applicable to evidentiary hearings appears in the first sentence of Article 8.2 where it is stated that the arbitral tribunal "shall at all times have complete control over the Evidentiary Hearing." Likewise, the arbitral tribunal may limit or exclude any question, response or appearance of a witness if it concludes that such question, response or appearance is irrelevant, non-substantial, prejudicial, repetitive or constitutes any of the possible objections contained in Article 9.2.[58]

With respect to witness appearance, as previously mentioned, the new Article 8.1 specifically provides that only those witnesses requested by the parties or the arbitral tribunal must appear at the evidentiary hearing. This provision seeks to promote efficiency by avoiding having witnesses who have already submitted witness statements appear at the evidentiary hearing only for purposes of repeating the content of the witness statements.

Article 8.3 regulates how the arbitral tribunal must conduct the evidentiary hearing, such as when a party may pose additional questions regarding an issue of the dispute raised by the other party's questioning of witnesses or experts.[59] Article

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8.4 provides that a witness must affirm in the manner that the arbitral tribunal deems appropriate and conduct him/herself according to the truth. If the witness has submitted a witness statement or an expert report, the witness would have to ratify it. The arbitral tribunal may order that a witness statement or expert report serve as direct testimony of such witness.

Finally, Article 8.5 authorizes the arbitral tribunal to request oral or written evidence with respect to any aspect that the arbitral tribunal deems relevant and substantial. In such case, the parties shall have the right to interrogate the witness.

G. Admissibility and Assessment of Evidence (Article 9)

Article 9 covers the admissibility and weight of evidence. As a general principle, Article 9.1 provides that the arbitral tribunal shall determine the admissibility, relevance, importance and weight of any evidence. Notwithstanding the general power contained in Article 9.1, Article 9.2 states that the arbitral tribunal, whether at a party's request or sua sponte, can exclude evidence or a request to produce evidence based on specific reasons.

The new IBA Rules contain an important advancement relating to claims of legal privilege. Within the context of international arbitration, claims of legal privilege related to communications between counsel and client have created difficult problems in light of the potentially different legal rules of parties and counsel from different jurisdictions. Article 9.2(b) of the IBA Rules on Evidence (1999) recognized this problem and provided that a "legal impediment or privilege" existing under legal or ethical rules could serve as basis for excluding documents, testimony or inspections.[60]

The new IBA Rules, however, include a list of criteria that the arbitral tribunal must take into account when deciding to exclude evidence on the basis of privilege.[61] These considerations include:

- The need to protect the confidentiality of a document created or an oral statement or a communication given in connection with and for purposes of the providing of legal advice, or in connection with negotiations of agreements.[62]
- The party's and counsel's expectations at the time of creation of the alleged privilege.[63]
- Any potential waiver of the privilege by consent, prior disclosure, affirmative use of the document or of the oral statement, communication or advice contained in the document.[64]
- The need to maintain equity and fairness among the parties, particularly if they are subject to different legal or ethical rules.[65]

III. Conclusion

There is no doubt that the revised IBA Rules represent an improvement over their 1999 counterpart. The introduction of the concept of good faith in the IBA Rules—by itself—should prove to be an invaluable tool in application. The IBA Rules on Evidence (2010) will likely be rapidly embraced by the international community such that the revised rules will enjoy a higher level of acceptance than their already successful predecessor.

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Endnotes:

1. The 1999 IBA Rules have been so successful that some commentators recommend that they be adopted for domestic arbitration in the United States as a way to limit the scope of discovery practiced in domestic arbitration, which reflects discovery under the Federal Rules of Civil Procedure.
2. In common law systems, the parties have the freedom to establish their own discovery tactics. *See* Fed. R. Civ. Proc. 26(b) ("Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense."). On the other hand, the civil system is inquisitory by nature and demands that the parties submit in advance the documents on which they rely. An example of the civil law approach is provided by two norms contained in the Venezuelan Civil Procedure Code. First, article 340 requires a plaintiff to attach to the complaint the documents supporting its claim. Second, article 396 provides that the parties shall promote at the beginning of the evidentiary stage all the means of proofs upon which they would like to rely.
3. For a discussion of both legal systems and how they interplay within international arbitration, *see* W. Laurence Craig, et al., International Chamber of Commerce Arbitration 418-429 (3d ed. 2000).
4. In a recent ICC arbitration handled by one of the authors, the arbitral tribunal included the following language in the terms of reference: "Subject to any mandatory rules of the place of arbitration related to arbitration procedure, and subject to the ICC Rules, the procedure to be followed shall be as agreed between the Parties or, failing such agreement, as determined by the Arbitral Tribunal in its absolute discretion. In exercising its discretion, the Arbitral Tribunal shall be guided by the 1999 Rules on the Taking of Evidence in International Commercial Arbitration."
5. IBA Rules on the Taking of Evidence in International Arbitration Foreword, at 2 (2010): "[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration]."
6. Institutional arbitrations are proceedings initiated pursuant to an arbitration

