

International Arbitration

STEVEN SMITH, IVANA CINGEL, BENJAMIN JONES, KEVIN RUBINO, QAIS GHAFARY,
AND BRIAN CHANG*

This article surveys developments in international commercial arbitration during 2012.

I. Introduction

The first section of this survey examines significant decisions from U.S. courts in 2012 of interest to practitioners in the field of international commercial arbitration. The United States Supreme Court issued two per curiam decisions reinforcing the Federal Arbitration Act's preemption of state law and one decision interpreting a statutory "right to sue" provision to permit arbitration. There were also several noteworthy appellate decisions interpreting the Supreme Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and 2011 decision in *AT&T Mobility LLC v. Concepcion*; the jurisdiction of arbitral tribunals under investment treaties; the availability of discovery in aid of arbitration; the status of "manifest disregard of the law" as a ground for vacatur of arbitral awards; and the assignment and enforcement of arbitration awards against foreign sovereigns.

The second section of this survey examines significant arbitration decisions from foreign courts. In one noteworthy development, the High Court of Singapore upheld arbitration awards rendered and sought to be enforced in Singapore, rejecting the argument that the award debtors were authorized under the Singapore International Arbitration Act to challenge the awards on jurisdictional grounds for the first time in enforcement proceedings long after the time limits for setting them aside had expired. In another noteworthy development, the Supreme Court of India reversed a controversial decision that permitted Indian courts to review and set aside foreign arbitral awards regardless of whether the arbitration was seated in India or whether enforcement of the award was sought in India.

The third section of this survey looks at major developments from 2012 in the field of investment treaty arbitration. Important jurisdictional decisions addressed the denial of substantive investment protections under the Dominican Republic—Central America

* Steven Smith is a partner with Jones Day's Global Dispute Practice, and Benjamin Jones is an associate with the firm. Ivana Cingel is a counsel with O'Melveny & Myers LLP, and Kevin Rubino, Qais Ghafary, and Brian Chang are associates with the firm.

Free Trade Agreement (CAFTA) to an enterprise of a contracting party, and the application of most-favored nation clauses to the dispute resolution provisions of an investment treaty. In awards on the merits, tribunals addressed the minimum standard of treatment required under CAFTA, the effect of a “minor breach” of the minimum standard of treatment under an investment treaty, and in another case issued the largest known International Centre for Settlement of Investment Disputes (ICSID) award under a bilateral investment treaty, over a strong dissent. One tribunal also addressed the effect of an investor’s waiver of its contractual right to damages on its ability to recover for the host state’s purported breach of an investment treaty obligation.

II. Arbitration Developments in U.S. Courts Concerning the Interpretation and Enforcement of Arbitration Clauses

A. FAA PREEMPTION OF STATE LAW

Reaffirming well-established precedent, the United States Supreme Court held in *Marmet Health Care Center v. Brown* that the Federal Arbitration Act (FAA) preempts state laws prohibiting arbitration of particular types of claims.¹ The Court reversed a decision of the West Virginia Supreme Court of Appeals holding that pre-dispute arbitration clauses in nursing home admission agreements that apply to claims for personal injury or wrongful death are unenforceable as a matter of state public policy. The West Virginia Supreme Court of Appeals had found that Congress did not intend for the FAA to apply to these types of claims and preempt state public policy and that the United States Supreme Court “[w]ith tendentious reasoning . . . has stretched the application of the FAA from being a *procedural* statutory scheme effective only in the federal courts, to being a *substantive* law that preempts state law in both the federal *and* state courts.”² The Supreme Court rejected this view, holding that the “West Virginia court’s interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court,” and remanded the case for consideration of whether the arbitration clause is unenforceable on non-arbitration-specific grounds.³

In *Nitro-Lift Technologies, L.L.C. v. Howard*, the Supreme Court reversed a decision of the Oklahoma Supreme Court that declared a noncompetition clause in an employment contract containing an arbitration clause void and unenforceable under Oklahoma public policy.⁴ The Oklahoma Supreme Court had rejected the argument that pursuant to the FAA and Supreme Court jurisprudence, any dispute as to the validity of the underlying contract was a question for the arbitrator, and held that its decision rested on adequate and independent state grounds.⁵ The Supreme Court held that the Oklahoma Supreme Court’s reasoning had “ignored a basic tenet of the [FAA’s] substantive arbitration law”⁶ and observed that “it is a mainstay of the [FAA’s] substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself,

1. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 1203 (2012).

2. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 278, 293 (W. Va. 2011).

3. *Marmet*, 132 S. Ct. at 1203-04.

4. *Nitro-Lift Tech., L.L.C. v. Howard*, 568 U.S. ___, 133 S. Ct. 500, 501 (2012) (per curium).

