

International Commercial Dispute Resolution

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I. Developments in United States Courts

A. ENFORCEMENT OF FOREIGN AWARD CONVERTED TO A FOREIGN MONEY JUDGMENT

A federal district court in New York City had occasion to emphasize the important difference between enforcement of a foreign arbitral award, and enforcement of a foreign money judgment based upon such a foreign award. In *Ocean Warehousing B.V. v. Baron Metals and Alloys, Inc.*,¹ the Court confirmed an order of attachment, holding that the moving party was likely to succeed in enforcing a foreign money judgment that was based on an arbitral award, even if there might be a viable defense to enforcement of the award itself under the New York Convention.

In *Ocean Warehousing*, the winning Dutch party in a Dutch arbitration took the award to a Dutch court and had the award recognized and converted into a Dutch money judgment. The losing party, a New York corporation, failed to appear in the arbitration and also failed to appear in the Dutch judicial confirmation action. The winning party then brought an action to enforce the Dutch judgment under the Uniform Foreign Country Money-Judgments Recognition Act (Judgments Recognition Act)² and/or to enforce the award under the New York Convention, obtained an *ex parte* order of attachment, and then moved to confirm the order of attachment. Resisting the attachment, the losing party in the arbitration argued that it was not allowed to raise a defense in the Dutch confirmation proceeding that the arbitration agreement in this case was not an “agreement in writing” under the New York Convention, and that the U.S. court should not enforce the foreign judgment under circumstances in which it would not enforce the underlying arbitration award under the Convention.

The District Court rejected this argument, and held that the Convention’s “agreement in writing” requirement was not relevant to whether the moving party was likely to succeed

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1. *Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc.*, 157 F. Supp. 2d 245 (S.D.N.Y. 2001).

2. N.Y. C.P.L.R. 53 (McKinney 2001).

in enforcing the Dutch judgment in a U.S. court. The Court held enforcement of the foreign money judgment in a U.S. court, the Court held, depended solely on the criteria set forth in the Judgments Recognition Act, even if the judgment was based upon an award whose direct enforcement in a United States court would be governed by the New York Convention. As there was no dispute that the Dutch court had jurisdiction and observed at least minimum standards of due process in the proceedings to enforce the award, the requirements of the Uniform Act were satisfied.

Ocean Warehousing presents yet another reminder that arbitration awards are predominantly creatures of the legal regime of the arbitration procedures, i.e. the seat of the arbitration. The *lex arbitri* may very well provide for conversion of an arbitral award into a judicial judgment, and in that process, the losing party might not have the opportunity to raise, as grounds to set aside the award or to refuse its conversion to a money judgment, all of the enforcement defenses of the award that are enumerated in the New York Convention. Here, Dutch law did not permit the award to be set-aside on the ground that the arbitration agreement was not in writing. The prevailing party was therefore shrewd in adopting a two-step enforcement strategy, first converting the Dutch award to a Dutch judgment, and then seeking enforcement of the Dutch judgment in a New York court, in a proceeding where the Judgments Recognition Act, not the New York Convention, applied.

B. ENFORCEMENT OF ARBITRATION AGREEMENTS BY AND AGAINST NON-SIGNATORIES

Several decisions of U.S. courts during the past year addressed this important and sometimes vexing issue. In *General Electric Co. v. Deutz AG*,³ the Third Circuit Court of Appeals held a German guarantor was not entitled to invoke the arbitration clause in a contract signed by its subsidiary with an American corporation. The case involves an interesting twist on a familiar problem in arbitration law, because it is far more common that a guarantor will resist arbitration when the beneficiary of the guaranty seeks it, on the ground that the beneficiary only agreed to arbitration with the guarantor's principal. Here, it was the guarantor, a foreign company, that sought—in three separate forums (a U.S. District Court, the High Court in London, and an ICC arbitral tribunal), to invoke the contract's arbitration clause in service of avoiding litigation on the merits in a United States court.

All of these efforts were unsuccessful, as the guarantor was effectively the victim of its own careful drafting, at the time the contract was made, to avoid the implication that it had agreed to arbitrate. Here, the parties to the agreement had initialed each page, whereas the guarantor did not. In the arbitration clause, it was mentioned that the parties to the agreement would nominate arbitrators, and that they agreed to certain procedures. The guarantor was not mentioned in this section as a party that would participate in the nomination of arbitrators. The guarantor signed the agreement in a separate signature block, which specified that it was a party for purposes only of the guaranty and the provisions concerning confidentiality.

The District Court in this action found that the contract was ambiguous as to whether the guarantor had agreed to arbitrate disputes, and so it submitted this question to a jury determination as provided in Section 4 of the FAA. The jury found that there was no

3. *Gen. Elec. Co. v. Deutz Ag*, 270 F.3d 144 (3d Cir. 2001).

agreement by the guarantor to arbitrate disputes. The Third Circuit found no error in the District Court's conclusion that the agreement was ambiguous as to the guarantor's agreement to arbitrate, and further found that the jury's conclusion that there was no such agreement was supported by the evidence, which included oral testimony of the party's negotiators. The Third Circuit also took note of the fact that an ICC arbitral tribunal, sitting in Switzerland and applying Swiss law, had decided the same arbitrability question with the same outcome. The Third Circuit noted that the arbitral tribunal had been impressed particularly by the fact that the guarantor had refused to include the arbitration clause among the sections of the agreement specifically enumerated in its signature block.

In another case, the Third Circuit Court of Appeals declined to enforce the arbitration agreement against a putative third party beneficiary of a contract containing the arbitration clause. In *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*,⁴ the United States Court of Appeals for the Third Circuit, applying traditional common law third party beneficiary principles, held that the arbitration clause would not be enforced where there was insufficient evidence of a specific intention to benefit the third party through the performance of the contract. The Third Circuit Court of Appeals also rejected two other traditional contract law-based theories of when a non-signatory is bound by an arbitration clause: a principal-agent relationship with the signatory, and equitable estoppel. The decision underscores the importance of state law contract principles to the U.S. law on enforcement of international arbitration agreements. Here, Delaware contract law applied on the question of formation of an agreement to arbitrate, and that state was particularly stringent in requiring not only that the putative third-party beneficiary be an intended and not merely an incidental beneficiary of the contract, but that the intention to benefit the third party should be a material element of the benefits to be derived from the agreement and should be a gift to the third party or a benefit conferred in satisfaction of some pre-existing obligation. This was a standard the moving party could not meet, even though the putative third-party beneficiary, DuPont, was in practical terms the clear beneficiary of a joint venture agreement entered into by one of its subsidiaries.

In *Signature Mktg. Pty. Ltd. v. Slim Print Int'l, LLC*, a district court in Connecticut enforced an arbitration agreement against non-signatory individuals who controlled and operated the signatory corporation, on the basis of equitable estoppel principles.⁵ In this case, the claims made against the individuals were based upon the same transactions and conduct as the claims against the corporations they controlled. On this basis, the court held the signatory plaintiffs were estopped from avoiding arbitration with the non-signatory defendants. Applying settled equitable estoppel principles in the arbitration context announced by the United States Court of Appeals for the Second Circuit,⁶ the Court found (1) a close relationship between the signatory and non-signatory defendants, (2) the claims against the non-signatories were closely intertwined with the contractual duties and conduct of the signatory, and (3) it would be inequitable, in such circumstances, to permit a signatory to circumvent the arbitration clause by pursuing interdependent claims separately in judicial and arbitral forums.

