BUSINESS TRANSACTIONS AND DISPUTES

International Commercial Arbitration

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I. Developments in U.S. Courts

A. Attempts to Enforce in U.S. Courts Awards Annulled by Courts at the Place of Arbitration

The U.S. Court of Appeals for the Second Circuit rekindled the smoldering debate in international arbitration circles over judicial enforcement of annulled arbitration awards with its decision in *Baker Marine (Nigeria), Ltd. v. Chevron (Nigeria), Ltd.*[1] This important decision flatly rejects the notion that domestic standards for setting aside an arbitration award in the United States should apply in a U.S. judicial action to enforce a foreign award under the New York Convention. Instead, the standards for setting aside an arbitration award at the place of the arbitration are to be respected if they were properly applied by the competent courts at that place, and a judgment of that court vacating an award on proper legal grounds should be respected by U.S. courts under the New York Convention.

In *Baker Marine*, unlike the much-discussed decision in *In re Chromalloy Aeroservices*,[2] nothing in the parties' arbitration agreement purported to prohibit judicial review of the award in the courts at the seat of the arbitration—in this case, Lagos, Nigeria—and the Nigerian arbitration law provided for such review. The *Baker Marine* decision effectively relegates *Chromalloy* to a narrow corner of New York Convention jurisprudence, reasoning that the *Chromalloy* court's decision to enforce an award that had been set aside by an Egyptian court was justified only because the parties in that case (notably the government of Egypt itself) had agreed in the contract that there would be "no appeal or other recourse" against the award.

Further, while the court did not dispute that it has *discretion* under article V of the New York Convention to enforce an award that has been annulled at the place of arbitration,[3]

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1. Baker Marine (Nigeria), Ltd. v. Chevron (Nigeria), Ltd., 191 F.3d 194 (2d Cir. 1999).

2. *In Re* Chromalloy Aeroservices, 939 F. Supp. 907 (D.D.C. 1996).

3. Some commentators have argued that the meaning of this language is not to confer discretion to enforce an award even though the grounds for refusal of enforcement are present, but instead merely to state that these are the only grounds for refusal of enforcement—i.e., that the court *may not refuse enforcement on any other grounds.*

that discretion clearly will not be exercised where the annulment resulted from a lawful application of the applicable law at the place of arbitration, and that was not foreclosed by the arbitration agreement. Refusal to enforce the award, in such circumstances, is entirely consistent with the pro-arbitration policy of the Federal Arbitration Act because it respects the agreement of the parties.[4]

But the *Baker Marine* decision will do little to settle the debate over enforcement of annulled awards, which must inevitably come to focus on *illegitimate* annulments in courts at the place of arbitration. U.S. policy favoring enforcement of private agreements to arbitrate is, as the *Baker Marine* court stated, the appropriate standard to apply in such cases. Where annulments at the place of arbitration undermine the agreement of the parties to have their disputes finally resolved by independent arbitrators through a fair procedure and in accordance with the law chosen by the parties, and free of any political influence or predisposition against the foreign party, those annulments deserve to be ignored. In such a case, enforcement of the foreign judgment annulling the award would flatly contradict the pro-arbitration policy of the Federal Arbitration Act, and undermine the confidence of international commercial parties in the utility of international arbitration as a method of resolving disputes.

B. Enforcement of Awards Against Foreign States

In *Creighton v. Qatar*,[5] the U.S. Court of Appeals for the District of Columbia Circuit held that an international arbitration award against a foreign state could not be enforced under the New York Convention in a U.S. district court, even though there was subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), because the district court lacked personal jurisdiction over the foreign state under the Due Process Clause of the Fifth Amendment.

The case is mainly significant because it highlights an important issue that the court was not in a position to resolve: whether a foreign state is a "person" entitled to the protections of the Due Process Clause of the Fifth Amendment. For reasons that are unclear, the plaintiff in *Creighton* did not argue this point, and addressed the personal jurisdiction issue only by asserting that Qatar had either waived objections to personal jurisdiction, or that the "minimum contacts" test for personal jurisdiction was fully satisfied. The D.C. Circuit held that Qatar (which is not a member state of the New York Convention) did not waive objections to personal jurisdiction in the United States by agreeing to arbitrate in France, and did not create jurisdictionally sufficient contacts with the United States merely by contracting with a U.S.-based company for construction of a hospital in Qatar.

