

International Commercial Dispute Resolution

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The first section of this survey examines significant decisions from U.S. courts in 2011 of interest to practitioners in the field of international commercial arbitration.¹ In particular, the U.S. Supreme Court held that class-action waivers in consumer arbitration agreements are enforceable even where those waivers are unconscionable under applicable state law. There were also several noteworthy appellate decisions addressing the allocation of claims, statute of limitations issues, and other gateway matters between arbitrators and courts; the jurisdictional divisions between district and appellate courts; efforts to vacate awards based on arbitrator misconduct; the status of “manifest disregard of the law” as a ground for vacatur of arbitral awards; and the availability of discovery in aid of arbitration.

The second section of this survey examines significant arbitration decisions from European courts. In one noteworthy development, the Supreme Court of the United Kingdom overturned a decision of the English Court of Appeal that had held that an arbitration clause requiring the parties to appoint members from an identified community is discriminatory and thus void. In another noteworthy development, decisions by the Supreme Court of the United Kingdom and the Paris Court of Appeal reaffirmed a party’s right, under the New York Convention, to raise jurisdictional challenges to an arbitration award at the place of enforcement and the place of arbitration, without deference to the arbitrator’s own conclusions on jurisdiction. Ironically, the earlier decision by the U.K. court declined enforcement of the award based on an application of French law that the French court eschewed only months later.

The third section of this survey looks at major developments from 2011 in the field of investment treaty arbitration. Important jurisdictional decisions addressed the validity of a claimant’s waiver of domestic remedies before initiating arbitration, the applicability of most-favored-nation clauses to jurisdictional prerequisites, and the power of a tribunal to devise procedures to hear mass claims under the International Centre for Settlement of

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1. For developments during 2010, see Steven Smith et al., *International Arbitration*, 45 INT’L LAW. 95 (2011). For developments during 2009, see Steven Smith et al., *International Commercial Dispute Resolution*, 44 INT’L LAW. 113 (2010).

Investment Disputes (ICSID) Convention. In awards on the merits, tribunals considered the limits of the host state's taxation power in light of the state's obligation to protect investment. There were also several controversial annulment decisions, which reinforced the limited scope of review of investment treaty arbitration awards.

In other developments, the International Chamber of Commerce published a revised version of its Rules of Arbitration, which entered into force on January 1, 2012.

I. Arbitration Developments in U.S. Courts

A. INTERPRETATION AND ENFORCEMENT OF ARBITRATION CLAUSES

1. *Arbitration of Class Claims*

For many years, corporate defendants facing consumer class actions in California were often unable to enforce arbitration clauses in their agreements because the California Supreme Court ruled in *Discover Bank v. Superior Court of Los Angeles* that class action waivers in certain consumer arbitration agreements are unconscionable.² In a decision likely to significantly enhance corporate defendants' ability to enforce arbitration provisions, the U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act (FAA) preempted the *Discover Bank* rule and that class-action waivers in consumer arbitration agreements are enforceable even where such waivers are unconscionable under the applicable state law.³

In finding the *Discover Bank* rule preempted by the FAA, the Supreme Court first observed that section 2 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."⁴ The Court further observed that the inquiry becomes "more complex when a doctrine normally thought to be generally applicable, such as . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration,"⁵ but explained that "nothing in [section 2 of the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."⁶ The Court reasoned that since the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the *Discover Bank* rule, by "requiring the availability of classwide arbitration," "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."⁷

The Court noted that its conclusion followed from its reasoning in last year's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁸ where the Court held that a party

2. *Discover Bank v. Super. Ct. of Los Angeles*, 113 P.3d 1100, 1109-10 (Cal. 2005).

3. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

4. *Id.* at 1746-47 (citing 9 U.S.C. § 2 (2011)).

5. *Id.* at 1747.

6. *Id.* at 1748.

7. *Id.* at 1748; *see also id.* at 1750 ("California's *Discover Bank* rule . . . interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post."):

8. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1782 (2010).

could not be forced to arbitrate class claims when the arbitration agreement is silent on the issue, as the difference between bilateral and class-action arbitration is “fundamental.”⁹ In *Concepcion*, the Court outlined the various ways in which class arbitration eliminates many of the built-in procedural advantages of bilateral arbitration and concluded that class arbitration, “to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”¹⁰

In light of *Concepcion*, the Supreme Court vacated and remanded an Eleventh Circuit decision that had held that a class-action waiver provision in a consumer arbitration agreement was substantively unconscionable and thus unenforceable under Georgia law.¹¹ It also vacated and remanded a California Supreme Court decision holding unconscionable and thus unenforceable a pre-dispute waiver in an employment arbitration agreement of an employee’s right to a formal hearing before the state labor commissioner.¹²