4. *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187 (3d Cir. 2001).

5. *Signature Mktg. Pty. Ltd. v. Slim Print Int'l*, 2001 U.S. Dist. LEXIS 21222 (D. Conn. Dec. 11, 2001).

6. *See, e.g., Smith/Enron Cogeneration Ltd. P'ship v. Smith Assoc.*, 64 F.3d 773, 779 (2d Cir. 1999).

Courts and arbitral tribunals in other parts of the world have recently struggled with issues involving non-signatories to the arbitration agreement, as well. For example, in arbitration between U.S. and Russian parties under the Stockholm Chamber of Commerce arbitration rules, the arbitral tribunal, applying Swedish contract law, found that the parent company of the Russian party to the contract had *by its commercial conduct* become a party to the contract including the arbitration agreement.⁷ The tribunal found that the parent, by centralizing control of operations and indicating to the counter-party its intention to take over the contract, was “bound by the impression that he has created with [the] other party,” that the parent was in fact the party to the contract.⁸ This conclusion applied with equal force the arbitration agreement, the tribunal held, because the arbitration agreement “is an integral part of the substantive rights and obligations that a new party to the Contract assumes.”⁹ As noted by a commentator on the foregoing Swedish case, arbitral decisions such as this one, which apply general principles of contract formation found in national laws, face very uncertain fates when enforcement is sought under the New York Convention and in states whose arbitration laws require an agreement in writing.¹⁰

C. OBJECTIONS TO CONFIRMATION OF THE AWARD: SCOPE OF ISSUES SUBMITTED TO ARBITRATION

The decision of a federal district court in Philadelphia upholding an arbitration award in favor of U.S. corporations against a Pakistani corporation draws attention to the importance of the Terms of Reference in ICC arbitration, by establishing definitively the scope of the issues submitted for arbitral determination.¹¹ The Pakistani company entered into a contract with a consortium of U.S. companies for the design and construction in the United States of an electric power plant, which was then to be installed in Pakistan. The contract provided for arbitration of disputes under ICC arbitration rules in London, in English. In connection with the project, the Pakistani firm obtained a letter of credit from the U.S. parent company of one of the consortium members. When the Pakistani corporation defaulted and the consortium members sought arbitration, the Pakistani firm commenced an action in the Pakistani courts and claimed that the disputes involved were outside the arbitration agreement, but the firm also filed an answer and counterclaims in the arbitration. The Pakistani firm obtained a judgment by defaults from a court in Lahore, and successfully sought to enforce that judgment in Pennsylvania state courts under the Uniform Foreign Country Money-Judgments Recognition Act. In the meantime, the U.S. parties pursued the ICC arbitration, obtained an award in their favor, and sought confirmation of the award in the U.S. District Court for the Eastern District of Pennsylvania.

In the confirmation proceeding, the Pakistani company insisted it had never agreed to arbitrate any disputes with parent to a consortium member, which had issued the letter of credit. However, the record of the arbitration proceedings made it clear that the Pakistani company had voluntarily submitted to the arbitral tribunal the question of whether its claims

7. See Final Arbitral Award Rendered in Stockholm Chamber of Commerce Arbitration Case No. 108/1997 (2000), published in 2001:1 Stockholm Arbitration Report at pp. 57 *et seq.*

8. See *id.*

9. *Id.*

10. See *id.* at 67.

11. CBS Corp. v. WAK Orient Power & Light, Ltd., 168 F. Supp. 2d 403 (E.D. Pa. 2001).

involving this letter of credit (claims also asserted in the Pakistani judicial action) were arbitrable, because that precise question was listed in the Terms of Reference in the arbitration, which the Pakistani company had signed. The Court held that by signing the Terms of Reference, the Pakistani company agreed that it understood, as a matter of law, that it could not withdraw unilaterally from the obligation to arbitrate, and that it could not attempt to litigate an arbitrable dispute before a different forum.

D. QUASI-IN-REM JURISDICTION TO ENFORCE ARBITRATION AWARD UNDER NEW YORK CONVENTION

In *CME Media Enter. v. Zelezny*,¹² a federal district court in New York City relied upon *quasi-in-rem* jurisdiction to enforce a foreign arbitral award against property of the defendant located in the jurisdiction of the Court, while acknowledging that it had no personal jurisdiction over that defendant. The Court noted that the rationale for asserting *quasi-in-rem* jurisdiction is very narrow; the action must be brought to collect upon a debt based upon a claim that has already been adjudicated in a forum that did have personal jurisdiction over the defendant. That was the case here, because the arbitral tribunal had personal jurisdiction over the defendant. However, the Court held that it could only confirm the award to the extent that there existed assets in the jurisdiction, because the effect of a judgment in a *quasi-in-rem* case is limited to the property that supports jurisdiction. Thus, although the moving party held an arbitral award in excess of \$23 million, it could only be confirmed to the extent of the sums found to exist in the defendant's New York bank account, which was only \$0.05.

E. ENFORCEMENT OF ARBITRATION AWARDS IN U.S. COURTS

A recent decision of a federal district court in Houston, Texas, enforced a \$261 million award in an ICSID arbitration against a state-owned Indonesian electric utility company.¹³ The decision is remarkable mainly for the unabashed litigiousness of the losing party in the arbitration, in asserting defenses to enforcement under the New York Convention on completely untenable grounds. Thus, the losing party sought refusal of enforcement on a number of grounds specified in Article V of the New York Convention: improper composition of the arbitral tribunal, improper arbitral procedure, and insufficiency of the arbitral hearings, which it claimed arose to the level of a due process.

Objection to the constitution of the arbitral tribunal was based on the fact that the arbitration agreement appeared to require the parties who were adversaries in this case, to appoint one arbitrator jointly. Instead, the claimant appointed an arbitrator unilaterally, and this approach was upheld by the arbitral tribunal (constituted when the ICSID appointed the other two arbitrators), which reasoned that (1) joint nomination was required only in disputes where those parties were aligned in interest, (2) the parties had also agreed to arbitration under UNCITRAL Arbitration Rules, and (3) in a case where those parties were adversaries, arbitrator appointments should be made in accordance with the UNCITRAL Rules. Moreover, the Court found that no prejudice had arisen from the constitution of

12. *CME Media Enter. B.V. v. Zelezny*, 2001 U.S. Dist. LEXIS 13888 (S.D.N.Y. Sept. 10, 2001).

13. *Karaha Bodas Co. LLC v. Perusahaan Petambangan Minyak Dan Gas Negara*, 190 F. Supp. 2d 936 (S.D. Tex. 2001).

the arbitral tribunal and further held, significantly, that the party opposing enforcement of the award on this basis “must show that there is a violation of the arbitration agreement between the parties *and that the violation actually caused [that party] substantial prejudice in the arbitration.*”¹⁴

Enforcement was also resisted on the basis that the arbitral tribunal had ordered consolidation of disputes under separate contracts, even though neither contract reflected the parties’ consent to such consolidation. The Court, while acknowledging that U.S. law generally opposes arbitral consolidation absent consent, affirmed the finding of the arbitral tribunal that in this instance the two separate contracts were fully integrated and that “the parties did not contemplate the performance of two independent contracts, but the performance of a single project consisting of two closely related parties.”¹⁵ Further, the seat of the arbitration was Geneva, Switzerland, and the Court found that the tribunal had good ground under the Swiss *lex arbitri* for consolidating the arbitrations on the basis of the interrelationship of the two contracts.¹⁶

The Court also rejected the due process claims based on what was claimed to be a failure of the tribunal to permit additional discovery by the respondent following the claimant’s rebuttal submission. The Court found that this rebuttal submission had in fact raised no new arguments or claims, and that the losing party had received ample opportunity to prepare and present its case.¹⁷

An appeal to the United States Court of Appeals for the Fifth Circuit was pending at the time of preparation of this article.