The issue of a foreign state's status as a "person" having Fifth Amendment due process rights is an important one in the context of enforcement of international arbitration awards. It may often be the case that foreign states have assets within the United States in the form of funds held in U.S. bank accounts. Accordingly, the United States may be a practically attractive forum in which to seek enforcement of an award of money damages, but enforce-

4. A subsequent district court decision in New York adhered to the rationale of *Baker Marine*, refusing to enforce an award that had been annulled at the place of arbitration—Venice, Italy—on the lawful ground under Italian law that the arbitrators had exceeded their powers. *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 979 (S.D.N.Y. 1999).

5. Creighton v. Qatar, 181 F.3d 118 (D.C. Cir. 1999).

ment may be frustrated if the bank accounts holding such funds are the foreign state's only meaningful contact with the United States.

Under the FSIA, personal jurisdiction exists under the statute if there is subject matter jurisdiction under the FSIA and effective service of process.[6] But courts have held that the inquiry does not end there, because personal jurisdiction must also be consistent with the U.S. Constitution.[7] In *Argentina v. Weltover*, the U.S. Supreme Court questioned whether the personal jurisdiction requirement of the Due Process Clause applies at all to foreign states, citing its prior holding that a state of the union is not a "person" for purposes of that clause.[8] Since that time, one federal district court held that a foreign state is not a "person" having due process rights under the Constitution;[9] the Second Circuit has questioned whether its earlier holding that a foreign state is a "person" having due process rights remains good law,[10] but did not decide or analyze the question; and two other district courts avoided the issue because sufficient minimum contacts for personal jurisdiction were present in any event.[11]

The Constitutional question is a difficult one, particularly because the rationale for finding subject matter jurisdiction under the FSIA generally will involve the foreign state or its instrumentality having engaged in commercial activity, which is to say that, in the particular case, the foreign state acted more like a person than a sovereign. It is conceivable that such a distinction could emerge in the case law, with foreign sovereigns having no due process protection as "persons" in those rare instances—such as the special provisions of the FSIA related to state-sponsored terrorism[12]—where subject matter jurisdiction under the FSIA exists with respect to a foreign state's governmental, as opposed to commercial, conduct.

C. Enforcement of Arbitrators' Interim Orders

The New York Convention does not define the term "award" for purposes of determining which decisions of arbitral tribunals are subject to recognition and enforcement under the Convention. The U.S. Court of Appeals for the Seventh Circuit has made an important contribution to jurisprudence concerning the enforcement of arbitrators' decisions that are not final awards in *Publicis Communications v. True North Communications, Inc.*[13]

The decision of the arbitral tribunal involved in *Publicis* was not an "award"—at least not according to the arbitral tribunal. The chairman of the Arbitral Tribunal was the Danish attorney and law professor Allan Philip, one of the most accomplished and experienced specialists of international arbitration in Europe. The other members of the Tribunal were French law professor Alain Viandier and former U.S. Attorney General Nicholas Katzenbach. The arbitration involved a dispute between two advertising companies, one American and one French, who had been parties to a joint venture agreement. The arbitral tribunal's

6. Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(b) (1999).

7. *See, e.g.*, Gilson v. Ireland, 668 F.2d 1022, 1028 (D.C. Cir. 1982) ("a statute cannot grant personal jurisdiction where the Constitution forbids it.").

8. Argentina v. Weltover, 504 U.S. 607, 619 (1992).

9. Flatow v. Iran, 999 F. Supp. 1, 19 (D.D.C. 1998).

10. *See* Hanil Bank v. PT. Bank Negara Indonesia, 148 F.3d 127, 134 (2d Cir. 1998).

11. *See* Wasserstein Perella Emerging Mkts. Finance LP v. Formosa, 2000 U.S. Dist. LEXIS 6146 at 30 (S.D.N.Y. 2000); Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya, 1999 U.S. Dist. LEXIS 15035 at 10 (D.D.C. 1999).

12. 28 U.S.C. § 1605(a)(7) (1999).

13. Publicis Communications v. True North Communications, Inc., 206 F.3d 725 (7th Cir. 2000)

decision did not involve the merits of the dispute, but only granted a request by the American company to obtain certain tax records from the French company. The arbitral tribunal labeled its decision an "*order*," not an award. Nevertheless, the Seventh Circuit held that the order was entitled to enforcement in the United States under the New York Convention.

The court rejected as "extreme and untenable formalism" the arguments of the French company that the Arbitral Tribunal had denominated its decision an "order," and that the New York Convention speaks only of enforcement of awards. Reasoning that the essence of an award is its *finality* with respect to the issues involved in the decision, the court concluded that the arbitrators had made a final determination of the U.S. party's entitlement to obtain the requested tax records, and that on this basis the arbitral decision was enforceable under the New York Convention whether it was denominated an award, an order, a decision, or otherwise.