5. *Id.*

6. *Id.*

are to be resolved ‘by the arbitrator in the first instance, not by a federal or state court.’”⁷ Citing *Marmet*, the Supreme Court concluded that “it is for the arbitrator to determine in the first instance whether the covenants not to compete are valid as a matter of applicable state law.”⁸

B. ARBITRATION OF STATUTORY CLAIMS

In a decision reinforcing the liberal federal policy favoring arbitration agreements, the United States Supreme Court held in *CompuCredit Corp. v. Greenwood* that “right to sue” language contained in the Credit Repair Organizations Act (CROA)⁹ did not preclude the parties to a consumer financial contract from choosing to arbitrate rather than litigate their CROA claims.¹⁰ CROA mandates that credit repair organizations make certain disclosures prior to executing consumer contracts, including the disclosure that the consumers “have a right to sue a credit repair organization that violates [CROA].”¹¹ CROA also contains a non-waiver provision stating that “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.”¹²

The Ninth Circuit held that the “right to sue” language created a right to initial judicial enforcement, and given CROA’s non-waiver provision, consumers could not waive via an arbitration agreement.¹³ The Supreme Court reversed, holding that CROA’s disclosure provision only required consumers to receive the disclosure set forth in the statute and did not prevent arbitration.¹⁴ The Court observed that it is “utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit,” and concluded that the parties to a credit repair contract were free to specify the details of the right of enforcement, provided that CROA’s guarantee of the consumer’s right to impose liability upon a credit repair organization was preserved.¹⁵ The Court observed that arbitration agreements were already in wide use in consumer financial contracts at the time of CROA’s enactment and contrasted CROA against several statutes that explicitly restricted the arbitration of federal rights created by the statute.¹⁶

C. DECISIONS ON CLASS ARBITRATION INTERPRETING *STOLT-NIELSEN*

Several recent circuit court decisions have interpreted the Supreme Court’s holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* that a party cannot be forced “to submit to class arbitration unless there is a contractual basis for concluding that the party

7. *Id.* at 503 (quoting *Preston v. Ferrer*, 552 U.S. 346, 349 (2008)).

8. *Id.* at 504.

9. Credit Repair Organizations Act, 15 U.S.C. § 1679-1679j (2006).

10. *CompuCredit Corp. v. Greenwood*, 565 U.S. ___, 132 S. Ct. 665, 673 (2012); see also Ekaterina Apostolova & Benjamin Jones, *CompuCredit: Pro-Arbitration Policy Continued*, [Feb. 2012] 27 Mealey’s Int’l Arb. Rep. No. 2, at 14 (Feb. 28, 2012).

11. 15 U.S.C. § 1679c(a) (2006).

12. *Id.* § 1679f(a).

13. *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1211 (9th Cir. 2010).

14. *CompuCredit Corp.*, 132 S. Ct. at 670.

15. *Id.* at 670-71.

16. *Id.* at 672-73.

agreed to do so.”¹⁷ The First, Second, and Third Circuits relied on the Supreme Court’s acknowledgment in *Stolt-Nielsen* that parties could “implicitly authorize” class arbitration, and used very similar reasoning to affirm decisions that allowed class arbitrations based on clauses that did not expressly mention class arbitration.¹⁸ Each circuit’s decision stressed that, unlike *Stolt-Nielsen* where the parties had “stipulated” that they had not reached agreement contractually permitting class arbitration, the parties before them disagreed about whether they had reached agreement on the permissibility of class arbitration.¹⁹ All three circuits concluded that where the parties dispute whether they had agreed on class arbitration, that dispute is for the arbitrator to decide as a matter of traditional contract interpretation.²⁰ The Third Circuit also reasoned that *Stolt-Nielsen* “did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement that incants ‘class arbitration’ or otherwise expressly provides for aggregate procedures.”²¹

In a recent decision addressing the same issue, the Fifth Circuit agreed with the First, Second, and Third Circuits that the question of whether the parties had agreed to class arbitration was for the arbitrator to decide, but held that the arbitrator had exceeded its authority under *Stolt-Nielsen* by determining that the parties agreed to class arbitration in the absence of any reference to class arbitration in their agreement.²² The agreement at issue called for arbitration of “any dispute” between the parties and granted the arbitrator the power to grant “any remedy” without mentioning class arbitration.²³ The Fifth Circuit concluded that such a clause “could support a finding that the parties did not preclude class arbitration, but under *Stolt-Nielsen* this is not enough.”²⁴

D. DECISIONS ON CLASS ARBITRATION INTERPRETING *AT&T MOBILITY LLC*

In 2011, the Supreme Court issued a landmark decision in *AT&T Mobility LLC v. Concepcion*, holding that the FAA preempted a California state law rule that class action waivers in certain consumer arbitration agreements are unconscionable, and established that such waivers are enforceable even if they would be unconscionable under the applicable state law.²⁵ In finding the California rule preempted by the FAA, the Supreme Court observed that section two of the FAA allows arbitration provisions to be “declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract,’” including unconscionability, but not by “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”²⁶ Several recent circuit court decisions have addressed the arbitrability of federal and state statutory claims in light of *Concepcion*.

17. *Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 559 U.S. ___, 130 S. Ct. 1758, 1775 (2010).

18. *Fantastic Sams Franchise Corp. v. FSRO Ass’n Ltd.*, 683 F.3d 18, 25-26 (1st Cir. 2012); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 120 (2d Cir. 2011); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 225 (3d Cir. 2012).

19. *Fantastic Sams Franchise Corp.*, 683 F.3d at 23; *Jock*, 646 F.3d at 121, 124; *Sutter*, 675 F.3d at 224.