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agreement providing for the application of the arbitration rules of any of the many arbitration centers operating around the globe. These arbitration centers include important institutions such as the International Center for Dispute Resolution, the International Court of Arbitration, the London Court of International Arbitration or the Stockholm Chamber of Commerce. There are many other arbitration centers, however, even of a more domestic nature, that handle international arbitration and where the IBA Rules are potentially applicable. Ad hoc arbitrations are arbitrations not falling under the umbrella of an arbitration center and where the parties themselves provide for the management of the case. The UNCITRAL Arbitration Rules are perhaps the most relevant rules crafted for use in ad hoc arbitration.

7. *See* Gary Born, *The Principle of Judicial Non-interference in International Arbitration Proceedings*, U. Pa. J. Int'l L. 999 (2009).

8. *See* Gabrielle Kauffman-Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313, 1323 (2003) ("First of all, the 1999 IBA Rules on the taking of Evidence in International Commercial Arbitration play an important role in shaping arbitration procedure.").

9. The official English version of the IBA Rules on Evidence (2010) can be obtained at the IBA's webpage: http://tinyurl.com/IBA-Arbitration-Guidelines. The IBA Rules on Evidence (2010) shall be applicable to all arbitrations in which parties agree to apply them after May, 29, 2010, as part of a new arbitration agreement or in the determination of the procedural rules applicable to a pending or future arbitration proceeding.

10. Two fundamental considerations permeate arbitration procedure in general. One is flexibility with respect to the taking of evidence. The other is the arbitral tribunal's power to determine the rules relating to evidence and to control the taking of evidence. *See* Article 19 of the UNCITRAL Model Law on International Commercial Arbitration, adopted on May 21, 1985: "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." *See also* Julian Lew, et al., Comparative International Commercial Arbitration 558 (1st ed., 2003); Kauffman-Kohler, *supra* note 8, at 1328.

11. The issue of controlling costs led to the creation of an ICC task force that produced the oft-cited pamphlet "Techniques for Controlling Time and Costs in Arbitration." *See* ICC Publication 843 (2007).

12. IBA Rules on the Taking of Evidence in International Arbitration Foreword, para. 3 (2010).

13. *Id*. at art. 9.7.

14. http://www.ibanet.org/Article/Detail.aspx?ArticleUid=AD2E4AFA-F3E5-4009-99BC-6745C8B97648.

15. This requirement had previously been included only in the Foreword to the IBA Rules on Evidence (1999), which, in the opinion of one commentator, diminished its practical use. *See* Nicholas Ulmer, *The Cost Conundrum*, 26 Arb. Int'l 221, 230 (2010).

16. There is a global network of bilateral or multilateral treaties providing protections to investors of one State with respect to actions undertaken by the State where the investment is made. These treaties generally authorize the investor to initiate arbitration against the State, either under the auspices of the International Centre for the Settlement of Investment Disputes, an arbitration center like the ICC or the Stockholm Chamber of Commerce, or ad hoc arbitration under the UNCITRAL Arbitration Rules. On this subject, *see generally* Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 214 (1st ed., 2008).

17. As was the case with their 1999 predecessor, U.S discovery tools like requests for admission, interrogatories or depositions are not even mentioned in the IBA Rules on Evidence (2010). *See* Kauffman-Kohler, *supra* note 8, at 1328.

18. IBA Rules on the Taking of Evidence in International Arbitration, art. 2.2 (2010).

19. *See* Jack J. Cole, *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness—Some Thoughts concerning Arbitral Process Design*, 2 Pepp. Disp. Resol. L.J. 53, 65, 66 (2002) (arguing that pre-hearing conferences allow final hearings to "unfold in a predictable, orderly fashion.").

20. IBA Rules on the Taking of Evidence in International Arbitration art. 2.3(b) (2010).

21. *Id.*, art. 3.14, 4.4, and 8.3(e).

22. This practice is encouraged by the ICC in its publication "Techniques for Controlling Time and Costs in Arbitration," ¶ 53.