F. OTHER U.S. JUDICIAL DEVELOPMENTS IN BRIEF

The Ninth Circuit Court of Appeals recently reaffirmed an indisputable, but little discussed principle: that jurisdiction over the person or the property of the defendant is necessary in an action under the New York Convention for recognition and enforcement of an award. Thus, in *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*,¹⁸ the Court stated:

District Courts determine the existence vel non of personal jurisdiction not by reference to statutory imprimatur, but by inquiring whether maintenance of a suit against the defendant comports with the constitutional notions of due process . . . Thus, it is not significant in the least that the legislation implementing the Convention lacks language requiring personal jurisdiction over the litigants. We hold that neither the Convention nor its implementing legislation removed the district courts’ obligation to find jurisdiction over the defendant in suits to confirm arbitration awards.¹⁹

While the decision seems unremarkable as a matter of U.S. personal jurisdiction law (the award debtor had no more contacts with the forum than a handful of grain shipments over a twelve-year period) international arbitration practitioners have identified a thorny enforcement problem implicit in this result. Enforcement of an award in the domiciliary state

14. *Id.* at 945.

15. *Id.* at 946.

16. *Id.*

17. *Id.* at 952.

18. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002).

19. *Id.* at 1121.

of the award debtor may be difficult for many reasons, and so the award creditor may be inclined to seek enforcement in a pro-enforcement jurisdiction where, it has reason to believe, the award debtor may *at some point* have assets subject to attachment (if only, perhaps, because funds in transit might flow through a bank account “situated” in that jurisdiction). Inflexible requirements that award debtors be domiciled in, or doing business in, or have substantial assets located in, the enforcement jurisdiction and the time the enforcement action is commenced may create a significant impediment to effective enforcement in a wide range of cases.

In a decision challenging an award on the ground that the arbitral tribunal exceeded its power, a federal district court in New York City reaffirmed that under federal arbitration law, arbitrators have very broad remedial powers, particularly equitable powers, and that the limitations on such powers are only those that are very clearly set forth in the agreement of the parties. Thus, in *Millicom Int’l V N.V. v. Motorola, Inc.*,²⁰ the Court held that the arbitral tribunal did not exceed its powers when it ordered dissolution of a joint venture even though the joint venture agreement only mentioned other remedies in dispute between the joint venture parties.

II. Non-Judicial Developments in the International Arbitration Community

A. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION

Several years of work by the Working Group on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) are expected to culminate, as this article goes to press, in the adoption by UNCITRAL of a Model Law on International Commercial Conciliation at UNCITRAL’s 35th Session to be held in New York beginning June 17, 2002.²¹

The draft Model Law defines conciliation broadly as “a process . . . whereby parties request a third person . . . to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship.”²²

Important provisions of the Model Law include its proposed definitions of “international” and “commercial” for purposes of international commercial conciliation. These terms are not well defined in the UNCITRAL Model Law on International Commercial Arbitration, or in the New York and Panama Conventions. Accordingly the expansive definitions adopted in this Model Law are likely to be an important reference points. The proposed Model Law provides that a conciliation is “international” if the parties have their places of business in different states, if the place of conciliation is outside the state in which both parties have their place of business, or if a substantial part of the obligations of the commercial relationship is to be performed outside the state where the parties have their places of business. As to the term “commercial,” the Model Law includes an interpretive note that this term “should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.”²³ This language

20. *Millicom Int’l V N.V. v. Motorola, Inc.*, 2002 U.S. Dist. LEXIS 5131 (S.D.N.Y. Mar. 28, 2002).

21. UNCITRAL, Model Law on International Commercial Conciliation (2002), available at <http://www.uncitral.org> (last visited July 29, 2002).

22. *Id.*

23. *Id.*

is followed by a lengthy, but non-exhaustive, list of categories of commercial intercourse that would qualify as "commercial."

The Model Law provides the parties with maximum flexibility to agree upon rules governing the conciliation process, and, failing such agreement, leaves the conciliator free to conduct the proceedings in the manner the conciliator considers appropriate. The conciliator's authority includes the ability, at any stage of the conciliation process, to make proposals for settlement of the dispute. Other provisions of the Model Law provide that the conciliator may meet and communicate with the parties separately or together; that the conciliator may share with one party information received from the other party until it is received with an understanding that it shall be kept confidential; and that the conciliation may be terminated by the conciliator, by agreement of the parties, or by one party upon notification to the conciliator and the other party.

As a general matter, the proposed Model Law provides that adversary proceedings concerning the dispute, i.e., arbitral or judicial proceedings should not be commenced during the pendency of the conciliation. The proposed Model Law further provides, as a general rule, that statements made by the parties or the conciliator, or information disclosed during the conciliation, shall not be used as evidence in arbitral or judicial proceedings relating to the same dispute.

B. PROGRESS TOWARD A REVISED CODE OF ETHICS FOR ARBITRATORS IN DOMESTIC AND INTERNATIONAL COMMERCIAL DISPUTES

The American Arbitration Association, CPR Institute for Dispute Resolution, and the American Bar Association continue to collaborate toward a final draft of a proposed revised Code of Ethics for Arbitrators in Domestic and International Commercial Disputes. When completed, this would achieve the first comprehensive revisions of the Code of Ethics for Arbitrators in Commercial Disputes prepared in 1977 by a committee comprised of representatives of the AAA and the ABA. While the outcome of these efforts remains uncertain, an important initiative of the Section of International Law and Practice of the American Bar Association (ABA/SILP) has been to harmonize ethical standards for arbitrators in international and domestic disputes. This initiative seeks in substantial measure to conform U.S. domestic practice to international customs and standards by establishing a presumptive rule that all party-appointed arbitrators shall be independent and impartial.

Thus, Canon 1 of the ABA/SILP working draft of the Code provides that a person should accept appointment as an arbitrator only if fully satisfied of his or her ability to serve without bias, and that he or she can serve independently from the parties, potential witnesses, and other arbitrators. No distinction is made, in the application of these proposed standards, between domestic and international arbitrations, or between appointments to act as sole arbitrator, chairperson of a three-member tribunal, or as the party-appointed arbitrator upon a three-member tribunal. Canon 1 of the ABA/SILP draft further provides that after accepting appointment as arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any personal or financial interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

The ABA/SILP working draft proposes important revisions of Canon II of the Code concerning disclosure by arbitrators, and Canon III concerning *ex parte* communications. The changes in Canon II emphasize that any doubts about the scope of required disclosure should be resolved in favor of disclosure. Nevertheless, the standard for disclosure remains

that which “might reasonably create an appearance of partiality or lack of independence or bias in the eyes of any of the parties.”²⁴ Candidates thus continue to have enormous latitude for disclosure, subject to the mandatory requirements of arbitration-sponsoring and appointing institutions. The changes in Canon III proposed by the ABA/SILP would conform the Code to existing international practice with respect to interviews of arbitrator candidates, and communications with the party-appointed arbitrator concerning matters of compensation, or concerning the appointment of the chairperson.