Various courts of appeals have been reconsidering their unconscionability jurisprudence in light of *Concepcion*. The Third Circuit held that a New Jersey Supreme Court decision finding certain class-action waivers unconscionable was preempted by the FAA.¹³ And the Second Circuit has decided *sua sponte* to reconsider its holding that a class-action waiver in an arbitration agreement was unenforceable because it precluded plaintiffs from pursuing their statutory rights under the antitrust laws.¹⁴

2. Arbitrability of Claims, Timeliness Issues, and Gateway Matters

In *KPMG LLP v. Cocchi*,¹⁵ the U.S. Supreme Court reaffirmed its long-standing holding that a court may not deny arbitration of certain claims on the ground that other claims are non-arbitrable. In *Cocchi*, the Fourth District Court of Appeal of the State of Florida upheld a trial court’s refusal to compel arbitration on the ground that two out of the four claims in the complaint were non-arbitrable without determining whether the remaining claims were arbitrable.¹⁶ Citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), the Supreme Court stated that the FAA “has been interpreted to require that, if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.”¹⁷ The Court further explained that from this it

follows that state and federal courts must examine with care the complaints seeking to invoke their jurisdiction in order to separate arbitrable from non-arbitrable claims. A court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration.¹⁸

9. *Concepcion*, 131 S. Ct. at 1750–51.

10. *Id.*

11. *Branch Banking & Trust v. Gordon*, 132 S. Ct. 577 (2011).

12. *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

13. *Litman v. Celco P’ship*, 655 F.3d 225 (3d Cir. 2011).

14. *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.*, No. 06-1871-cv, 2011 U.S. App. LEXIS 19851 (2d Cir. Aug. 1, 2011).

15. *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25-6 (2011).

16. *Id.* at 24.

17. *Id.*

18. *Id.*

The Court reversed and remanded, directing the Florida Court of Appeal to determine whether either of the remaining claims was arbitrable.¹⁹

In *Bechtel Do Brasil Construções Ltda. v. UEG Araucária Ltda.*, the Second Circuit addressed whether the inclusion of a choice-of-law clause in an arbitration agreement providing that New York law would govern the “procedure and administration of any arbitration” permitted the petitioner to invoke New York Civil Practice Law and Rule (N.Y.C.P.L.R.) 7502(b), a provision of New York arbitration law authorizing a party to seek judicial determination of statute-of-limitations issues.²⁰ Noting that the question of contract interpretation was “a close one,” the court explained that its task was to determine “whether the parties intended at the time of contracting to have issues of timeliness determined by the arbitrator.”²¹ The court reasoned that the parties’ broad agreement to arbitrate “any dispute . . . arising out of or relating to the Contract” was in tension with their adoption of New York law to govern the contract and the “procedure and administration of any arbitration,” rendering the contract at least ambiguous as to whether the parties intended to refer timeliness issues to a court under N.Y.C.P.L.R. 7502(b).²² While the court acknowledged that the choice-of-law clause could be read to adopt New York arbitration law as a modification to the broad agreement to arbitrate, it concluded that the contract did not compel such a reading “without doubt.”²³ Finding that the contract was thus ambiguous, the court relied on the Supreme Court’s decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), to hold that “such ambiguities must be resolved in favor of arbitration.”²⁴

In *Republic of Ecuador v. Chevron Corp.*, the Second Circuit considered whether to stay an arbitration between Ecuador and Chevron under the United States–Ecuador Bilateral Investment Treaty (BIT) based on Ecuador’s claims of waiver and estoppel.²⁵ The court declined to rule on the merits of the motion to stay, and held that Ecuador’s claims must be determined by the arbitral tribunal since waiver and estoppel are generally considered “gateway matters” presumptively for the arbitrators under the framework established by the Supreme Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).²⁶ The court further explained that, even if Ecuador’s waiver and estoppel claims could be considered “questions of arbitrability” that are presumptively for the court to decide under *Howsam*, the parties’ adoption of the United Nations Commission on International Trade Law (UNCITRAL) Rules—Article 21 of which grants arbitrators the power to rule on their own jurisdiction—provided “clear and unmistakable evidence” that the parties intended these claims to be decided by the arbitral panel in the first instance.²⁷ Because the court found that a stay was inappropriate, it expressly declined to consider whether it had the power to order a stay of a BIT arbitration under the New York Convention or the FAA, a question that remains open in the Second Circuit.²⁸

19. *Id.* at 26.

20. *Bechtel Do Brasil Construções Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150, 153 (2d Cir. 2011).

21. *Id.* at 154.

22. *Id.* at 156.