20. *Fantastic Sams Franchise Corp.*, 683 F.3d at 22-23; *Jock*, 646 F.3d at 121, 125-27; *Sutter*, 675 F.3d at 222-24.

21. *Sutter*, 675 F.3d at 222.

22. *Reed v. Florida Metro. Univ., Inc.*, 681 F.3d 630, 642 (5th Cir. 2012).

23. *Id.* at 642-43.

24. *Id.* at 644.

25. *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1756 (2011).

26. *Id.* at 1746-47 (citing 9 U.S.C. § 2 (2006)).

In *In re American Express Merchants' Litigation*, the Second Circuit held that an arbitration clause in a merchant card acceptance agreement that would force merchants to individually arbitrate their antitrust claims against American Express was unenforceable where it would have the practical effect of precluding plaintiffs from enforcing their statutory rights.²⁷ The Second Circuit relied heavily on expert testimony that the costs of expert analysis needed to support plaintiffs' antitrust claims would far exceed the plaintiffs' potential individual recovery, effectively preventing them from vindicating their rights in individual arbitrations.²⁸ The court observed it could not order the parties to submit to class arbitration in light of *Concepcion*, and concluded that the arbitration clause was unenforceable altogether.²⁹ The Second Circuit denied an en banc rehearing of its decision, despite vigorous dissents from three Second Circuit judges.³⁰ The ruling stands in contrast to the Ninth Circuit ruling in *Coneff v. AT&T Corp.*, where the court enforced a class action waiver even though the waiver, as a practical matter, precluded the individual plaintiff from vindicating her federal statutory rights.³¹

With respect to state law claims, the Ninth Circuit held in *Kilgore v. KeyBank, N.A.* that, in light of *Concepcion*, the FAA preempted a California state law prohibiting arbitration of claims for broad public injunctive relief.³² The court held that the California law "did not survive *Concepcion*" because it "prohibits outright the arbitration of a particular type of claim—claims for broad public injunctive relief."³³ The Ninth Circuit then rejected the argument that the arbitration clause at issue was procedurally unconscionable, observing that the clause provided "a 60-day opt-out provision and a conspicuous and comprehensive explanation of the arbitration agreement."³⁴ The Ninth Circuit has granted a petition for en banc rehearing in *Kilgore*.

III. Availability of Discovery in Aid of Arbitration — 28 U.S.C. § 1782

In *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, the Eleventh Circuit declined to follow the holdings of the Second and Fifth Circuits that 28 U.S.C. § 1782, which authorizes district courts to compel discovery "for use in a proceeding in a foreign or international tribunal," does not permit discovery for use in a foreign, private commercial arbitration.³⁵ The Eleventh Circuit held that the tribunal in an international commercial arbitration pending in Ecuador before the Center for Arbitration and Conciliation of the Guayaquil Chamber of Commerce constituted a "foreign tribunal" for purposes of section 1782.³⁶ After observing that "[t]he arbitral panel acts as a first-instance decisionmaker; it

27. *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 219 (11th Cir. 2012).

28. *Id.* at 217-18.

29. *Id.* at 219.

30. *In re Am. Express Merchs.' Litig.*, 681 F.3d 139, 139 (2d Cir. 2012).

31. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012).

32. *Kilgore v. KeyBank Nat'l Ass'n*, 673 F.3d 947, 960 (9th Cir. 2012).

33. *Id.*

34. *Id.* at 964.

35. See *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (refusing to grant discovery assistance to an ICC arbitration seated in Mexico); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (refusing to grant assistance under 28 U.S.C. § 1782 to an international commercial arbitration pending before the Arbitration Institute of the Stockholm Chamber of Commerce).

36. *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987, 990 (11th Cir. 2012).

permits the gathering and submission of evidence; it resolves the dispute; it issues a binding order; and its order is subject to judicial review,” the court ruled that section 1782 “requires nothing more.”³⁷ Similarly, in *In re Mesa Power Group, LLC*, a federal district court in the eleventh circuit applied factors articulated by *Consortio*, and concluded that a NAFTA arbitration tribunal constituted a foreign or international tribunal,³⁸ and authorized a U.S.-based investor to take discovery against a third-party company for use in a NAFTA arbitration against the Government of Canada.³⁹

IV. Recognition and Enforcement of Arbitral Awards

A. STATUS OF “MANIFEST DISREGARD OF THE LAW” FOLLOWING *HALL STREET*

Another open question involves whether judicially created grounds not expressly set forth in the FAA—including manifest disregard of the law and complete irrationality—continue to be valid grounds for vacatur of arbitral awards following the Supreme Court’s 2008 decision in *Hall Street Associates v. Mattel, Inc.*⁴⁰ The answer will likely depend on whether “manifest disregard” and “complete irrationality” are deemed extra-statutory grounds for vacatur—which would call their viability into doubt—or whether they instead refer collectively to the grounds set forth in section ten of the FAA, or are merely shorthand for, or a gloss on, FAA sections 10(a)(3)-(4), which authorize vacatur when the arbitrators are “guilty of misconduct” or “exceed[] their powers.” The Supreme Court has declined to resolve this issue, and circuit courts remain divided.