Canon IX of the proposed ABA/SILP draft seeks to establish guidelines for the person asked to serve as a party-appointed arbitrator to ascertain, and then to disclose, whether he or she is expected to act as a non-neutral arbitrator, as is sometimes the understanding in domestic commercial arbitration in the United States. Thus, Canon IX would impose on the party-appointed arbitrator an ethical duty to assure that his or her status, as a neutral or non-neutral, is known to the parties and the other arbitrators as early as possible, and certainly before consideration of any procedural or substantive matters by the arbitral tribunal. Canon IX further provides that until, and unless, there is an agreement of the parties that the party-appointed arbitrators are in fact acting as non-neutrals, they should continue to comply with all provisions of the Code. A special Supplement to the Code, as proposed by the ABA/SILP, then delineates the special responsibilities of the “partisan” arbitrator, including the obligation to ensure that, if the impartiality of the arbitrators is a requirement for enforcement of an award under the legal regime applicable to the arbitration, that this is made known to the appointing party.

C. LCIA’S TYLNEY HALL SYMPOSIUM

The Tylney Hall symposium of the London Court of International Arbitration (LCIA), scheduled for May 10–12, 2002, was rapidly approaching as this article was being prepared for publication. The LCIA now publishes on its Web site²⁵ the questions submitted for discussion at the Tylney Hall symposia, which in some respects reflect recent developments in arbitration practice as perceived by experienced arbitrators and practitioners.

In this section, three of those questions are presented with some comments based upon this writer’s own experience.

1. *Changing the Seat of the Arbitration*

a. Hypothetical

Parties A and B are involved in ad hoc arbitration, the seat is in A’s country. B considers that for political and safety reasons, its counsel, party representatives and witnesses are prevented to travel to A’s country. In order to deal with this problem, the arbitral tribunal suggests holding all hearing and meetings abroad. B points out that the arbitral tribunal’s suggestion is unacceptable since A’s arbitration law would continue to govern the arbitration and therefore any judicial proceedings related to the arbitration, such as challenge of an arbitrator and recourse against awards, would still have to be brought to the courts of A’s country. A considers that B’s concerns are unfounded but proposes to move the seat of the arbitration to any venue to be chosen by the arbitral tribunal, which may include B’s coun-

24. *Id.*

25. London Court of International Arbitration (2002), available at <http://www.lcia-arbitration.com> (last visited July 29, 2002).

try. However, B points out that any change of seat amounts to a change of the arbitration clause to which it refuses consent. Based thereupon, B takes the position that the arbitration clause has become unenforceable and that no arbitration can take place.

I. Should the arbitral tribunal decide to hold all hearings outside of A's country, but without changing the seat, and therefore accept that the arbitration continues to be governed by A's arbitration law despite B's strong objection against A's state courts?

II. Alternatively, can the arbitral tribunal decide a change of seat, for instance move it to B's country? On which rules/law could the arbitral tribunal rely in light of B's opposition? Note that A's arbitration law does not deal with issues such as change of seat or unenforceability of the arbitration clause.

III. Which of alternatives (I) or (II) appears preferable in order to ensure the enforcement of an award?

b. Comment

No legal system of which the author is aware permits the arbitral tribunal to change the seat of the arbitration as agreed upon by the parties. However, most institutional arbitration rules, the UNCITRAL Arbitration Rules, and the arbitration laws of many countries, permit the arbitral tribunal to decide—without changing the seat—to hold hearing and meetings at a place other than the seat. The ICC considered but declined to adopt, in the 1998 revision of its rules, a provision that would have empowered the ICC Court of International Arbitration to change the agreed seat of arbitration in extreme circumstances. On the other hand, contract law in both common law and civil law systems recognizes that a contractual obligation may cease to be binding if there has been an extreme and unforeseeable change of circumstances that renders performance of the obligation impossible or oppressive to one or both of the parties. That principle of contract law should be applicable to the obligation to conduct the arbitration at a particular place.

Further, as a matter of policy, if it will assist in upholding the parties' primary agreement to resolve disputes by an arbitration process that is fundamentally fair and free of coercive influences on the parties or the arbitrators, an arbitral tribunal should not hesitate, in a proper case, to decide that such a change of circumstances concerning the seat of the arbitration has occurred. However, the tribunal should in most cases be able to avoid any such coercive influences by simply holding the hearings and meetings at a more suitable location, provided that the legal regime of the seat of the arbitration has not changed in ways that are fundamentally hostile to the arbitration process. Further, changing the seat implies a change of the *lex arbitri*, which includes the grounds provided in the arbitration law of the seat for setting aside an award. If the proposed new seat does not recognize all of the same grounds for setting aside the award, the party opposing the change of the seat is deprived of one of the bargained-for benefits of the agreement on the seat.

If the legal regime at the agreed seat of arbitration has indeed changed in unforeseen ways—for example if the courts are no longer independent, are subject to manipulation by an authoritarian government, and could be expected to nullify the results of the arbitration for political reasons—a change of the seat of the arbitration might be considered. But this approach requires the arbitral tribunal to consider which solution will least jeopardize the enforceability of the award: a change of seat, which invites one party to claim that the procedure is not in accordance with the agreement of the parties, or a refusal to change the seat, in which case the award could be set aside by the competent court at the seat of the arbitration. In resolving this dilemma, the arbitral tribunal would wish to consider

whether a politically-motivated annulment, not genuinely based upon the grounds for annulment of an award provided in the arbitration law of the seat, would be a sufficient ground to resist enforcement of the award in the courts of other New York Convention countries.

2. Summary Dismissal

a. Hypothetical

Is there a place in international commercial arbitration for requests for summary dismissal, given the fact in particular that contrary to a writ, a request for arbitration is merely an introductory document and is not supposed to state Claimant's whole case?

b. Comment

Suppose the law applicable to the merits provides that, if the contract contains an express disclaimer by both parties of any reliance upon statements made by the other party during the negotiations, then a claim of fraudulent inducement of the contract based upon those alleged representations is unsustainable. If the contractual language is clear, should the arbitral tribunal nevertheless conduct a full hearing concerning (1) the making of the alleged pre-contractual statements, (2) their truth or falsity, and (3) the aggrieved party's actual and reasonable reliance upon them?

It is submitted that there is indeed a place in international commercial arbitration for summary dismissals, not necessarily at the stage of the initial request for arbitration, but surely prior to a full hearing of the merits. It is noteworthy that the ICC Rules, for example, require the arbitral tribunal to hold a hearing to establish the facts of the case, if either party so requests. But those Rules do not strictly require the tribunal to hear witnesses.²⁶ Further, of course, the ICC Rules provide that "[t]he proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is made to the rules of procedure of a national law to be applied to the arbitration."²⁷

In the scenario presented above, certain facts, even if established, would be irrelevant to the outcome. Even if it were stipulated that the alleged statement that was made was false, and was relied upon, the claim based upon that statement must fail. The facts of the case that the tribunal must establish, under Article 20, must be those facts necessary to its decision. If the establishment of certain facts, for example, the existence of the contractual disclaimer, would trigger the application of a dispositive rule of law, and make further fact-

26. See Y. Derains & E. Schwartz, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 254 (1998):

While providing generally that the Arbitral Tribunal shall "hear" the parties, Article 20(2) does not indicate the precise nature or extent of the parties' rights in this regard. In deed, unlike some other arbitration rules, Article 20(2) does not guarantee the parties a right to a hearing for the purpose of presenting oral evidence (see with respect to this Article 20(3) *infra*). It accords a right of hearing to the "parties," but not necessarily witnesses or other persons whom the parties may wish to have heard . . . [I]t is for the Arbitral Tribunal to determine in each case what is reasonably necessary in order for it to decide upon the matters at issue, consistent with the parties' right to a fair, but relatively expeditious, procedure.