23. *Id.* at 158.

24. *Id.*

25. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391-92 (2d Cir. 2011).

26. *Id.* at 394.

27. *Id.*

28. *Id.* at 391.

B. JURISDICTIONAL ISSUES UNDER THE FAA

In *Johnson v. Wells Fargo Home Mortgage, Inc.*,²⁹ the Ninth Circuit held that, even where the parties agree to vest review of the arbitral award only with the court of appeals, a district court may not decline to review the award as required by the FAA and enter an order confirming that award in the expectation that review will begin in the court of appeals.³⁰ While the Ninth Circuit recognized that circuit courts have appellate jurisdiction over final decisions of district courts even where the district court's decision not to review the award was erroneous, it declined to review the award in the first instance.³¹ The court noted that there is no statutory grant of direct appellate jurisdiction over arbitral awards and that a court of appeals reviews an award by reviewing a district court's decision to confirm, modify, or vacate that award.³² The court further noted that section 9 of the FAA, which provides that a district court "must" confirm an arbitration award unless it decides to modify or vacate it under sections 10 and 11 of the FAA, "defeats any notion that district courts may decline to consider motions to vacate, modify, or correct arbitration awards filed in response to a motion to confirm."³³ This requirement of the FAA could not be altered by agreement of the parties or by the district court, which on remand was required to apply the standard of review ordinarily mandated by the FAA.³⁴

In *Levin v. Alms & Associates, Inc.*, the Fourth Circuit joined the majority of U.S. appellate circuits in holding that an appeal on an issue of arbitrability under section 16(a)(1)(A) of the FAA "automatically divests the district court of jurisdiction over the underlying claims and requires a stay of the action, unless the district court certifies the appeal as frivolous or forfeited."³⁵ The court reasoned that the "core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims."³⁶ Therefore, because the district court lacks jurisdiction over "those aspects of the case involved in the appeal, it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue."³⁷ The court also adopted the "frivolousness exception" to the divestiture of jurisdiction used in the majority of other circuits: in the event the district court certifies the appeal as frivolous, the party alleging arbitrability may move the court of appeals to stay the district court proceedings pending a review of the frivolousness determination.³⁸

29. *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 412 (9th Cir. 2011).

30. *Id.* at 404, 408.

31. *Id.* at 408–09.

32. *Id.*

33. *Id.* at 412.

34. *Id.* at 413.

35. *Levin v. Alms & Assoc., Inc.*, 634 F.3d 260, 263, 266 (4th Cir. 2011). The Third, Seventh, Tenth, and Eleventh circuits have held that an appeal regarding arbitrability of claims does divest the district court of jurisdiction over those claims, as long as the appeal is not frivolous. The Second and Ninth circuits have held that no such divestiture occurs.

36. *Id.* at 264.

37. *Id.*

38. *Id.* at 266.

C. ENFORCEMENT OF ARBITRAL AWARDS

1. *Efforts to Vacate an Award Related to Arbitrator Conduct*

Most efforts in U.S. courts to vacate an arbitration award under FAA section 10(a) for arbitrator non-disclosure rely on the argument that the arbitrator's failure to disclose constituted "evident partiality." In *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, however, the Second Circuit rejected a unique claim that failure by an arbitrator to fully disclose prior expert witness engagements—which constituted evidence of the arbitrator's "predisposition" on questions of law—justified vacatur as "other misbehavior by which the rights of any party have been prejudiced" under FAA section 10(a)(3).³⁹ Along with rejecting the claim for lack of factual support, the Second Circuit also rejected its underlying premise that an arbitrator's predisposition on legal issues can justify vacatur, and held that the premise finds no support in the FAA or the case law.⁴⁰ The Second Circuit explained that a "judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice" and that "[t]his is all the more true for arbitrators."⁴¹ The court noted that the most sought-after arbitrators are often "prominent and experienced members of the specific business community in which the dispute to be arbitrated arose" and that "it would be strange if such an arbitrator were forced to search the record of all prior testimony for any statement that might—however tangentially—relate to any of the many legal issues that might arise in any given case."⁴²

In *Trustmark Insurance Co. v. John Hancock Life Insurance Co.*, the Seventh Circuit held that the district court erred in issuing an injunction that prevented parties from participating in the second arbitration of a reinsurance coverage dispute even though one member of the second arbitration panel had been a member of the first arbitration panel.⁴³ While the parties' reinsurance agreements included provisions that specified that all arbitrators be "disinterested," the Seventh Circuit held that the term "disinterested" in the arbitration context means "lacking a financial or other personal stake in the outcome," and that knowledge about a dispute acquired in a prior proceeding is not a disqualifying factor.⁴⁴

2. *Status of "Manifest Disregard of the Law" Following Hall Street*

It remains unsettled 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.*⁴⁵ 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 10 of the FAA, or are merely shorthand for,

39. *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 71 (2d Cir. 2011).