The Second Circuit previously affirmed the continued viability of “manifest disregard” on the statutory “shorthand” theory, indicating that this standard is a “judicial gloss on the specific grounds for vacatur enumerated in section ten of the FAA.”⁴¹ But that decision was reversed and remanded on unrelated grounds by the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*⁴² The Second Circuit resolved the question in *Goldman Sachs Execution & Clearing L.P. v. Official Unsecured Creditors’ Committee of Bayou Group, L.P.*, finding that even after *Hall Street*, manifest disregard remains a valid basis for vacatur.⁴³ Nevertheless, the court emphasized that the manifest disregard standard is “highly deferential” to arbitrators and affirmed the district court’s refusal to overturn the arbitral award.⁴⁴

37. *Id.*

38. *In re Mesa Power Grp., LLC*, No. 11-24335, 2012 WL 2886827, at *4 (S.D. Fla. July 13, 2012).

39. *Id.* at *8.

40. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

41. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), *rev’d*, 130 S. Ct. 1758.

42. *Stolt-Nielsen*, 130 S. Ct. at 1777.

43. *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors’ Comm. of Bayou Grp., L.L.C.*, Nos. 10-5049-cv (Lead), 11-2446-cv (XAP), 2012 WL 2548927, at *1 (2d Cir. July 3, 2012); *see also* T.Co Metals, L.L.C. v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339-40 (2d Cir. 2010) (acknowledging *Stolt-Nielsen’s* findings on manifest disregard and noting that *Hall Street* had placed the standard into some doubt, but leaving the issue unresolved by concluding that the manifest disregard standard had not been met).

44. *Goldman Sachs*, 2012 WL 2548927, at *1, *5.

This year, the Fourth Circuit joined the Ninth⁴⁵ and Sixth⁴⁶ Circuits in finding that “manifest disregard” remains a viable ground for vacatur.⁴⁷ The Tenth Circuit⁴⁸ found that the standard had not been satisfied in various cases without squarely deciding its continued viability. In contrast, the Fifth,⁴⁹ Eighth⁵⁰ and Eleventh⁵¹ Circuits have held that manifest disregard is no longer a viable ground. The First Circuit stated in dicta in one opinion that *Hall Street* abolished “manifest disregard,” but in a subsequent opinion vacated an award based on the manifest disregard standard without discussing *Hall Street*.⁵² The Third Circuit has declined to reach the issue.⁵³

B. ENFORCEMENT OF ARBITRATION AWARDS AGAINST FOREIGN SOVEREIGNS

The Second Circuit issued two recent decisions that may have significant implications for award creditors seeking to enforce arbitral awards against foreign sovereigns. In *Figueirido Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, the Second Circuit, in a controversial decision, blocked enforcement of an international arbitral award on forum non conveniens (FNC) grounds.⁵⁴ The Second Circuit held that Peru’s cap statute, which limits the amount of money a Peruvian governmental entity may pay annually to satisfy a judgment, was a “significant public factor” that “tips the FNC balance decisively against the exercise of jurisdiction in the United States.”⁵⁵ While the Second Circuit acknowledged that enforcement of arbitral awards “is normally a favored policy of the United States and is specifically contemplated by the Panama Convention, that general policy must give way to the significant public factor of Peru’s cap statute.”⁵⁶

In *EM Ltd. v. Republic of Argentina*, the Second Circuit affirmed an order “compelling two non-party banks to comply with subpoenas duces tecum seeking information” regarding Argentina’s assets abroad.⁵⁷ Argentina argued that the discovery order violated the Foreign Sovereign Immunities Act (FSIA) by compelling disclosure of Argentinian assets abroad.⁵⁸ The Second Circuit rejected this argument, holding that the discovery order

45. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1283 (9th Cir. 2009); *see also Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414 & n.10 (9th Cir. 2011); *Lagstein v. Certain Underwriters at Lloyd’s*, 607 F.3d 634, 641 & n.5 (9th Cir. 2010).

46. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 418 (6th Cir. 2008).

47. *Wachovia Sec., L.L.C. v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012).

48. *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App’x 612, 620 (10th Cir. 2011); *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344-45 & n.2 (10th Cir. 2009).

49. *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009).

50. *Air Line Pilots Ass’n Int’l v. Trans States Airlines, L.L.C.*, 638 F.3d 572, 578 (8th Cir. 2011); *Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010).

51. *White Springs Agric. Chems., Inc. v. Glawson Invs. Corp.*, 660 F.3d 1277, 1280 (11th Cir. 2011); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010).

52. *Compare Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 & n.3 (1st Cir. 2008), *with Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 79 (1st Cir. 2008), *and Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 20 (1st Cir. 2010).

53. *See, e.g., Paul Green Sch. of Rock Music Franchising, L.L.C. v. Smith*, 389 F. App’x 172, 175-77 (3d Cir. 2010).

54. *Figueirido Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 393 (2d Cir. 2011).

55. *Id.* at 392.

56. *Id.*

57. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012).