See also *id.* at 256 (noting that courts in both France and England have upheld the right of an arbitral tribunal to refuse to hear witnesses, in appropriate circumstances, without thereby violating due process rights to a party).

27. *Id.*

finding by the tribunal redundant. Thus, arbitrators should not hesitate to structure proceedings in the arbitration to permit that result.

3. *Timing of Witness Statements—Tribunal's Control Over Witness Evidence*

a. Hypothetical

There are as many arbitral procedures as there are arbitrations. When the parties have provided for a double exchange of submissions, when should the witness statements be filed? With the first set of submissions? With the second set of submissions? Just before the evidentiary hearing? Any other solution? What can parties do to encourage arbitrators to undertake more control over counsel's questioning of witnesses?

b. Comment

Some practitioners and arbitrators express a preference to receive the witness statements in the first set of submissions concerning the merits. This practice facilitates a dialogue between the witnesses of the adverse parties on disputed questions of fact, forcing the parties to declare, at an early stage, which facts will be established by which witnesses. It also allows the arbitrators to begin to weigh the evidence. This approach also permits the tribunal to impose more stringent limitations on oral testimony, as it will usually be possible for most of the opposing party's fact statements to be addressed in written rebuttal witness statements, if initial statements are required with the first submissions.

Such an approach is closely related to the question of control over questioning of witnesses at oral hearings. The trend appears to be in favor of a truncated direct examination, if any. Such an approach certainly saves time. But it assumes that there will be sufficient cross-examination to enable the tribunal to take the measure of the witness and assess his or her credibility. If the cross-examination is minimal, or is even waived completely, the tribunal may have no occasion to obtain a sense of the character of the witness, unless the tribunal is prepared with its own questions.

At a recent conference the author heard an experienced arbitrator report that he insists upon the submission of a photograph of the witness along with the witness statement. The stated purpose was to allow the arbitrator, after the oral hearing, to remember the witness when reviewing the hearing transcript or minutes. One suspects that there is another purpose: to take the measure of the witness well before the appearance in person at the hearing. Perhaps the next trend as will be discussed below, will be in favor of video-recorded witness statements.

D. NEW CYBER ARBITRATION SERVICE ESTABLISHED

One of the latest entrants in the growing sector of on-line dispute resolution services is I-CASS, the cyber arbitration service of the Inter-Pacific Bar Association. I-CASS Arbitration Rules are modeled on the UNCITRAL Arbitration Rules, and are supplements by the I-CASS System Rules, which implement the mandatory on-line features of the system, and take into account its unique technical aspects. Thus, Article 2 of the System Rules provides that, unless otherwise requested by I-CASS or the arbitral tribunal, all communications relating to an I-CASS arbitration *must* be made electronically through the I-CASS server—including electronic filing of all pleadings, documents, and testimony. Article 4 of the System Rules provides that, unless otherwise agreed by the parties or ordered by the tribunal, all hearings *shall be* conducted through multipoint video-conferencing. I-CASS functions in most respects as a conventional institutional sponsor of commercial arbitrations, acting

as appointing authority under its rules, determining challenges to arbitrator candidates based upon lack of independence, and fixing and collecting administrative fees and advances on costs. One notable exception is that the I-CASS rules provide that the arbitral tribunal, not by I-CASS, shall select the place of arbitration in case the parties have not agreed. Thus, it is assured that even though all proceedings will take place in cyberspace, arbitrations under the I-CASS Rules will be subjected to the arbitral procedural regime of a particular state.²⁸

III. Investor-State Arbitration

Several of the most interesting publicly available decisions in the past year involve private investors bringing claims against sovereign governments under the dispute settlement provisions of various bilateral investment treaties (BIT), Chapter 11 of the NAFTA, or directly under the ICSID Convention.²⁹ Many of these decisions address increasingly important preliminary matters—either challenges to jurisdiction or the rules governing procedural matters in the arbitration.

A. CONFIDENTIALITY AND *AMICUS CURIAE* PARTICIPATION

One of the institutional barriers to reporting on international commercial arbitrations has been the confidentiality that has traditionally surrounded such proceedings. In many respects those barriers remain, and many arbitrations, particularly those between private parties, remain secret. Events in the past year have, however, confirmed already-evident trends that an unquestioned duty of confidentiality does not necessarily attend all arbitrations, and particularly not those involving a government.

While the level of confidentiality inherent in arbitrations is at issue in both investor-State proceedings and in those involving private parties, the policy concerns that arise from keeping such proceedings secret are much more immediate in cases involving sovereign States. Non-governmental organizations have argued, not without force, that the public has a legitimate interest in disputes involving a government, and that such disputes should be transparent. The Governments of Canada, the United States, and Mexico confirmed that, in principle, the public should have access to the documents involved in disputes under Chapter 11 of the NAFTA:

Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.³⁰

28. The Web address of I-CASS, where its rules, fee schedules, lists of arbitrators, and other information may be found is <http://www.i-cass.org>.

29. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

30. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions § A1 (July 31, 2001), available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp> (last visited July 29, 2002). Notwithstanding the interpretation, the NAFTA Parties agreed to protect confidential business information, information “which is privileged or otherwise protected from disclosure under the Party’s domestic law,” and information that relevant arbitration rules would require withholding. *Id.* § A2. Mexico, which had effectively retained the right not to make awards public in NAFTA Annex 1137(4), retained that right. *Id.* § A3.

The NAFTA Parties' decision is an important and nearly unprecedented step in opening such proceedings to public scrutiny.

Related to the desire for knowledge of the pleadings is the desire to participate in them; thus, various self-identified interested parties have moved to participate in the arbitrations in the capacity of *amici curiae*. The two NAFTA tribunals to have considered the matter have taken openness even further by concluding that the tribunals have the authority to accept *amicus curiae* submissions.³¹ In *Methanex Corp. v. United States of America*, the tribunal reviewed the relevant literature and concluded that it had the authority to accept such submissions and that it was inclined to do so in future stages of the proceedings, although it emphasized that tribunal decisions in any given case are discretionary and can only be taken in the context of a particular case.³² In *Methanex*, the interested *amici* had not sought to intervene as full parties. In *UPS v. Government of Canada*, the Council of Canadians and Canadian Union of Postal Workers sought first to intervene as full parties and secondarily as *amici curiae* should the tribunal deny the motion to intervene. The *UPS* tribunal flatly rejected the suggestion that it had the authority to grant the proposed intervenors standing as full parties,³³ but followed the *Methanex* tribunal's reasoning that it had the authority to receive submissions from *amici*.³⁴ Ironically, NGOs have had more success in their attempts to participate in historically closed arbitration proceedings, albeit as *amici* rather than as intervenors, than in historically open court proceedings—the Council of Canadians, Greenpeace, and the Sierra Club of Canada were denied leave to intervene in the set-aside proceedings brought by Mexico in the Supreme Court of British Columbia in the *Metalclad* case and in the set-aside proceedings brought by Canada in federal court in Ottawa in *S.D. Myers*.³⁵

On the private commercial arbitration front, in a decision closely followed by arbitration practitioners around the world, the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Fin. Inc.* held that no general duty of confidentiality binds the participants in an arbitration.³⁶ The Bulgarian Foreign Trade Bank Ltd. (Bulbank) initially argued to

31. *Methanex Corp. v. United States of America*, Jan. 15, 2001 (Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amicus Curiae*"), available in 13 *WORLD TRADE & ARB. MATERIALS* at 97 (June 2001); *United Parcel Serv. of Am. Inc. v. Government of Canada*, Oct. 17, 2001 (Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*), available at http://www.dfait-maeci.gc/tna-nac/IntVent_Oct.pdf (last visited July 29, 2002) [hereinafter "*UPS Decision*"].