40. *Id.* at 77.

41. *Id.*

42. *Id.*

43. *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869, 871–72 (7th Cir. 2011).

44. *Id.* at 872–74.

45. *Hall Street Assoc. v. Mattel, Inc.*, 552 U.S. 576 (2008).

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.⁴⁶

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 10 of the FAA.”⁴⁷ But that decision was reversed and remanded on different grounds by the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*⁴⁸ A subsequent Second Circuit case acknowledged *Stolt-Nielsen’s* findings on manifest disregard, noting that *Hall Street* had placed the standard into some doubt, but left the issue unresolved by concluding that the manifest disregard standard had not been met.⁴⁹ The Ninth⁵⁰ and Sixth⁵¹ Circuits have held that “manifest disregard” remains a viable ground for vacatur, while the Fourth⁵² and Tenth⁵³ Circuits have found that the standard is not satisfied in various cases without squarely deciding its continued viability. In contrast, the Fifth,⁵⁴ Eighth⁵⁵ and Eleventh⁵⁶ Circuits have held that it 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*.⁵⁷ The Third Circuit has declined to reach the issue.⁵⁸

D. AVAILABILITY OF DISCOVERY IN AID OF ARBITRATION—28 U.S.C. § 1782

The case law remains unsettled on whether evidence can be obtained in aid of an international arbitration pursuant to 28 U.S.C. § 1782, which authorizes district courts to compel discovery “for use in a proceeding in a foreign or international tribunal.”⁵⁹ Lower federal courts continue to be divided on whether a private international arbitral tribunal constitutes “a foreign or international tribunal” for purposes of the statute. In *In re Fimserve Group Ltd.*, the district court denied a section 1782 application and questioned

46. *Stolt-Nielsen*, 130 S. Ct. at 1768.

47. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008).

48. *Stolt-Nielsen*, 130 S. Ct. at 1758.

49. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010); *see also STMicroelectronics*, 648 F.3d at 68.

50. *Comedy Club Inc. v. Improv W. Assocs.*, 553 F.3d 1277 (9th Cir. 2009); *see also Lagstein v. Certain Underwriters at Lloyd’s*, 607 F.3d 634 (9th Cir. 2010); *Johnson*, 635 F.3d at 414, n.10.

51. *Coffee Beanery, Ltd. v. WW, LLC*, 300 F. App’x 415 (6th Cir. 2008).

52. *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183 (4th Cir. 2010); *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010).

53. *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341 (10th Cir. 2009); *Abbott v. Law Office of Patrick J. Mulligan*, No. 10-4113, 2011 WL 4375087 (10th Cir. Sept. 21, 2011).

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

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

56. *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010); *White Springs Agric. Chems., Inc. v. Glawson Inv. Corp.*, No. 10-14532, 2011 WL 4907386 (11th Cir. Oct. 17, 2011).

57. *Compare Ramos-Santiago v. United Parcel Services*, 524 F.3d 120 (1st Cir. 2008), *with Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008), *and Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19 (1st Cir. 2010).

58. *See, e.g., Paul Green Sch. of Rock Music Franchising, LLC v. Smith*, 389 F. App’x 172 (3d Cir. 2010).

59. 28 U.S.C. § 1782(a) (1996).

whether the London Court of International Arbitration (LCIA) qualified as a “foreign or international tribunal” because it appeared to the court that there was no judicial review of the LCIA’s decisions.⁶⁰ In contrast, just days earlier, the district court in *In re Broadsheet LLC* granted an application for discovery in connection with an arbitration under the Rules of the Chartered Institute of Arbitrators without addressing whether the arbitral tribunal qualified as a “foreign or international tribunal” for purposes of the statute.⁶¹ Lower federal courts, however, appear to have reached a consensus that arbitral tribunals established pursuant to bilateral investment treaties do satisfy the “foreign or international tribunal” requirement of section 1782.⁶²

II. Arbitration Developments in European Courts

In 2011, the U.K. Supreme Court unanimously overturned the Court of Appeal decision in *Jivraj v. Hashwani*.⁶³ The Court of Appeal held that an arbitration clause under a joint venture agreement requiring the parties to appoint as arbitrators only members from the Ismaili community was discriminatory and thus void. The decision cast doubt on whether widely used institutional arbitration rules that restrict the nationality of arbitrators may contravene Employment Equality (Religion and Belief) Regulations 2003 (the Regulations) and consequently invalidate arbitration agreements.