58. *Id.* at 205.

did not infringe sovereign immunity where it did not involve the attachment of sovereign property and was directed at third-party banks rather than Argentina itself.⁵⁹ The Second Circuit expressly disagreed with the Seventh Circuit's prior decision in *Rubin v. Islamic Republic of Iran*, which held "that the FSIA requires a judgment creditor to identify specific non-immune assets before it is entitled" to discovery regarding those assets.⁶⁰

In *Blue Ridge Investments, LLC v. Republic of Argentina*, the Southern District of New York addressed the question of assignability of ICSID awards and the time period within which the assignee must enforce the award. The court held that "nothing in the ICSID Convention, in Congress's legislation implementing ICSID, or in New York law prevents an assignee from seeking recognition and enforcement of an ICSID Convention award."⁶¹ The court rejected Argentina's argument that the assignee's petition was "time-barred under New York's one-year statute of limitations for lawsuits seeking confirmation of an arbitration award,"⁶² finding that, "[b]ecause ICSID awards are to be treated as final judgments of a state court—rather than as arbitration awards—the most analogous state statute of limitations" was the 20-year statute of limitations for the enforcement of out-of-state money judgments.⁶³ The assignee's enforcement petition was thus timely filed.⁶⁴

C. PROPER FORUM FOR ARBITRABILITY DETERMINATIONS

Under well-established precedent, the intent of the contracting parties controls whether the question of "arbitrability" is properly addressed by a court or an arbitrator. In 2012, two circuit courts considered this standard and arrived at divergent conclusions.

Applying the rule that "arbitrability" is a question for the courts to decide absent "clear and unmistakable" evidence that the contracting parties had "agreed to arbitrate arbitrability," the D.C. Circuit in *Argentina v. BG Group* held that a tribunal established under the Argentina-United Kingdom Bilateral Investment Treaty (BIT) exceeded its authority by finding the parties' dispute arbitrable and thus vacated its award.⁶⁵ Because the investor invoked the BIT's arbitration clause without first seeking recourse in Argentine courts for the eighteen-month period required by the BIT, the D.C. Circuit held that the arbitral tribunal's authority to decide questions of "arbitrability" enshrined in the UNCITRAL Arbitration Rules governing the arbitration never "triggered."⁶⁶ The court found the BIT provision mandating recourse to Argentine courts explicit and observed that the question of "arbitrability," namely whether a British investor could seek arbitration without first turning to Argentinian courts, was one "the parties would likely have expected a court to

59. *Id.*

60. *Id.* at 209; see also *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011).

61. *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, No. 10 Civ. 153(PGG), 2012 WL 4714819, at *11 (S.D.N.Y. Sept. 30, 2012).

62. *Id.* at *15.

63. *Id.* at *17-18.

64. *Id.*

65. *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1365-66, 1369-70 (D.C. Cir. 2012) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

66. *Id.* at 1366, 1370-71 (citing *Agreement for the Promotion and Protection of Investments, Arg.-U.K.*, Dec. 11, 1990, 1765 U.N.T.S. 33, art. 8(1)-(2)).

decide.”⁶⁷ The investor has filed a petition for a writ of certiorari asking the United States Supreme Court to decide whether a court or an arbitrator should determine whether a precondition to arbitration has been satisfied.⁶⁸ Several amici, including a group of prominent professors and practitioners, have supported the petition.⁶⁹

Meanwhile, in *Schneider v. Kingdom of Thailand*, the Second Circuit held that the question of arbitrability turns on whether “there was clear and unmistakable evidence of the parties’ intent to commit that question to arbitration,” not, as the lower court had indicated, “on whether that question was one of [contract] scope or formation,”⁷⁰ and affirmed an arbitration award against Thailand.⁷¹ A Germany-Thailand BIT provided that disputes concerning “approved investments” were subject to arbitration,⁷² and the parties agreed in the Terms of Reference to use the UNCITRAL Arbitration Rules, including Article 21, which grants an arbitral tribunal “the power to rule on objections that it has no jurisdiction.”⁷³ Relying on *Republic of Ecuador v. Chevron Corp.*, where the Second Circuit held that a BIT’s incorporation of the UNCITRAL Arbitration Rules was “clear and unmistakable evidence” that the parties intended [questions of arbitrability] to be decided by the arbitral panel in the first instance,” the Second Circuit held that the parties’ incorporation of UNCITRAL Arbitration Rules via the Terms of Reference similarly constituted “clear and unmistakable evidence of [the parties’] intent to arbitrate issues of arbitrability,” including whether the project involved “approved investments.”⁷⁴

V. Arbitration Developments in Foreign Courts

The High Court of Singapore issued an important decision rejecting a jurisdictional challenge to awards rendered in Singapore, finding that the Singapore International Arbitration Act, unlike the UNCITRAL Model Law on International Commercial Arbitration, did not permit such a challenge in a proceeding to enforce the awards in the rendering jurisdiction. In *Astro Nusantara International BV v. PT Ayunda Prima Mitra*, the High Court upheld two “domestic international awards”⁷⁵ that were challenged on jurisdictional grounds for the first time by the Indonesian award debtors during enforcement proceedings only after the award creditors secured court judgments and enforcement orders and the period for applying to set aside the awards had expired.⁷⁶ The High Court

67. *Id.* at 1371 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)) (internal quotations omitted).

68. *See* Petition for Writ of Certiorari, *BG Grp. PLC v. Republic of Argentina*, 665 F.3d 1363 (2012) (No. 12–138), 2012 WL 3091067, at *1.