In support of its conclusion, the court referred to a series of cases decided under the Federal Arbitration Act, but involving domestic rather than international arbitration, in which decisions of arbitrators that were not final awards were nevertheless held to be final and subject to confirmation. The court reasoned that since the New York Convention "supplements the Federal Arbitration Act . . . the logic of decisions applied to the latter may guide the interpretation of the former."[14] The court further held that it was required to look at the "substance and effect" of the arbitral decision to decide whether it was entitled to enforcement, and that here "whether or not Public had to turn over the tax records is the whole ball of wax . . . . Producing the documents wasn't just some procedural matter —it was the very issue True North wanted arbitrated."[15]

The Seventh Circuit's position that substance rather than form should control the determination of whether a particular arbitral decision is an "award" under the New York Convention is undoubtedly correct, as is its paradigm for making this determination—whether there has been a final determination of all or a portion of the dispute that the parties submitted for arbitral determination. However, one may seriously question whether cases decided under chapter 1 of the Federal Arbitration Act are an appropriate guide to interpretation of the New York Convention; this approach does not comport with U.S. law on the interpretation of treaties, or with the purpose of the New York Convention to unify standards for enforcement of international arbitration awards. Finally, one would hope that when courts are asked to enforce as "awards" under the New York Convention decisions that do not complete the arbitral tribunal's work, they will show appropriate deference to the arbitral tribunal and the arbitral pleadings and proceedings in making decisions about whether to enforce the decisions. It will often be the case that a careful examination of the scope of the matters submitted to the arbitral tribunal will shed important light on whether a particular arbitral decision is properly viewed—in substance—as an award capable of enforcement under the New York Convention.

D. The Agreement in Writing Requirement of the New York Convention

The U.S. Court of Appeals for the Second Circuit had occasion to address the "agreement in writing" requirement of the New York Convention[16] in *Kahn Lucas Lancaster, Inc. v. Lark*

14. *Id.* at 729.

15. *Id.* at. 729-30.

16. United Nations Convention on Recognition and Enforcement of Foreign Arbitration Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

International Ltd.[17] The court held that arbitration clauses in unsigned purchase orders sent by the plaintiff to the defendant did not satisfy the Convention's requirement that the arbitration agreement be in writing, and consequently reversed an order of the district court granting a motion to compel arbitration.

Article II(1) of the Convention provides: "[E]ach contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them . . . concerning a subject matter capable of settlement by arbitration." The Convention goes on to define an "agreement in writing" to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of telegrams."

The Second Circuit rejected the district court's position that the signature requirement under the Convention relates only to an arbitration agreement *other than* one found in a contract, and held instead that the signature requirement (or, alternatively, the requirement of an exchange of letters or telegrams) pertains to arbitration clauses in contracts as well. The court's reasoning was mainly a matter of applying standard rules of punctuation under established principles of statutory (and treaty) construction. The conclusion from such rules of punctuation, that the phrase "signed by the parties or contained in an exchange of letters or telegrams" modified both of the preceding phrases—arbitral clause in a contract, and arbitration agreement—was strongly supported by the court's examination of the same provision in two other official languages of the Convention—French and Spanish—which had also been working languages during the U.N. conference on the drafting of the New York Convention. The court also found that the drafting history of the New York Convention resolved any doubt about the proper construction, since in the Working Group's commentary it was clear that the requirement of a signature would apply equally to contracts containing arbitration clauses and separate arbitration agreements.

E. When Have the Parties Agreed to "Arbitrate Arbitrability"?

Since the Supreme Court's decision in *First Options, Inc. v. Kaplan*,[18] there has been much discussion and a handful of decisions concerning the proper allocation between courts and arbitral tribunals of decisions concerning the proper parties to the arbitrable dispute and the scope of arbitrable issues. Two decisions within the past year reflect different approaches. One, it is submitted, is more correct than the other.

In *Kaplan*, the Supreme Court confronted the issue of what is the appropriate standard of judicial review of an arbitral tribunal's decision concerning arbitrability of a dispute, and held that the appropriate standard of review depends on whether the parties' arbitration agreement called for arbitral determination of such questions:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate.[19]

17. Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999).
18. First Options, Inc. v. Kaplan, 514 U.S. 938 (1995).
19. *Id.* at 943.

The *Kaplan* Court then went on to discuss "how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration," and in this regard stated:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. . . . In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement". . . .[20]

> The former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. . . . And, given the principle that a party can be forced to arbitrate only those issues it specifically agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving arbitrators that power. . . .[21]

Concluding this elaborate discussion, the Court held that the petitioner had not manifested a "*clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrators' decision on that point.*"[22] (emphasis added). This, in a nutshell, appears to be the applicable standard laid down by *Kaplan*.