The Supreme Court held that arbitrators are not “employees” within the meaning of the Regulations. The Court relied upon the distinction drawn by the European Court of Justice between “those who are, in substance, employed” and “those who are independent providers of services who are not in a relationship of subordination with the person who receives the services.”⁶⁴ The Court found that an arbitrator “is in critical respects independent of the parties . . . [and] is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a quasi-judicial adjudicator.”⁶⁵

Although the Court’s conclusion that arbitrators are not employees was dispositive, the Court clarified that, for the purposes of the “genuine occupational requirement” exception under the Regulations, the correct question to ask was whether the requirement that the arbitrators be from the Ismaili community “was, not only genuine, but legitimate and justified.”⁶⁶ The Court held that this test was satisfied, reasoning that arbitration before Ismaili arbitrators was “likely to involve a procedure in which the parties could have confidence” and was “likely to lead to conclusions of fact in which they could have particular

60. *In re Finserve Group Ltd.*, No. 4:11-mc-2044-RBH, 2011 WL 5024264, at *3 (D.S.C. Oct. 20, 2011).

61. *In re Broadsheet L.L.C.*, No. 11-cv-02436-PAB-KMT, 2011 WL 4949864, at *2 (D. Colo. Oct. 18, 2011).

62. See, e.g., *In re Chevron Corp.*, 633 F.3d 153, 161 (3rd Cir. 2011); *In re Republic of Ecuador*, No. C 11-80171 CRB, 2011 WL 4434816, at *2 (N.D. Cal. Sept. 23, 2011); *In re Republic of Ecuador*, No. 2:11-mc-00052 GSA, 2011 WL 4089189, at *4 (E.D. Cal. Sept. 13, 2011); *Republic of Ecuador v. Bjorkman*, No. 11-cv-01470-WYD-MEH, 2011 WL 3495993, at *2 (D. Colo. Aug. 9, 2011); *Gov’t of Ghana v. ProEnergy Servs. L.L.C.*, No. 11-9002-MC-SOW, 2011 WL 2652755, at *3 (W.D. Mo. June 3, 2011).

63. *Jivraj v. Hashwani*, [2011] UKSC 40 (overturning *Jivraj v. Hashwani*, [2010] EWCA Civ. 712).

64. *Id.* ¶ 27.

65. *Id.* ¶ 41.

66. *Id.* ¶ 59.

confidence” and that viewing the Court of Appeal’s reasoning on this point as “too legalistic and technical.”⁶⁷

In late 2010 and early 2011, the U.K. Supreme Court and the Paris Court of Appeal issued conflicting rulings on the validity of the arbitration award in *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*.⁶⁸ In that case, Dallah, a provider of assistance services for pilgrims to the Muslim holy sites, asserted claims against the government of Pakistan based on alleged contract breaches by a trust established by Pakistani authorities and later dissolved under Pakistani law. Paris was the place of arbitration and French law controlled whether the government of Pakistan, a non-signatory to the contract, could be treated as a party to the arbitration agreement. After the arbitrators rejected Pakistan’s jurisdictional objection and entered an award in Dallah’s favor, Dallah sought to enforce the award in the United Kingdom. There, the trial court, the Court of Appeal, and the Supreme Court each denied enforcement based on their application of the French-law standard for binding non-signatories to an arbitration agreement. In its November 2010 decision, the Supreme Court reiterated that the courts of the place where enforcement may entertain challenges under Article V(1)(a) of the New York Convention without deference to the arbitral tribunal’s contrary findings.

Once again confirming that timing is everything, less than four months later, the Paris Court of Appeal reached a contrary result in the parallel annulment proceeding in France. Consistent with the approach of the U.K. courts, the Court accorded no deference to the arbitrators’ decision on jurisdiction, but independently concluded that, under the relevant French standard, Pakistan was properly a true party to the arbitration agreement.

III. Investor-State Disputes

A. JURISDICTION

1. *Invalid Waiver of Domestic Remedies*

In *Commerce Group Corp. v. Republic of El Salvador*, an arbitral tribunal held that it lacked jurisdiction over claims brought under the Dominican Republic–Central America Free Trade Agreement (CAFTA–DR) where claimant mining investors had impermissibly failed to waive their domestic remedies prior to submitting their request for arbitration to ICSID, as required by article 10.18.2(b)(ii).⁶⁹ The investors had initiated proceedings before a court in El Salvador to challenge the state’s revocation of environmental permits necessary for gold and silver mining operations, and filed their request for arbitration while the judicial proceedings were still pending.⁷⁰ The investors argued that they were not required to discontinue pending judicial proceedings prior to submission of their claims to arbitration and that it was the responsibility of the state to seek enforcement of

67. *Id.* ¶ 70.