69. *See* Brief for Professors and Practitioners of Arbitration Law as Amici Curiae Supporting Petitioner at 9–10, *BG Grp. PLC v. Republic of Argentina*, 665 F.3d 1363 (2012) (No. 12–138), 2012 WL 3805768.

70. *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012).

71. *Id.* at 74.

72. *Id.* at 70.

73. *Id.* at 72–73 (citing G.A. Res. 65/22, art. 21, ¶ 1, U.N. Doc. A/RES/65/465 (Apr. 2011)).

74. *Id.* at 73 (citing *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011)).

75. *Astro Nusantara Int’l BV v. PT Ayunda Prima Mitra*, [2012] SGHC 212, at [1] (Oct. 22, 2012) (Sing.). The term “domestic international awards” as used by the High Court refers to an “international commercial arbitral award . . . made in the same territory as the forum in which recognition and enforcement is sought.” *Id.* Such an award is referred to as a “non-domestic” award in U.S. case law.

76. *Id.* at [7]–[9].

held that no grounds existed for challenging the awards under those circumstances,⁷⁷ and specifically rejected the debtors' attempt to invoke article thirty-six of the Model Law, which enumerates certain grounds for the refusal of recognition or enforcement regardless of the country in which the award was made.⁷⁸ The High Court reasoned that the Singapore International Arbitration Act draws a clear distinction between domestic international awards and foreign awards and, in any event, expressly excludes Article 36 of the Model Law.⁷⁹

The Supreme Court of India delivered a landmark decision reversing its controversial decision in *Bhatia International v. Bulk Trading SA*,⁸⁰ paving the way for reduced court intervention in arbitrations seated outside of India. In *Bhatia International*, the court interpreted the Indian Arbitration and Conciliation Act 1996 to allow for Part I of the Act (which provided for remedies such as awarding interim relief and setting aside of arbitral awards) to be applied even to arbitrations seated outside of India. After extensive criticism of *Bhatia International*, the court overruled that decision this year in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*,⁸¹ holding that Part I of the Act only applies to arbitrations seated within India and that awards rendered in arbitrations seated abroad are only subject to the jurisdiction of Indian courts when enforcement is sought in India. The decision in *Bharat Aluminium*, however, only applies to arbitration agreements entered into after September 6, 2012, suggesting that the legacy of *Bhatia International* will be relevant for some time to come.

VI. Jurisdiction of Investor-State Disputes

A. ENFORCEMENT OF "DENIAL OF BENEFITS" PROVISION

In 2012, an arbitral tribunal interpreted for the first time the "denial of benefits" provision under CAFTA and did so seemingly without analyzing other tribunals' interpretations of similar provisions under other investment treaties.⁸² In *Pac Rim Cayman LLC v. Republic of El Salvador*, a tribunal constituted under CAFTA held that it lacked jurisdiction over claims asserted by a claimant enterprise⁸³ against El Salvador pursuant to Article 10.12.2 of CAFTA, which permits a CAFTA party to deny the claimant enterprise the benefits conferred by CAFTA if "the [claimant] enterprise has no substantial business activities in the territory of any Party, other than the denying Party" and "persons of a non-Party, or of the denying Party own or control the enterprise."⁸⁴ The tribunal determined that El Salvador, as the denying party, was required to demonstrate two conditions in

77. *Id.* at [73].

78. *Id.* at [100].

79. *Id.* at [111].

80. *Bhatia Int'l v. Bulk Trading SA*, (2002) 2001 S.C.R. 6257 (India).

81. *Bharat Aluminum Co. v. Kaiser Aluminum Technical Serv., Inc.*, (2012) 2005 S.C.R. 7019 (India).

82. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, ¶ 4.3 (June 1, 2012). Article 10.12.2 of CAFTA permits a contracting party to deny the treaty's investment protections to an enterprise of another party if the enterprise has no "substantial business activities" in the territory of any contracting party other than the denying party, and if it is owned or controlled by persons of a non-party or the denying party. *Id.*

83. While the enterprise was located in the United States, a party to CAFTA, it was wholly owned by a parent company located in Canada, a non-party to CAFTA. *Id.* ¶ 4.81.

84. *Id.* ¶ 4.92.

order to benefit from this Article: (1) that the claimant enterprise had no substantial business activities in the territory of a CAFTA party (beyond mere form), and (2) that the claimant was either owned or controlled by persons of a non-CAFTA party.⁸⁵ Applying this standard, the tribunal determined that El Salvador was entitled to deny the benefits of CAFTA's investment protections to the claimant enterprise because it was "akin to a shell company with no geographic location"⁸⁶ and was wholly owned by a Canadian corporation.⁸⁷ Despite finding that it lacked jurisdiction over the enterprise's claims brought under CAFTA, the tribunal nevertheless exercised jurisdiction over claims brought under El Salvador's Investment Law, which the tribunal held to constitute a separate form of consent by El Salvador to ICSID jurisdiction.⁸⁸