Does a contract that provides for arbitration of "*all disputes concerning . . . interpretation of this agreement*" manifest a "*clear willingness*" to arbitrate arbitrability? One judge of the U.S. District Court for the Southern District of New York so held in *Bancol Y Cia. S. En C. v. Bancolombia S.A.*,[23] and on the basis of this language alone directed the parties to submit to the arbitral tribunal the question of whether claims under the U.S. securities laws were within the scope of their agreement to arbitrate. Such a result seems precisely contrary to the rationale of *Kaplan*, however, because when the parties agreed to arbitrate "all disputes concerning . . . the interpretation of the agreement" there can be little doubt that what they had in mind was the operative provisions of the agreement, and not the arbitration clause itself!

A more convincing rationale for sending issues of arbitrability to the arbitral tribunal exists where the parties have agreed to arbitrate under rules that specifically invest the arbitrators with competence to decide upon their own jurisdiction. Such was the case in a recent Ninth Circuit decision, *Wal-Mart Stores, Inc. v. PT Multipolar Corp.*,[24] where the parties had agreed to arbitrate under the UNCITRAL Rules. Article 21 of those Rules provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction." One might well argue that merely agreeing to arbitrate by rules that confer certain powers on the arbitrators does not imply a contractual removal of those powers from a court. Neither the UNCITRAL Rules nor any of the principal sets of institutional rules purport to limit expressly the ability of a litigant to obtain an arbitrability ruling from a court.

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20. *Id.* at 944.
21. *Id.* at 945.
22. *Id.* at 946.
23. Bancol y Cia. S. En C. v. Bancolombia S.A., 61 F. Supp. 2d 1 (S.D.N.Y. 1999).
24. Wal-Mart Stores, Inc. v. PT Multipolar Corp., 202 F.3d 280 (9th Cir. 1999) (This is an unpublished opinion, citation of which is subject to the Rules of the Ninth Circuit).

A recent case illustrates how entangled these issues can become. A U.S. company commenced an action against a foreign state and one of its instrumentalities in a federal district court, invoking jurisdiction under the FSIA. The state instrumentality responded by filing an ICC arbitration. The U.S. company countered by contesting ICC jurisdiction over the state entity's case, and by filing its own ICC arbitration against the state itself. In essence, the issue was whether the state, the state entity, or both, were parties to the arbitration agreement—and whether the court, the ICC court, or the arbitral tribunal should resolve those questions in the first instance. The U.S. court deferred to the ICC court in the first instance by staying the case for six months, and then deferred to the arbitral tribunal by extending the stay after the ICC Court referred the jurisdiction issues to the arbitrators.

This seems to be a sensible solution, particularly since the arbitration process had been invoked on at least two sides of the triangle. But where one party commences a lawsuit in court, believing the dispute is not arbitrable or hoping the other side will waive its right to compel arbitration, the correct answer seems less obvious. If the defendant responds with a motion to compel arbitration, invoking the New York or Panama Convention, the Federal Arbitration Act empowers the court to "direct that arbitration be held *in accordance with the agreement*. . . ."[25] (emphasis added). This language in the Federal Arbitration Act would appear to imply certainly the power, and arguably the duty, to determine the scope of the arbitrable issues in the absence of an explicit manifestation in the contract itself that the parties committed that issue to arbitral determination.

II. May an Arbitral Institution or Court Change the Place of Arbitration Agreed to in the Contract?

This question, intensely debated in certain quarters during the past year, is closely related to the question of enforcement of annulled awards. Suppose a foreign investor has agreed —improvidently in hindsight—to arbitrate in a place that has become a clearly hostile *legal* environment, where the host state party (perhaps the state itself) is virtually assured of obtaining the annulment of any unfavorable award in national courts that are overtly hostile to the foreign investor or the state of which it is a citizen. Should an arbitral institution or court be able to intervene to prevent that result by changing the place of arbitration agreed to in the contract? If courts will generally refuse to enforce an annulled award, has the foreign investor been deprived of the benefit of his arbitration bargain—final and binding resolution by an independent arbitral tribunal free of parochial bias—if the place of arbitration cannot be changed, and judicial annulment at that place is virtually assured?