68. *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, 3 W.L.R. 1472 (Nov. 3, 2010); Cour d’appel [CA] [regional court of appeal] Paris, 1^e ch., Feb. 17, 2011, Case No. 09/28533 (Fr.).

69. *Commerce Group Corp. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, ¶ 107 (Mar. 14, 2011), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1971_En&caseId=C741.

70. *Id.* ¶ 100.

the investors' waiver.⁷¹ The tribunal rejected this argument, embracing instead El Salvador's argument that a valid waiver requires that the investor both submit its waiver and discontinue all domestic court proceedings before initiating arbitration.⁷²

2. *Application of Most Favored Nation (MFN) Clauses to Dispute Resolution Provisions*

In *Impregilo S.p.A. v. Argentine Republic*, Argentina objected to the arbitral tribunal's jurisdiction because the claimant had failed to comply with the judicial recourse provision of the Argentina-Italy BIT, which requires claimants to submit to the jurisdiction of domestic courts for at least eighteen months before filing arbitration proceedings.⁷³ While recognizing that the claimant had failed to comply with this provision,⁷⁴ the majority held that—by operation of the MFN clause of the Argentina-Italy BIT—the claimant was entitled to rely on the more generous dispute resolution clause of the Argentina-United States BIT, which required only a six-month period of consultation before resorting to arbitration. In so concluding, the majority relied on the “near-unanimity” among arbitral tribunals in finding that broad MFN clauses apply to dispute-resolution provisions.⁷⁵

In a rare dissent, arbitrator Brigitte Stern distinguished between BIT provisions concerning investors' rights and provisions concerning “the fundamental conditions for access to the rights,” and explained that an MFN clause should only apply to the former.⁷⁶ In Stern's view, the judicial recourse provision of the Argentina-Italy BIT constituted a condition on Argentina's consent to arbitrate and thus a condition on an investor's access to arbitration. Noting that “consent is the cornerstone of ICSID arbitration,”⁷⁷ Stern explained that a state's conditional offer to arbitrate “cannot magically be transformed into an unconditional right by the grace of the MFN clause.”⁷⁸ Accordingly, Stern would have held that the Argentina-United States BIT provided no separate basis for jurisdiction.⁷⁹

3. *Jurisdiction over Mass Claims*

The U.S. Supreme Court's recent emphasis in *Stolt-Nielsen* and *Conception* on the tension between class claims and arbitration contrasts starkly with *Aclablat and Others v. the Argentine Republic* (formerly *Giovanna a Beccara and Others v. the Argentine Republic*), where an ICSID tribunal concluded that it could hear a claim initiated by a large class of claimants despite the ICSID Convention's and the relevant BIT's silence on the issue.⁸⁰ The

71. *Id.* ¶¶ 73–75.

72. *Id.* ¶ 80.

73. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2171_En&caseId=C109.

74. *Id.* ¶ 94.

75. *Id.* ¶ 108.

76. *Impregilo*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Prof. Brigitte Stern, ¶ 47.

77. *Id.* ¶ 89.

78. *Id.* ¶ 99.

79. *Id.* ¶ 109.

80. *Aclablat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1390_En&caseId=C95 [hereinafter Decision on Jurisdiction and Admissibility].

tribunal in *Abaclat* found that it had jurisdiction to hear the consolidated claims of approximately 60,000 Italian citizens who had invested in sovereign bonds on which Argentina defaulted. The tribunal considered the procedural changes necessary to accommodate a large group of claimants and concluded that they “relate strictly to the manner of conducting the [] proceedings” and “do not affect the object of [its] examination.”⁸¹ The tribunal also addressed the consequences of refusing to hear the consolidated claims and concluded that it could “equal a denial of justice,” as it would be “cost prohibitive for many Claimants to file individual claims” and “practically impossible for ICSID to deal separately with 60,000 individual arbitrations.”⁸² The tribunal thus concluded that nothing in the ICSID Convention or the Italy-Argentina BIT prohibited arbitration of a “mass claim,” regardless of whether the respondent had specifically consented to such arbitration.⁸³ The tribunal also determined that the claimants’ security entitlements in Argentina’s sovereign bonds constituted an “investment” covered by the ICSID Convention and the BIT even though the bonds were purchased on the secondary market.⁸⁴