23. A well-known commentary on the ICC Rules includes the following opinion in this regard: "It is widely considered that there is no place in international arbitration for the so-called 'fishing expeditions'." Yves Derains & Eric Schwartz, A Guide to the ICC Rules of Arbitration 282 (2d ed., 2005). *See also* Philippe Bärtsch & Gabrielle Kaufmann-Kohler, *Discovery in international arbitration: How much is too much?*, 2004 SchiedsVZ, 13 (2004).

24. The IBA Rules recognize the accepted international practice restricting discovery of documents to those whose need has been established and prohibiting discovery of whole categories of documents. *See* Lew et al., *supra* note 10 at 568.

25. IBA Rules on the Taking of Evidence in International Arbitration art. 3.3(a) (2010).

26. *Id*. art. 3.5.

27. *Id*. art. 9.2 (2010). Article 9 is clear in providing that the arbitral tribunal shall determine the admissibility, relevance, importance and specific weight of evidence, including the evidence requested in a request for production of documents.

28. In dealing with these determinations, arbitral tribunals frequently require the parties to submit their requests for production of documents in the form of the so-called "Redfern Schedule." A Redfern Schedule normally provides for requests for production to be presented in a chart that includes the following columns: (1) request for production; (2) the grounds for the request; (3) the objection to the request; and (4) the arbitral tribunal's decision. Each column is progressively completed by each party until the arbitral tribunal's final determination on whether the specific documents should be produced.

29. IBA Rules on the Taking of Evidence in International Arbitration art. 3.8 (2010).

30. By agreeing to international arbitration, parties necessarily agree to limit the amount of discovery to which they might otherwise be entitled. This fact has been noted by U.S. courts. The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pre-trial discovery in the one and its superfluity and utter incompatibility in the other. *Comm. Solvents Corp. v. La. Liquid Fertilizer Co.*, 20 F.D.R. 359 (S.D.N.Y. 1957); *see also Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) ("When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege.").

31. Commentators have referred to the fact that U.S. style "fishing expeditions" are not favored in international arbitration. For instance, Gary Born states:

> Nonetheless, as a practical matter, international arbitral tribunals are often reluctant to order disclosure as readily, or to the same extent, as in many common law litigations. This is reflected in arbitral awards, where tribunals typically refuse to grant expansive, fishing-expedition discovery requests.

Gary Born, International Commercial Arbitration 1097 (2009).

32. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines") have incorporated this requirement and provide that "[r]equests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance

and materiality to the outcome of the case." (Emphasis added.) ICDR Guideline, No. 3(a).

33. Article 9.2(a) states that "the Arbitral Tribunal shall . . . exclude from evidence or production any Document, statement, oral testimony, or inspection for any of the following reasons: (a) lack of sufficient relevance to the case or materiality to its outcome."

34. The definition of "document" in the IBA Rules on Evidence (2010) is as follows: "'Document' means a writing, communication, picture drawing, program or data of any kind, whether recorded or maintained on paper, or by electronic, audio, visual or any other means."

35. For a discussion of the operation of e-discovery within the framework of the IBA Rules on Evidence (1999), *see* John Barkett, *E-Discovery for Arbitrator*s, 1 Disp. Res. Int'l 129, 151 (2007).

36. Aside from the efforts undertaken by the IBA to provide guidance with respect to e-discovery, there have been other recent attempts to regulate this aspect, including: the "ICDR's Guidelines for Arbitrators Concerning Exchanges of Information," published in May 2008; the "Chartered Institute of Arbitrators Protocol for E-Disclosure," published in October 2008; the "CPR's Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration," published in December 2008; and the current activities being undertaken by the Working Group of the ICC regarding the production of electronic documents in international arbitration.

37. The 1999 IBA Rules and the revised IBA 2010 version define "document" in a similar, although not identical, way. Therefore, the old IBA Rules did not seek to define electronic document beyond a "document stored in any electronic means."

38 IBA Rules on the Taking of Evidence in International Arbitration art. 3.3(a) (2010). This provision appears to be an acknowledgement of the so-called Sedona Principles, particularly the eleventh Sedona Principle stating that a party may comply with an obligation to produce electronically stored information by using electronic processes such as data sampling, searching or selection criteria. *See Best Practices Recommendations and Principles for Addressing Electronic Document Production*, a project of the Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production (2d ed., June 2007). On this subject, *see* Richard Hill, *The New Reality of Electronic Document Production in International Arbitration: A Catalyst for Convergence?*, 25 Arb. Int'l 87, 91 (2009).