Arbitration rules of the UNCITRAL and the principal institutions administering international arbitrations provide no clear answers. They generally state that the place of arbitration shall be as agreed to by the parties or, absent such agreement, that the institution shall select the place of arbitration. Such rules also provide that the arbitral tribunal, after consultation with the parties, may elect to hold hearings and meetings at any suitable location. But such a change of *physical* venue does not alter the *legal* significance of the chosen place of the arbitration. Most significantly, the *lex arbitri* of the place of arbitration, including its provisions for appeals and other recourse to the courts in connection with arbitration, will govern the proceedings.

25. 9 U.S.C. §§ 206 and 303(a).

Some institutional rules such as article 35 of the International Chamber of Commerce (ICC) Rules, specify that, in all matters not expressly provided for in the Rules, the institution (such as the ICC International Court of Arbitration) shall make every effort to ensure the enforceability of the award. But how to apply such a rule can be a vexing question. If the contract contains a choice of a place of arbitration, is the matter expressly covered by the rule that the parties' agreement should be enforced—however much the conditions at the place of arbitration might have changed since the signing of the contract? If contractual doctrines of changed circumstances or impossibility of performance (in the civil law, the *clausula rebus sic stantibus*) might in extreme circumstances permit the original agreement on the place of arbitration to be set aside, is this a proper decision to be taken by an institution like the ICC Court, or is the matter more properly left to the arbitral tribunal?

A sensible approach to this issue may be to interpret the parties' arbitration clause in light of the presumed hierarchy of their objectives. At the top rung of the hierarchy is the agreement to arbitrate itself: first and foremost, the parties elected to resolve their disputes before arbitrators rather than national courts. Agreements on a particular set of institutional rules, and on the place of arbitration, generally should be regarded as subsidiary aspects of the arbitration clause, in the absence of clear evidence to the contrary. If the parties agree upon arbitration under the arbitration rules of a particular national chamber of commerce, it would be ludicrous to suppose that they wished to be remitted to trial before a national court if that chamber of commerce ceased to administer international arbitrations.

The choice of a place of arbitration should be similarly viewed, absent clear evidence to the contrary. If annulment of an arbitration award that is unfavorable to one of the parties is virtually assured, then enforcement of the arbitration agreement as written undermines its essential purpose; strict enforcement of the clause effectively remits the case to the national courts and turns the arbitration into an empty formality. Courts, arbitrators, and arbitral institutions should have the fortitude to apply these principles, and to avoid rigid enforcement of written agreements to arbitrate that would produce absurd and unintended results.

III. Developments Under the 1996 U.K. Arbitration Act

Cases decided in the United Kingdom during the past year continue to show that the 1996 U.K. Arbitration Act (1996 Act) has been generally effective in its mission to enhance party autonomy and limit judicial intervention in and review of international arbitration awards.

In an important and widely-discussed decision concerning the independence and impartiality of arbitrators, *AT&T Corp. v. Saudi Cable Corp.*,[26] the Commercial Court rejected a post-award challenge based upon the alleged lack of independence of the chairman of an ICC arbitral tribunal who had inadvertently failed to disclose his status as a nonexecutive director of a competitor of the claimant that had, in fact, competed with the claimant unsuccessfully to obtain the multibillion-dollar international contract that was at issue in the case.[27] The claimant pressed the matter to the Commercial Court even after the ICC International Court of Arbitration had rejected the challenge.[28] While this case actually

26. AT&T Corp. v. Saudi Cable Corp., 1 Lloyd's Rep. 22 (Q.B. 1999).

27. The arbitrator involved was L. Yves Fortier, QC of Montreal, President of the London Court of International Arbitration, and a former Ambassador of Canada to the United Nations.

28. Two interim awards on liability had been entered prior to claimant's discovery of Mr. Fortier's status as a nonexecutive director of the Canadian telecommunication company Nortel. After the ICC rejected the

arose under the predecessor to the 1996 Arbitration Act (the inception of the arbitration having pre-dated the 1996 Act), the new Act's provisions on disqualification of arbitrators had a strong influence on the outcome. Longmore, in his opinion, noted that the 1996 Act, unlike the ICC Rules, does not introduce the concept of arbitrator "independence" but instead speaks only in terms of matters that give rise to justifiable doubts about the impartiality of the arbitrator. This supported the conclusion that the ICC's rule of finality regarding the ICC Court's rulings on arbitrator challenges[29] should be respected, and that the question of independence should not be revisited. But this was not the end of the matter because the court considered it necessary, in a case governed by English *lex arbitri*, to consider whether there was actual or presumed bias that required setting aside the awards. The court concluded that there was none—there was no pecuniary interest in the outcome that would require automatic disqualification, and there was no real danger of unconscious bias against the claimant, given the arbitrator's very peripheral role in the affairs of the competitor on whose board he sat as a nonexecutive director.