32. 13 *WORLD TRADE & ARB. MATERIALS* at 118–20. The *Methanex* tribunal also noted that the amount of participation by *amici* was necessarily limited; UNCITRAL Rule 25(4) requires that hearings be held *in camera* absent the consent of both parties. Without such consent, the *amici* would not be able to attend the hearing, notwithstanding their ability to make written submissions. *Id.* at 116.

33. *UPS Decision*, *supra* note 32, at 16–18.

34. *Id.* at 24. The *UPS* tribunal also indicated it would restrict such submissions to the merits of the case and likely limit their length, as well.

35. *Attorney Gen. of Canada v. S.D. Myers*, 2001 F.C.T. 317 (Feb. 2001).

36. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Fin. Inc.*, Case No. T 1881–99 (Oct. 27, 2000), available in 13 *WORLD TRADE & ARB. MATERIALS* at 147 (Feb. 2001). This is the latest decision in a series of Swedish court decisions on the issue. Initially, the Stockholm city court had held that confidentiality was a "*fundamental principle*" in arbitration and therefore an implied condition in arbitration agreements. Hans Bagnner, *Confidentiality in Arbitration*, 14 *MEALEY'S INT'L ARB. REP.* at 18, 20 (Jan. 1999). Thus, the city court had determined that any disclosure whatsoever of information gleaned during the proceedings or decisions would constitute a breach of an arbitration agreement and that nullification of the award was the best penalty. *Id.* at 21. The Swedish appeals court overturned the Stockholm city court's ruling, but on the relatively limited grounds that nullification of the award was an improper sanction and that a monetary fine commensurate with

an arbitral tribunal that the arbitration agreement should be between it and A.I. Trade Finance, Inc. (AIT) should be declared invalid because AIT had grossly breached the agreement by publicizing the jurisdictional award rendered by the tribunal. The arbitral tribunal dismissed that objection and ultimately rendered a decision on the merits of the case. Bulbank then requested that the Swedish courts either declare the award invalid or revoke it on the ground that AIT's disclosure of the tribunal's jurisdictional decision effectively nullified the arbitral agreement, thereby depriving the tribunal of any authority to render an award on the merits.

In considering the claim, the Swedish Supreme Court first canvassed the applicable documents and rules—the arbitral rules, the governing Swedish arbitration act, and the contract between the parties—to ascertain whether any contained obligations of confidentiality.³⁷ The Court determined that the only such obligation appeared in the Arbitration Rules for the U.N. Economic Commission for Europe, which governed the arbitration and which provides that “The proceedings shall be held *in camera* unless both parties request that they be held in public.”³⁸ Despite Bulbank's arguments that the rule should be interpreted to constitute a broader obligation of non-disclosure, the Court declined to read it as applying to anything other than the proceeding itself. Thus, the only basis for requiring complete confidentiality would be some general obligation inherent in the nature of arbitration itself. In analyzing that proposition, the Court distinguished between a duty of confidentiality prevailing over the parties, which it determined did not exist, and the privacy of arbitration proceedings themselves, which it determined meant that the public has no right to attend proceedings or to have access to the documents in the matter.³⁹

By rejecting the notion that arbitral proceedings implicitly require confidentiality, the *Bulbank* Court bolstered the conclusions of a growing number of courts and arbitrators.⁴⁰ Certainly any lawyer advising a client who wanted to ensure private arbitral proceedings would be well advised to include a confidentiality provision in the arbitral agreement itself.

B. JURISDICTION AND THE MERITS

As investors have filed more claims under investment treaties, States have filed more jurisdictional challenges. These challenges have met with limited success, at least to the extent that the respondent States have hoped to dispose of cases in their initial stages. Arbitral tribunals have frequently dispensed with one or more of the challenges but have joined the rest to the merits of the proceeding. The respondent States thus are obliged to arbitrate the merits of the cases, with the added complexity of maintaining extant jurisdictional objections.

In *Roy Feldman Karpa (CEMSA) v. United Mexican States*, Mexico challenged the jurisdiction of the tribunal on the following grounds: (1) that Karpa lacked standing to bring a

the loss proven would be more appropriate. *A.I. Trade Fin., Inc. v. Bulgarian Foreign Trade Bank Ltd.*, Case No. T-1092-98 (Svea Court of Appeals, March 30, 1999), available in 14 MEALEY'S INT'L ARB. REP. at A-1 (Apr. 1999).

37. The Court noted that Swedish law protected the disclosure of trade secrets a person receives in confidence in conjunction with a business relationship, but did not consider that law in its analysis of secrecy in arbitration. 13 WORLD TRADE & ARB. MATERIALS at 152.

38. *Id.* at 151.

39. *Id.* at 153.

40. See, e.g., *Esso Australia Res. Ltd v. Plowman*, 183 C.L.R. 10 (Austl. 1995); L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131 (1999); Jan Paulsson & Nigel Rawding, *The Trouble With Confidentiality*, 5 ICC INT'L COURT OF ARB. BULL. at 48 (May 1994).

case under NAFTA Chapter 11 because he was effectively a Mexican national precluded from filing a claim against his own government; (2) that the suit was effectively time-barred because the dispute between Karpa and Mexico commenced in 1990 and continued for several years thereafter; (3) that Karpa could not bring an additional claim under NAFTA Article 1102 (which requires national treatment) because he had not included such a claim in his notice of arbitration; and (4) that Karpa could not recover under Chapter 11 for measures taken by the Respondent before NAFTA's entry into force on January 1, 1994.⁴¹

The *Karpa* tribunal dismissed Mexico's argument with respect to standing. Mexico had argued that Karpa, a U.S. citizen who had lived in Mexico for the past twenty-seven years, was effectively a dual national, necessitating the application of the "dominant or effective nationality" test established by the International Court of Justice in the *Nottebohm* case.⁴² The tribunal found that under international law "citizenship rather than residence or any other geographic affiliation is the main connecting factor between a state and an individual."⁴³ Thus, Karpa was not a dual national for whom the *Nottebohm* test would be relevant. The tribunal found nothing else in Chapter 11 to indicate that a resident of a State was precluded from filing a claim against that State, and permitted the claim to go forward. Karpa also prevailed against Mexico's third objection; the tribunal found that the ICSID Additional Facility rule 48 permitted ancillary claims.⁴⁴ The tribunal joined the time-bar issue to the merits because considering it fully would require a close examination of the facts of the case.⁴⁵ Mexico prevailed on its claim that only measures taken by the Mexican government after the NAFTA's entry into force were relevant to the claim under consideration (although the tribunal noted that it would exercise jurisdiction over the post-January 1, 1994 period of a permanent course of action that commenced before January 1, 1994 but became a breach of the NAFTA after the entry into force).⁴⁶

In another case having to do with investor nationality, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Venezuela objected to ICSID's jurisdiction.⁴⁷ Venezuela had entered into a concession agreement with a Venezuelan company, Aucoven, 99 percent of whose shares were owned by a Mexican multinational, ICA, to design, construct, operate, preserve and maintain the Caracas-La Guaira Highway System.⁴⁸ Subsequently, ICA transferred, with the approval of Venezuela's Ministry of Transportation, 75 percent of the shares to a U.S. subsidiary.⁴⁹ The concession agreement provided for local arbitration in the event of a dispute, but contained a superseding clause providing for ICSID arbitration to be triggered if a majority of Aucoven's shares were transferred to a national of an ICSID Convention signatory.⁵⁰ The United States, but not Mexico, is a signatory to the Conven-

41. *Karpa v. United Mexican States*, 40 I.L.M. 615 (May 2001).