B. APPLICATION OF MOST-FAVORED-NATION (MFN) CLAUSES TO DISPUTE RESOLUTION PROVISIONS

In *Daimler Financial Services AG v. Argentine Republic*, an ICSID tribunal split on the question of the applicability of MFN clauses to dispute resolution clauses. The majority, which included Professors Pierre-Marie Dupuy and Domingo Bello Janeiro, held that it lacked jurisdiction over the German investor's claims, including those brought under the MFN clauses of the Germany-Argentina BIT, where the claimant had failed to fulfill the treaty's condition precedent to arbitration—eighteen months of domestic litigation in the courts of Argentina.⁸⁹ The majority first "require[d] affirmative evidence" of the host state's consent to arbitration, such as an express declaration of consent or acts "conclusively establishing" such consent.⁹⁰ Accordingly, the majority sought to determine whether the parties to the BIT had intended to submit to ICSID jurisdiction where the investor had not fully complied with the investor-state dispute resolution process laid down in the BIT.⁹¹ The majority observed that the BIT contained multiple MFN clauses, with Article 3(1) of the BIT guaranteeing MFN treatment to qualifying investments, while Articles 3(2) and 4(4) guaranteed MFN treatment to qualifying investors "with respect to their activities in connection with investments."⁹² The majority considered the parties' understanding of the word "treatment" in the BIT's MFN clauses, concluding that the parties maintained a distinction between the host State's "direct treatment of investments within its territory and the international settlement of investor-State disputes."⁹³

The tribunal majority rejected the investor's argument that the dispute resolution provisions of the BIT were less favorable than those of a comparable Argentina-Chile BIT. While the majority observed that the two BITs provided different "procedural route[s]" to

85. *Id.* ¶ 4.61.

86. *Id.* ¶ 4.75.

87. Having found that the claimant enterprise was wholly owned by a non-party, the Tribunal found it unnecessary to consider the question of control. *Id.* ¶ 4.82.

88. *Id.* ¶¶ 5.39, 5.48.

89. *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 281 (Aug. 22, 2012).

90. *Id.* ¶ 175.

91. *Id.* ¶ 177.

92. *Id.* ¶ 232.

93. *Id.* ¶ 236.

dispute resolution, it held that the provisions of one BIT were not “objectively more favorable” than the other.⁹⁴ The tribunal majority also reviewed the practice of international arbitration tribunals and states, concluding that no *opinio juris* yet existed among arbitrators regarding the applicability of MFN clauses to dispute resolution provisions, and that the treaty practices of Germany, Argentina, and other states “converge in signaling that the specified MFN clauses do not, and were never intended to, reach the international dispute resolution provisions of the [relevant] investment agreements.”⁹⁵

In a dissent, Judge Charles N. Brower strongly criticized the *Daimler* majority’s analysis of the treaty’s MFN clause, describing it as “not simply unconvincing” but also “profoundly wrong.”⁹⁶ Judge Brower rejected the majority’s holding that “affirmative evidence” is required to demonstrate state consent to arbitration despite the state’s execution and ratification of the treaty, arguing that the majority’s position “finds no basis in the cases, in logic, or in any source of international law.”⁹⁷ Similarly, Judge Brower rejected the majority’s characterization of the Argentina-Chile BIT as different but not more favorable than the Germany-Argentina BIT, arguing that the provision in the Argentina-Chile BIT “offering an investor a choice [of domestic litigation versus arbitration] is inherently more favorable” than the provision in the Germany-Argentina BIT, which required the investor to pursue domestic litigation for eighteen months before initiating arbitration.⁹⁸

VII. Decisions on the Merits and Quantum

A. BREACH OF THE MINIMUM STANDARD OF TREATMENT

In *Railroad Development Corp. v. Republic of Guatemala (RDC)*, an ICSID tribunal constituted under CAFTA held that Guatemala breached the treaty’s minimum standard of treatment where it revoked the investor’s railway *usufruct* contract pursuant to a *lesivo* procedure, by which it determined that the contract had been unlawfully issued and was harmful to the state’s interests without providing the investor any opportunity to be heard.⁹⁹ The *RDC* tribunal was highly critical of the *lesivo* procedure, observing that “unless such an extraordinary remedy is used in truly exceptional circumstances . . . it creates situations which have the potential to violate the minimum standard of treatment of aliens under customary international law.”¹⁰⁰ In a holding that may have significant implications for subsequent claims brought under CAFTA, the tribunal endorsed the minimum standard of treatment articulated in *Waste Management v. United Mexican States*, holding that this standard “persuasively integrates the accumulated analysis of prior NAFTA Tribunals

94. *Id.* ¶ 250.

95. *Id.* ¶ 276; see also *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000).

96. *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Dissenting Opinion of Charles N. Brower, ¶ 38 (Dec. 27, 2012).

97. *Id.* ¶ 11.

98. *Id.* ¶ 36 (citing *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶ 96 (Oct. 24, 2011)).

99. *R.R. Dev. Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, ¶ 235 (June 29, 2012) [hereinafter *RDC*].