In another case, *Sanghi Polyesters Ltd. (India) v. International Investor KCSC*,[30] the Commercial Court rejected an application to vacate an award made in London under the 1998 ICC Rules, holding that under section 69 of the 1996 Act, which permits an appeal on a question of law unless the parties had otherwise agreed, the appeal was barred because article 24 of the 1988 ICC Rules provided that the parties waived rights of appeal to the extent permitted by law. By accepting the ICC Rules and article 24 in particular, the parties had "otherwise agreed" that there would be no appeal on questions of law. In the same case, the court also refused to overturn the award on the ground specified in section 69(3)—that the award is "obviously wrong" on a question of law—concluding without lengthy analysis that the sole arbitrator's application of Islamic banking law appeared to be correct.

In *Al-Naimi v. Islamic Press Service, Inc.*,[31] the Court of Appeal issued a significant decision concerning the allocation of power between judges and arbitrators over contested issues of arbitral jurisdiction under the 1996 Act. The court held that under section 9 of the 1996 Act, it is for the court to resolve a disputed issue of jurisdiction that is presented to it—including an issue of whether there is an arbitration agreement or not—if the answer is clear. Otherwise, the issue falls within the discretion of the court, which may either order a trial of the issue if there is a triable issue of fact, or remit the matter to the arbitral tribunal for decision, as permitted (but not required) by section 30 of the 1996 Act. Significantly, the court outlined a practical approach to the exercise of discretion by trial courts in retaining or referring to arbitrators disputed issues of arbitral jurisdiction. Where, for example, at least some issues are inevitably going to require a hearing before the arbitrators, the court reasoned, it may be entirely practical to refer arbitrability issues to the arbitrators. However, where the parties are willing to have the arbitrability issue determined on affi-

challenge, the tribunal proceeded to enter a final award assessing damages. All three awards were the subject of the Commercial Court proceeding.

One may note that claimant AT&T already had two interim awards on liability entered against it at the time it lodged the first challenge in the ICC Court. In a sense it had little to lose, although from a distance one cannot know what issues remained in the damages phase of the case. Further, failure to raise the matter with the ICC Court would have seriously impaired any challenge based on lack of partiality in the U.K. courts.

29. Art. 2.13 of the 1998 ICC Rules.

30. Sanghi Polyesters Ltd. (India) v. International Investor KCSC, transcript (Q.B. 2000).

31. Al-Naimi v. Islamic Press Service, Inc., THE TIMES, Mar. 16, 2000 (Eng. C.A. 2000).

davits without oral testimony, judicial resolution of the question is generally favored in the interest of speed and efficiency.

IV. Awards by Truncated Tribunals: The Case of the Kidnapped Arbitrator

On September 26, 1999, an ad hoc international arbitral tribunal acting under the UNCITRAL Rules issued interim awards in two consolidated cases in which the Republic of Indonesia was the Respondent. The awards have been published in full text in *Mealey's International Arbitration Report.*[32] They provide an important lesson in how foreign investor parties and international arbitral tribunals can address the difficulties presented by an intransigent state party.

The dispute arose from a $180 million arbitration award in May 1999 in favor of the claimants and against the Indonesian State Electricity Corporation. Based on a letter to the claimants from the Ministry of Finance of the Republic of Indonesia, the claimants alleged that Indonesia was liable for the state entity's nonpayment of the award.

A. Refusal to Accept "Service" of the Statement of Claim

After entry of the final award against the state entity, the claimant served its Statement of Claim on the Republic of Indonesia by delivering same to its counsel. This attempt at service was met by a letter rejecting the pleading and physically returning it to the claimant's counsel. The Arbitral Tribunal, when notified of these events, reacted in the strongest of terms, delivering a letter to counsel for the Republic of Indonesia reminding it that it had accepted the Arbitral Tribunal, and that while it was free to make any arguments or contentions permitted by the UNCITRAL Rules, *"it is not open to you to decide which communications you accept and which you ignore. You are in no position to 'reject service.'* "

B. Attempt to Enjoin the Arbitral Proceedings in Indonesian Courts

Within days after service of the Statement of Claim, the state entity commenced an action in the Jakarta District Court to enjoin the arbitration proceedings. This action was met with a fascinating response from the Arbitral Tribunal. While avowing its complete respect for the sovereignty of the Republic of Indonesia, it referred to remarks by a former president of the International Court of Justice, Emuardo Jimenez de Arechaga, that stated that, under international law, ". . . the judgment given by a judicial authority emanates from an organ of the state in just the same way as a law promulgated by the legislature or a decision taken by the executive." The Tribunal's message to the state was also clear: if forced to take a position, it would not hesitate to condemn actions of the Indonesian judiciary as unlawful manipulations by the state party to obstruct the arbitration.