42. *Id.* at 619; see also *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. REP. 4.

43. *Id.* at 619.

44. *Id.* at 624.

45. *Id.* at 623.

46. *Id.* at 625.

47. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Sept. 27, 2001 (Decision on Jurisdiction), available at <http://www.worldbank.org/icsid/cases/awards.htm> (last visited July 29, 2002).

48. *Id.* at 10-11.

49. *Id.* at 12-16.

50. *Id.* at 30-32. The ICSID Convention permits a national of one contracting State to be deemed a "National of another Contracting State" so long as it is under foreign control of an entity in that State. ICSID Convention, art. 25(2)(b). This provision effectively circumvents the international law norm that a State may not be deemed to violate international law vis-à-vis its own national.

tion. Venezuela objected to Aucoven's invocation of dispute settlement under the ICSID Convention, primarily on the ground that a Mexican corporation, ICA, effectively controlled the U.S. subsidiary.⁵¹

The tribunal dismissed Venezuela's arguments, first determining that the transfer of the Aucoven shares to the U.S. corporation was sufficient to trigger the superseding provision in the concession agreement.⁵² The tribunal then went on to consider the analysis appropriate for determining whether Aucoven was truly under "foreign control" by a U.S. corporation—in this case, whether the place of incorporation, as advocated by Aucoven, determined control, or whether nationality of the shareholders of the investor and actual control of the corporation, as advocated by Venezuela, determined control.⁵³ Noting that the drafters of the ICSID Convention had deliberately omitted to define foreign control in order to give contracting parties maximum flexibility in negotiating their agreements, the tribunal determined that it would examine the contract to determine if the parties had defined foreign control on the basis of reasonable criteria.⁵⁴ Because the contract had premised ICSID jurisdiction on the transfer of Aucoven shares, the tribunal determined that the parties had defined foreign control on the basis of direct share ownership, not additional criteria, such as nationality of the directors or effective or ultimate control over Aucoven.⁵⁵ The tribunal thus determined that it had jurisdiction over the matter.⁵⁶

Several recent ICSID cases have explored the relationship between dispute resolution clauses found in BITs and forum selection clauses found in specific contracts. LANCO International, Inc., a U.S. company with a minority investment in an Argentine company granted a concession contract by Government of Argentina, sought arbitration under the Argentine-U.S. BIT for breach of the contract.⁵⁷ Argentina challenged the tribunal's jurisdiction on the grounds (1) that LANCO was merely a minority shareholder in an Argentine company, which was itself the only grantee of the concession and the only proper party to make claim under the agreement, and (2) that the concession agreement contained a forum selection clause requiring disputes to be heard before the contentious administrative tribunals of Buenos Aires.⁵⁸ The tribunal determined that because LANCO had signed the contract, was a party to it in its own name, and was jointly and severally liable for all contractual obligations, it was an investor for purposes of the BIT.⁵⁹ Of more complexity was the interplay between the BIT and the apparent forum selection clause in the contract itself. The tribunal held that the contractual provision referring disputes to the contentious administrative tribunal of Buenos Aires could not be viewed as a forum selection clause because the jurisdiction of those tribunals was not subject to agreement or waiver—i.e., those tribunals were the only national forum to which a dispute under the concession agreement could be submitted.⁶⁰ Insofar as international parties were concerned, the con-

51. *Id.* at 22–23.

52. *Id.* at 33–36.

53. *Id.* at 42–43.

54. *Id.* at 37–39.

55. *Id.* at 43–44. The tribunal also considered but dismissed suggestions that the U.S. Corporation was merely a shell and that Aucoven had intentionally misled Venezuela about the ramifications of the share transfer. *Id.* at 45–47.

56. *Id.* at 48.

57. LANCO International Inc. v. Argentine Republic, Dec. 8, 1998 (Preliminary Decision on Jurisdiction of the Arbitral Tribunal), 40 I.L.M. 457 (Mar. 2001).

58. *Id.* at 460.

59. *Id.* at 461–63.

tract did not specify a forum for dispute resolution, and therefore the U.S.-Argentine BIT applied.⁶¹

A similar issue arose under the France-Argentine BIT in *Compania de Aguas Del Aconquija S.A. v. Argentine Republic*, though that tribunal resolved the issue somewhat differently.⁶² Again a threshold issue before the tribunal was the interaction between the forum-selection provision of the contract (which provided for disputes to be presented to the contentious administrative tribunals of Tucuman, the province in which the events occurred) and the applicable BIT.⁶³ While acknowledging the *LANCO* decision, the *Compania de Aguas* tribunal based its decision on the fact that the claims brought by the claimant alleged violations of provisions of the BIT, not the concession agreement, which could not be heard by the contentious administrative tribunals.⁶⁴ The tribunal thus determined that it had jurisdiction under the BIT.⁶⁵ After asserting jurisdiction, however, the tribunal held all of the alleged violations of the BIT were intertwined with performance or non-performance under the concession agreement. Because the parties to the concession agreement had contractually agreed that those issues would be heard by the contentious administrative tribunals, the tribunal would not find any violations of the BIT unless and until the claimants had asserted and been denied their rights in that venue.⁶⁶ In *dicta*, the tribunal emphasized that because the parties had contractually given responsibility for determining violations of the concession agreement to the contentious administrative tribunals, pursuing that remedy would not have invoked the “fork in the road” provision of the BIT (which requires claimants to choose *ex ante* whether to pursue their claim in local courts or to proceed under the BIT), nor would it have effectively read an “exhaustion of local remedies” requirement into the contract.⁶⁷

A related issue appeared in *Maffezini v. Spain*.⁶⁸ In *Maffezini*, brought under the Spain-Argentine BIT, the Kingdom of Spain argued that Article X of the BIT, which requires that a claimant first seek redress in a local court before placing a claim before an international tribunal, precluded jurisdiction because *Maffezini* had failed to put his case before the local Spanish court in the first instance. The *Maffezini* tribunal noted that while this Article fell short of requiring the exhaustion of local remedies, the parties to the BIT might well have desired local courts “[to be] given an opportunity to vindicate the international obligations guaranteed in the BIT.”⁶⁹ Thus, because the claimant had failed to seek relief first in local courts, his claim would have failed except for the most-favored-nation (MFN) clause in the treaty. The tribunal found that because the Chile-Spain BIT did not contain an analogous provision that would have required a Chilean investor to first seek relief in Spanish courts, the Chilean investor would be treated more favorably than an Argentine investor.⁷⁰ Re-

60. *Id.* at 466.

61. *Id.* at 467–69.

62. ICSID Case No. ARB/97/3, Nov. 21, 2000 (Award), 40 I.L.M. 426 (Mar. 2001).

63. *Id.* at 428.