100. *Id.* ¶ 233.

and reflects a balanced description of the minimum standard of treatment.”¹⁰¹ While the RDC tribunal awarded the investor damages for its losses, it conditioned the payment of the award on the investor’s relinquishment of its rights under its contracts with Guatemala.¹⁰²

In *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, an ICSID tribunal held Macedonia liable for a “minor breach” of the fair and equitable treatment standard of the Switzerland-Macedonia BIT, on the basis of “a series of measures that collectively amount to a composite act.”¹⁰³ Although the investor’s claims focused on the Macedonian judicial proceeding in which its investment contract was terminated and a portion of its equity investment in a Macedonian enterprise transferred to Macedonia’s Ministry of Economy, the *Swisslion* tribunal held that the judicial proceeding did not violate international law, observing that the investor “was unable to point to any serious procedural unfairness in the conduct of the legal proceedings . . . [or] evidence of a lack of judicial independence or other judicial misconduct.”¹⁰⁴ Rather, the tribunal concluded that a treaty breach arose from measures by state agencies “taken prior to or on the margins of the contractual litigation,” including the Ministry of Economy’s failure to timely respond to the investor’s inquiries and its prolonged consideration of whether the investor was acting in compliance with its investment contract, as well as certain administrative actions taken by Macedonian securities regulators and the publication of information relating to a criminal investigation of the investor.¹⁰⁵ The tribunal determined that the minor nature of the breach “necessarily leads to a substantial reduction in the amount of damages that can be awarded,” and awarded damages for the legal costs the investor incurred contesting the securities regulation and criminal investigation measures, the diversion of its management’s time in responding to heightened controls imposed by the Ministry of Economy, and an allocation of lost sales resulting from the investor’s reputational damage.¹⁰⁶

B. EXPROPRIATION

In *Occidental Petroleum Corp. v. Republic of Ecuador*, an ICSID tribunal held Ecuador liable for its expropriation of the investor’s oil rights in the Amazon, in violation of the U.S.-Ecuador BIT and Ecuadorian and international law, and issued the largest known ICSID award under a bilateral investment treaty, totaling nearly US \$1.8 billion.¹⁰⁷ The tribunal held that Ecuador’s *caducidad* decree, which terminated the investor’s participation agreement for the exploration and exploitation of an area of the Ecuadorian Ama-

101. *Id.* ¶ 219 (quoting *Waste Mgmt. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004) (holding that the minimum standard of treatment is infringed by conduct attributable to the state that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety . . .”).

102. RDC, *supra* note 99, ¶ 267.

103. *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, ¶ 275 (July 6, 2012).

104. *Id.* ¶ 268.

105. *Id.* ¶¶ 276, 337.

106. *Id.* ¶¶ 337, 350.

107. *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 825 (Oct. 5, 2012).

zon¹⁰⁸ in response to the investor's unauthorized transfer of its participation rights to another oil company, violated the principle of proportionality under Ecuadorian and international law and constituted a measure "tantamount to expropriation" and thus a breach of the U.S.-Ecuador BIT.¹⁰⁹ Although the investor had transferred 40 percent of its participation rights to another oil company via a transfer agreement, the majority proceeded to calculate the investor's damages on the basis of 100 percent of its participation rights, treating the transfer as "inexistent" or an "absolute nullity" for purposes of determining damages.¹¹⁰ Nonetheless, the tribunal concluded that the investor was partially at fault for having failed to seek authorization from Ecuador prior to executing the transfer agreement, and consequently reduced the investor's damages award by 25 percent.¹¹¹

Professor Brigitte Stern joined the majority decision as to liability but dissented as to the calculation of damages, which she characterized as "resting on grossly incorrect legal bases."¹¹² Professor Stern argued that the tribunal "overly underestimated" the investor's contribution to the harm it suffered, observing that a "fair and reasonable apportionment of responsibility . . . should more appropriately have been a 50/50 split."¹¹³ Moreover, Professor Stern argued that the transfer agreement remained in force and binding under both New York and Ecuadorian law even after the *caducidad* decree was issued,¹¹⁴ and that the majority erred by treating it as "inexistent" for purposes of calculating damages.¹¹⁵ Accordingly, Professor Stern argued that the tribunal should only have awarded the investor damages corresponding to its 60 percent participation right and that such an award would satisfy the international law principle of full recovery.¹¹⁶

C. EFFECT OF WAIVER OF CONTRACTUAL RIGHT TO DAMAGES ON RECOVERABILITY OF DAMAGES FOR BREACH OF A TREATY OBLIGATION

In *Toto Construzioni Generali S.P.A. v. Republic of Lebanon*, an ICSID tribunal held that the investor's waiver of its contractual right to damages for project delays prevented the investor from later seeking the same damages under the Italy-Lebanon BIT.¹¹⁷ The tribunal observed that "when it concerns the same damage for the same act, compensation that a Claimant has waived under the Contract cannot be recovered under the Treaty."¹¹⁸ The tribunal also rejected the investor's claims for damages on the independent ground that the investor had no legitimate expectations that the state would provide the investor with parcels of land on which to construct the project without delay.¹¹⁹

108. *Id.* ¶ 2.

109. *Id.* ¶¶ 452-55.

110. *Id.* ¶¶ 634, 655-56.

111. *Id.* ¶¶ 686-87.

112. *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern, ¶ 1 (Oct. 5, 2012).

113. *Id.* ¶ 8.

114. *Id.* ¶¶ 55, 113.

115. *Id.* ¶¶ 40, 116.

116. *Id.* ¶¶ 144, 154-57 (citing *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 31 (Sept. 13)).

117. *Toto Construzioni Generali S.P.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, ¶ 85 (June 7, 2012).

118. *Id.*

119. *Id.* ¶ 191.