C. Threat to Prosecute and Imprison Claimant's Counsel

When the state entity published in the Jakarta press remarks critical of the claimant's counsel and threatened to prosecute and imprison counsel and its witnesses if they pro-

32. *See Himpurna California Energy Ltd. v. Indonesia*, 15 Mealey's Int'l Arb. Rep. 1, A-1 (2000); *Patua Power Ltd. v. Indonesia*, 15 Mealey's Int'l Arb. Rep. 1, B-1 (2000).

ceeded with the arbitration in violation of a Jakarta District Court injunction, the Arbitral Tribunal reacted promptly by notifying the parties that it would consider changing the physical venue of the arbitration to remove it from Jakarta, and from the obvious threats to the tribunal's jurisdiction.[33]

D. Issuance of Injunction by Jakarta District Court

Following issuance of an injunction against the arbitration by the Jakarta District Court, including a prospective fine of $1 million per day for any violation of the injunction, the Arbitral Tribunal, after receiving extensive submissions from the parties and the experts concerning the consequences of the injunction, issued a procedural order, determining: (1) that the purported injunction violated international law, as incorporated into Indonesian law; (2) that Indonesia's refusal to proceed with the arbitration based upon the purported injunction was a breach of the arbitration agreement; (3) that Indonesia was therefore in default; and (4) that the physical venue of further proceedings would be changed to The Hague, without any change of the legal seat of the arbitration, which would remain in Jakarta.

E. Challenge to the Independence of the Arbitral Tribunal

Following the procedural order, Indonesia asked the chairman of the Arbitral Tribunal to resign on grounds of bias and conflict of interest of the chairman's law firm, and expressed the same views in a letter to the Secretary-General of the International Center for Settlement of Investment Disputes (ICSID). The chairman refused to resign, finding the claims of bias and conflict of interest to be groundless, and the application motivated solely by Indonesia's objections to the terms of the procedural order.

F. Kidnapping of Indonesia's Appointed Arbitrator, and the Penultimate Ruling That the Two Remaining Arbitrators Could Proceed With the Case

The Tribunal's interim awards fully described the astonishing circumstances of the apprehension of the Indonesia-appointed arbitrator, apparently by agents of the state, after his arrival in the Amsterdam airport to attend the hearings in The Hague. In its final award, the Tribunal comprehensively set forth the authorities in international law clearly supporting the ability of the remaining two members of an arbitral tribunal to proceed to a final award despite the inability of the third arbitrator to participate.[34] In particular, the Tribunal relied upon the writings of Judge Stephen Schwebel, president of the International Court of Justice. Judge Schwebel wrote in a series of lectures delivered in 1987, which surveyed, inter alia, the experience of the Iran-U.S. Claims Tribunal:

> Withdrawal of an arbitrator from an international arbitral tribunal which is not approved or authorized by the tribunal is wrong under customary international law and the general principles of law recognized and applied in the practice of international arbitration. It generally will constitute a violation of the treaty or contract constituting the tribunal, if not in terms

33. Article 16(2) of the UNCITRAL Rules provides that the arbitral tribunal "may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration." *Id.*

34. 15 Mealey's Int'l Arb. Rep. 2, A-1 (2000).

then because the intention of the parties normally cannot be deemed to have authorized such withdrawal.

One can only applaud the extraordinary fortitude and intellectual rigor with which the members of the Arbitral Tribunal approached their task in this case while in a virtually constant state of siege. Further, this entire drama unfolded over a period of approximately four months from the filing of the Statement of Claim to the final award. International arbitrators and counsel for parties in such proceedings may well refer to these awards, for generations to come, for the guidance they provide in combating a deliberate campaign of sabotage against the arbitration proceedings by the state party.

V. Internet Domain Name Dispute Resolution

Any recap of developments in international commercial arbitration over the past twelve months would be woefully incomplete without discussion of the quite extraordinary emergence of an entirely new dispute resolution system relating to Internet domain name disputes, in which the World Intellectual Property Organization (WIPO) has been a principal innovator.[35]

The WIPO Arbitration and Mediation Center has become the world's leading provider of dispute resolution services for implementation of the Uniform Domain Name Dispute Resolution Policy (ICANN Policy) adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999. Those services give effect to the Rules for Uniform Domain Name Dispute Resolution Policy (ICANN Rules) approved by ICANN on October 24, 1999, and are implemented by the WIPO Center's Supplemental Rules for Uniform Domain Name Dispute Resolution Policy that entered into effect on December 1, 1999.[36]

Public discussions of these dispute resolution services often focus on the online features of the dispute resolution services themselves, such as the WIPO's Supplemental Rules providing for e-mail filing or web site posting of pleadings. Somewhat submerged in these discussions (or so it may appear to the uninitiated) are the roots of the system in the law and tradition of international commercial arbitration. Those aspects of the system are briefly summarized here, and the reader is encouraged to visit the WIPO and ICANN web sites to examine the policies and procedures in all of their detail.