In a strongly worded dissent, arbitrator Georges Abi-Saab disagreed with the majority on both issues.⁸⁵ Citing the U.S. Supreme Court’s recent decisions in *Stolt-Nielsen* and *Concepcion*, Abi-Saab found that the tribunal had no jurisdiction over the mass claim absent Argentina’s consent and argued that the tribunal could not presume consent from the silence of the BIT and the ICSID Convention⁸⁶ in light of the “fundamental differences” in procedure between bilateral and mass claim arbitration.⁸⁷ Abi-Saab further rejected the majority’s conclusion that the tribunal possessed the authority to devise new procedures for the arbitration; according to the dissent, the majority had far exceeded its limited mandate to “fill gaps” under article 44 of the ICSID Convention by substantially modifying the existing ICSID Rules,⁸⁸ and the proposed procedural modifications would deprive Argentina of its due process right to challenge each claimant’s allegations.⁸⁹ Abi-Saab also dissented from the majority’s decision on jurisdiction, reasoning that the claimants’ investments in sovereign bonds fell outside the scope of covered “investments” under the ICSID Convention or the Italy-Argentina BIT, because there was no territorial link between the investments and Argentina.⁹⁰

81. *Id.* ¶¶ 533–34.

82. *Id.* ¶ 537.

83. *Id.* ¶¶ 480–92.

84. *Id.* ¶¶ 372–78, 387. The majority explained that “security entitlements are the result of the distribution process of the bonds through their division into a multitude of smaller securities representing each a part of the value of the relevant bond” and that they had no value independently of the bond. The majority thus treated the sovereign bonds and the claimants’ security entitlements in those bonds as “part of one and the same economic operation.” *Id.* ¶¶ 358–59.

85. *Abaclat*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab [hereinafter Dissenting Opinion of Professor Georges Abi-Saab].

86. *Id.* ¶¶ 177, 190.

87. *Id.* ¶¶ 150–53, 171–74; see Decision on Jurisdiction and Admissibility, *supra* note 80.

88. Dissenting Opinion of Professor Georges Abi-Saab, *supra* note 85, ¶¶ 210–13.

89. *Id.* ¶¶ 242–44.

90. See generally *id.* ¶¶ 101–19 (distinguishing cases).

B. DECISIONS ON THE MERITS

1. *Fair and Equitable Treatment*

In *Sergei Paushok v. Government of Mongolia*, a tribunal held that a windfall profit tax on sales of gold by mining companies operating in Mongolia was not a breach of Mongolia's fair and equitable treatment obligations, even though it constituted a "radical change" in the state's taxation regime and was widely considered "ill-conceived, counter-productive and generally excessive."⁹¹ The investor who initiated arbitration under the Russian Federation–Mongolia BIT to challenge the tax argued, among other things, that the tax violated the BIT's fair and equitable treatment standard by frustrating the investor's legitimate expectations, lacking transparency in its enactment and enforcement, and altering the predictability of the business and legal environment.⁹² The tribunal rejected each argument, observing that, unless the investor had entered into an agreement with Mongolia that limited or prohibited the possibility of tax increases, it "should not be surprised to be hit with tax increases in subsequent years," as such an event "could not be considered [. . .] 'unpredictable.'"⁹³ The tribunal's reasoning suggested that the standard for a state's breach of its fair and equitable treatment obligations may be heightened where the challenge relates to the rights of taxation, "in respect of which States jealously guard their sovereign powers."⁹⁴

2. *Expropriation*

In *Tza Yap Shum v. Republic of Peru*, a tribunal held that the Peruvian tax authority indirectly expropriated a Chinese investor's investment in a Peruvian company by imposing interim measures that froze the company's assets and substantially impacted its ability to conduct business.⁹⁵ While the investor alleged that the authority expropriated its investment in the company both through a tax audit and through subsequent imposition of interim measures, the tribunal found that the tax audit was routine and did not constitute expropriation.⁹⁶ In contrast, the tribunal found that the interim measures were arbitrary and not in compliance with the tax authority's own internal guidelines and procedures.⁹⁷ Notably, the tribunal awarded only book-value damages to the investor, taking into consideration that the company had negative cash flow, that it was highly leveraged in a high-risk industry, and that its competitive position had begun to worsen at the time the interim measures were imposed.⁹⁸

91. Paushok v. Mongolia, Award on Jurisdiction and Liability, UNCITRAL, ¶¶ 299, 305 (Apr. 28, 2011), <http://italaw.com/documents/PaushokAward.pdf>.

92. *Id.* ¶¶ 301–05.

93. *Id.* ¶ 305.

94. *Id.* ¶ 310.

95. *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award (July 7, 2011).

96. *Id.* ¶¶ 95, 103, 113.

97. *Id.* ¶¶ 171–217.

98. *Id.* ¶¶ 261–73.