39. Section 28 U.S.C. § 1782 states, in pertinent part, "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ." The application of this statute to international arbitration has been hotly debated among federal courts after the decision of the United States Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004).

40. 542 U.S. 241 (2004). As mentioned above, after *Intel* there has been much debate among federal courts on whether arbitral panels fall within the definition of "international tribunal" under 28 U.S.C. § 1782. Some courts, even prior to *Intel*, have answered this query in the negative. *See El Paso Corp. v. La Comision Ejecutiva Hidroeclectrica Del Rio Lempa,* No. 08-20771, 2009 WL 2407189 (5th Cir. Aug. 6, 2009); *Nat'l Broad. Co. Inc. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *In re Operadora DB Mexico, S.A. DE C.V.*, No. 09-cv-383, 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009); *In re An Arbitration in London, England*, 626 F.Supp.2d 882 (N.D. Ill. 2009). Other courts, however, have concluded that 28 U.S.C. § 1782 applies to international arbitration. *See Ex rel Winning (HK) Shipping Co. Ltd.***,** No. 09-22659-MC, 2010 WL 1796579 (S.D. Fla., April 30, 2010); *In re Babcock Borsig AG*, No. 08-mc-10128, 2008 WL 4748208 (D. Mass. Oct. 30, 2008); *In re Hallmark Capital Corp*., 534 F. Supp. 2d 951 (D. Minn. 2007); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

41. *In re Caratube Int'l Oil Co.,* Misc. Action No. 10-0285 (JDB), 2010 WL 3155822 (D. Colum. Aug. 11, 2010). In an international arbitration between a U.S. corporation and Kazakhstan under the ICSID Convention, the arbitral tribunal had adopted the IBA Rules on Evidence (1999) as guidance as to the taking of evidence in the arbitration. Without first seeking leave from the arbitral tribunal, the U.S. corporation filed a petition under 28 U.S.C. § 1782 seeking discovery located in the District of Columbia. The district court denied the petition by holding that the U.S. corporation's petition represented an attempt to circumvent foreign proof-gathering procedures, one the factors to be considered under *Intel*. The district court reasoned in its decision that, by unilaterally filing the petition, the U.S. corporation side-stepped the guidelines adopted by the arbitral tribunal and established in Rule 3.8 of the IBA Rules (1999) to obtain evidence from third parties.

42. IBA Rules on the Taking of Evidence in International Arbitration art. 4.1 (2010).

43. *Id.* art. 4.2.

44. *See* Lew, et al., *supra* note 10, at 573. However, there might be limits to the scope of the communications between counsel and witness, particularly with respect to coaching of witnesses. *See* Alan Redfern et al., Law and Practice of International Commercial Arbitration, 364 (4th ed., 2004).

45. IBA Rules on the Taking of Evidence in International Arbitration art. 4.5 (2010).

46. *Id*. art.5.1.

47. *Id*. art. 5.2(c).

48. *Id*. art. 5.2(f). The new requirement applicable to the translation of the expert report may be useful to expose the role of counsel in the preparation of the expert report, particularly in cases where counsel does not speak the language of the expert.

49. *Id*. art. 5.2(a).

50. *Id*. art. 20.4.

51. IBA Rules on the Taking of Evidence in International Arbitration art. 6.2 (2010).

52. *Id*. art. 6.3.

53. *Id*. art 6.4.

54. *Id*. art. 6.5.

55. *Id*. art. 6.6.

56. *Id*. art. 6.7.

57. IBA Rules on the Taking of Evidence in International Arbitration art. 6.8 (2010).

58. *Id*. art. 8.2.

59. As two distinguished practitioners note, the issue of fact-witness presentation often creates misunderstanding between counsel and even arbitrators so they suggest that arbitrators should provide for pre-hearing guidelines as to how fact witnesses will be examined during the evidentiary hearing. *See* Laurent Levy & Lucy Reed, *Managing Fact Evidence in International Arbitration*, 123 ICCA Congress Series 633 (2007).

60. IBA Rules on the Taking of Evidence in International Aarbitration art. 9.2(b) (1999).

61. IBA Rules on the Taking of Evidence in International Arbitration art. 9.3 (2010).

62. *Id*. art. 9.3(a)-(b).

63. *Id*. art. 9.3(c).

64. *Id*. art. 9.3(d).

65. *Id*. art. 9.3(e).

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