64. *Id.* at 438–39.

65. *Id.* at 439.

66. *Id.* at 443–44.

67. *Id.* at 444.

68. ICSID Case No. ARB/97/7, Jan. 25, 2000, (Decision of the Tribunal on Objections to Jurisdiction), 16 FOREIGN INV. L.J. 212 (Spring 2001).

69. *Id.* at 225.

70. *Id.* at 235–36.

jecting Spain's argument that the MFN clause should apply only to substantive, rather than procedural matters, the *Maffezini* tribunal determined that dispute settlement provisions are "inextricably related to the protection of foreign investors" and therefore should be extended to Argentine investors.⁷¹ The tribunal cabined its holding, however, stating that an MFN clause could not be invoked to override a treaty provision in which Parties had conditioned consent to arbitration on a fundamental rule of international law, such as the exhaustion of local remedies; in which they had specifically agreed to a "fork-in-the road" approach to dispute settlement; or in which they had selected a highly institutionalized system of arbitration.⁷² On the merits, in a decision with potential ramifications for cases involving national environmental protection legislation or procedures, the tribunal upheld Spain's strict insistence that *Maffezini* comply with Spain and EU environmental legislation,⁷³ although it decided in *Maffezini*'s favor on another claim.⁷⁴

Two other decisions in NAFTA cases came down in 2001—one on jurisdiction, the other on the merits. In *The Loewen Group Inc. v. United States*, the tribunal rejected outright one of the U.S. objections to jurisdiction, but joined the rest to the merits of the case. The tribunal dismissed the United States' argument that judicial acts in litigation between private parties were not "measures" regulated by NAFTA Chapter 11.⁷⁵ While noting that two of the other jurisdictional objections were not strongly pressed, the tribunal joined them to the merits, and further noted that two additional jurisdictional objections were more properly considered at the merits phase.⁷⁶ The hearing took place in October 2001, and a decision on the merits is expected in 2002.

In *Pope & Talbot v. Canada*, the tribunal issued its second merits decision.⁷⁷ While the first had been adverse to the investor,⁷⁸ the second determined that Canada had violated NAFTA by failing to accord the investment "fair and equitable treatment" as required by NAFTA Article 1105. The *Pope* tribunal interpreted Article 1105 to require that parties accord ordinary standards of fairness to investments and investors of another party, thereby rejecting the Government of Canada's argument that Article 1105 was designed to protect only against exceptionally egregious conduct.⁷⁹ This decision preceded the interpretation issued by the NAFTA Parties in July 2001 that limited the scope of Article 1105.⁸⁰ The *Pope* tribunal then determined that the Government of Canada had failed to act with administrative fairness in one respect.⁸¹

71. *Id.* at 231, 235–36.

72. *Id.* at 234–35.

73. *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Nov. 13, 2000 (Award), 16 FOREIGN INV. L.J. 248, 268–70 (Spring 2001).

74. *Id.* at 274.

75. *The Loewen Group, Inc. v. United States*, ICSID Case No. Arb(AF)/98/3, Jan. 5, 2001 (Decision On Hearing of Respondent's Objection To Competence and Jurisdiction) at 16.

76. *Id.* at 21–22.

77. *Pope & Talbot Inc. v. Canada*, April 10, 2001 (Award on the Merits of Phase 2), available at http://www.dfait-maeci.gc.ca/tna-nac/Award_Merits-e.pdf (last visited July 29, 2002).

78. *Pope & Talbot Inc. v. Canada*, June 26, 2000 (Interim Award), available at <http://www.dfait-maeci.gc.ca/tna-nac/pubdoc7.pdf> (last visited July 29, 2002).

79. *Id.* at 46–56.

80. See *infra* note 89 and accompanying text.

81. *Pope & Talbot Inc. v. Canada* (Award on Phase 2) at 87–88.

C. SET-ASIDE PROCEEDINGS IN NAFTA CHAPTER 11 CASES

The Government of Mexico requested, with partial success, that the Supreme Court of British Columbia (the place of arbitration) set aside the arbitral tribunal's award in *Metalclad Corp., Inc. v. United Mexican States*.⁸² The first task of the Court was to decide which B.C. law governed the proceedings, which would dictate the standard of review to be applied.⁸³ The Court determined that the International Commercial Arbitration Act, which permits a court to set aside a tribunal award only on very limited grounds, applied, and reviewed the tribunal award accordingly.⁸⁴ The Court set aside the portion of the award based on Article 1105 of the NAFTA, which requires that each NAFTA Party accord the investors of another NAFTA Party "treatment in accordance with international law, including fair and equitable treatment and full protection and security," because the *Metalclad* tribunal had found a "transparency" requirement in Article 1105 by broadly interpreting the sweep of the provision.⁸⁵ The B.C. Supreme Court found that Article 1105's obligations were restricted to those imposed by customary international law, and could find no obligation of "transparency" within that rubric.⁸⁶ The Court left intact that portion of the award that was based on Article 1110, which prohibits unlawful expropriation.⁸⁷ While both parties initially appealed the decision, they later came to terms on the amount of compensation due under the remainder of the award and withdrew their challenges to the B.C. Supreme Court's decision.⁸⁸

The B.C. Supreme Court decision in *Metalclad* preceded by two months the Notice of Interpretation issued by the Free Trade Commission, composed of the trade ministers of the NAFTA State Parties, which confirmed that it had been the parties' understanding that Article 1105 be limited to those protections found in customary international law.⁸⁹ Some have argued, and will continue to argue, this the interpretation is really an amendment in the guise of a clarification. Nevertheless, the State Parties reserved the right to issues interpretations under NAFTA Article 1131.⁹⁰ Given the divergence between the interpretation of Article 1105 in the *Pope & Talbot* award and in the British Columbia Supreme Court *Metalclad* decision, a "clarification" may have been warranted to dispel any confusion and may particularly have been welcomed by those tribunals in front of whom claims under Article 1105 remain.

82. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Aug. 30, 2000 (Award), 16 FOREIGN INV. L.J. 168 (Spring 2001).

83. *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664 at 14–21.

84. *Id.* at 20–21.

85. *Id.* at 25–28.

86. *Id.*

87. *Id.* at 31–36.

88. William S. Dodge, Note, 95 AM. J. INT'L L. 910, 915 (Oct. 2001). Professor Dodge also presents an interesting analysis of the set-aside proceedings and suggests (as he has before) establishing an appellate body to review NAFTA Chapter 11 decisions. *Id.* at 915–19.

89. "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party." Notes of Interpretation of Certain Chapter 11 Provisions § B(1), July 31 2001, available at <http://www.dfait-macci.gc.ca/tma-nac/NAFTA-Interpr-e.asp> (last visited July 29, 2002). "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." *Id.* at § B(2).

90. "An interpretation by the Commission of a provision of this Agreement shall be binding on a tribunal established under this section." NAFTA art. 1131(2).

Canada has also challenged the tribunal decision in *S.D. Myers v. Canada* on the grounds that the tribunal had exceeded its jurisdiction by resolving matters not properly before it, that it erred in extending the benefits of Chapter 11 to a company that was not an investor in the allegedly injured company, and that it misapplied Article 1102.⁹¹ The case is still pending.

Given the trend towards more open access to pleadings and decisions, and the continued demand for great access to proceedings generally, a richer and more available body of arbitral law will likely continue to develop.

91. Attorney Gen. of Canada v. S.D. Myers, Inc., 2001 F.C.T. 317.