A. Agreement to Arbitrate

To register a domain name with ICANN, an applicant must complete a Registration Agreement. The Registration Agreement incorporates by reference the ICANN Policy, which provides that the registrant agrees to resolve disputes over the registration and use of an Internet domain name registered by the registrant pursuant to the ICANN Rules. The ICANN Rules, in turn, require the registrant to refer the dispute to arbitration under

35. At the beginning of 2000, there were three "approved providers" of domain name dispute resolution services sanctioned by the ICANN: the WIPO, the National Arbitration Forum, and Disputes.org/eResolution Consortium. *See* <http://www.icann.org/udrp/approved-providers.htm>.

36. Comprehensive information about the WIPO Center and its domain name dispute resolution procedures, including full texts of Administrative Panel Decisions, may be found on the WIPO web site <http://www.wipo.org>, or more directly at <http://arbiter.wipo.int>.

the auspices of one of the ICANN-approved dispute resolution providers—which the registrant may select at the time it files the complaint.

B. Scope of Arbitrable Issues

Proceedings concerning domain name registrations are identified as "Mandatory Administrative Proceedings" (MAPs). In such proceedings, the claimant must prove the existence of three elements: (1) that a registrant's domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; (2) that the registrant has no rights or legitimate interests in respect of the domain name; and (3) that the registrant's domain name has been registered and is being used in bad faith. Thus, any dispute that does not involve all of these elements is not an arbitrable dispute under the ICANN Policy and Rules, and no other disputes are within the scope of the submission to arbitration. This is expressly addressed in paragraph 5 of the ICANN Rules.[37]

C. Availability of Judicial Remedies

While submission of the dispute to a MAP is required, either party may also elect to seek relief in court, either before or after the submission of the dispute to a MAP. If the losing party in the MAPs notifies the provider within ten days after the Administrative Panel Decision that it has commenced a lawsuit in a proper jurisdiction, the decision will not be implemented and the ICANN will not cancel the domain name registration pending completion of the court proceedings. Thus, the ICANN and its dispute resolution providers have created what amounts to an optionally-binding arbitration procedure.

D. Appointment of Arbitrators

The complainant may propose to have the dispute resolved by a sole arbitrator or a three-member panel. If the complainant chooses a three-member panel, then it must submit three candidates to serve as one of the arbitrators, who may (but need not) be drawn from an ICANN-Provider's list of panelists. The respondent may reject a complainant's proposal to have a sole arbitrator, and even in that there must be a three-member panel. The Provider will appoint one candidate from each side's list of three and, to select the Presiding Panelist, will submit to the parties a list of five candidates, which the parties are invited to return with the rank-ordered preferences indicated.

E. Proceedings, Hearings, and Decisions

Any written submissions beyond the complaint and the response (and the documents annexed thereto) are in the discretion of the panel. There are to be no in-person hearings (including teleconference or videoconference) unless the panel so determines, exceptionally. The panel shall resolve the dispute in accordance with the ICANN Rules and "*any rules and principles of law that it deems applicable.*" (emphasis added). A three-member panel must

37. "All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available."

decide by majority. The panel's decision must be in writing, stating the reasons on which it is based. Strict time limits for completion of the proceedings are imposed.

Since initiating its services as a Provider in December 1999, the WIPO has received in excess of 200 cases, involving registrants from more than forty countries. A survey of the emerging jurisprudence is beyond the scope of this article. But it may be useful to pose several questions for further consideration as the volume of decisions mount: (1) what is the applicable law in disputes between registrants of different nationalities; (2) will parties ever have occasion to seek to vacate or enforce a panel decision, or will ICANN's cancellation of the losing party's registration (from the winner's perspective) and the right to start a lawsuit (from the loser's perspective) eliminate nearly all need for such proceedings; and (3) will the mechanism generally be effective in resolving disputes because the results will be broadly accepted by the parties, or will a large percentage of the cases find their way into the courts?

For the time being, the dispute resolution community can only watch with fascination as this very visible and very active new sub-field of international arbitration evolves.