C. DAMAGES AND COSTS

This year, several tribunals issued damages awards that shed light on the measure and calculation of damages in investment treaty arbitration. In *Lemire v. Ukraine*, an ICSID tribunal rendered an award on damages owed to a foreign investor for Ukraine's breaches of its fair and equitable treatment obligations under the United States–Ukraine BIT.⁹⁹ The tribunal adopted an expansive view of the claimant's compensable investment, considering not only his cash contributions but also his "risk-taking, personal commitment, and the essential contribution of a path-breaker," noting that "[t]ransitional economies need [investors such as claimant], who take considerable risks and commit themselves with great energy, notwithstanding the absence of clear recovery horizons."¹⁰⁰ While the *Lemire* tribunal rejected the investor's request for moral damages, it articulated a standard for those "exceptional cases" in which moral damages may be available to an investor.¹⁰¹ Specifically, the tribunal held that moral damages may be available where (i) the host state's actions imply physical threat, illegal detention, or other analogous situations in which the ill treatment contravenes the norms according to which civilized nations are expected to act; (ii) the host state's actions cause stress, anxiety, deterioration of health, or mental suffering such as humiliation, shame and degradation, or loss of reputation, credit, and social position; and (iii) both the cause of the injury and its effects are grave and substantial, as in the case of the use of force by the host state.¹⁰²

After previously determining that Ecuador was liable for hundreds of millions of dollars in direct damages and pre-judgment interest due to egregious delays by its courts in adjudicating claimant's lawsuits, an ad hoc UNCITRAL tribunal in *Chevron Corp. v. Republic of Ecuador* issued its final award on damages, ruling that the damages award was subject to taxation under Ecuadorian law.¹⁰³ Specifically, the tribunal held that claimant's direct damages and pre-judgment interest award was subject to Ecuador's 87.31% "unified tax,"¹⁰⁴ and that the award of pre-judgment interest was also subject to Ecuador's 25% income tax.¹⁰⁵ Ecuador's very high tax rate and the tribunal's decision to recognize it reinforces the need for claimants and their counsel to evaluate potential damages in light of the host state's tax laws.

After making awards on damages, the *Lemire* and *Chevron* tribunals considered the allocation of costs between the parties. Both tribunals acknowledged a recent trend in investment arbitration jurisprudence toward the allocation of costs to the losing party and chose to follow that approach.¹⁰⁶ The reasoning of the two tribunals, however, reflects the difficulties in determining the prevailing party in complex arbitral proceedings. In *Lemire*, the tribunal held that the investor was the "overall winning party" but decided to award him only a portion of his costs on the ground that the investor had not completely prevailed on

99. *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (Mar. 28, 2011).

100. *Id.* ¶¶ 303, 306.

101. *Id.* ¶¶ 333, 344.

102. *Id.* ¶ 333 (citing *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17 ¶¶ 166, 185–86, 286 (Feb. 6, 2008)).

103. *Chevron v. Ecuador*, Final Award, UNCITRAL, ¶ 87 (Aug. 31, 2011), <http://italaw.com/documents/ChevronEcuadorFinalAward.pdf>.

104. *Id.* ¶¶ 314, 348.

105. *Id.* ¶¶ 337, 348.

106. *Lemire*, ¶ 380; *Chevron*, ¶ 375.

a single disputed issue in the arbitration and had abandoned a number of the claims he initially submitted.¹⁰⁷ In contrast, the tribunal in *Chevron* found that the claimants were largely successful in the jurisdiction and liability phases of the arbitration but that the respondent was mostly successful in the damages phase.¹⁰⁸ The tribunal thus divided the arbitrators' costs evenly between the parties and required that each party pay its own costs and fees.

D. ANNULMENT OF ARBITRATION AWARDS

This year, ICSID ad hoc annulment committees rejected requests for annulment in several high profile cases, reinforcing the narrow standard of review for annulment of ICSID arbitration awards. In *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, Peru sought annulment of the tribunal's decisions on jurisdiction and the merits partly on the ground that the tribunal had failed to apply the Peruvian Civil Code in determining the scope of its jurisdiction and had refused to cross-examine Peru's damages expert, thus depriving Peru of its right to be heard.¹⁰⁹ The committee noted that the tribunal had considered both international law and Peru's foreign investment law in deciding its jurisdiction and held that the committee did not have the power to reevaluate which provisions of Peruvian law might be relevant to the tribunal's determination of its jurisdiction.¹¹⁰ Moreover, the committee held that an ICSID tribunal is not obliged to hear from all witnesses orally and the tribunal was within its rights to reject the findings of Peru's damages expert without cross-examination.¹¹¹

In the long-awaited decision on annulment in *Continental Casualty Co. v. Argentine Republic*, rendered under the United States–Argentina BIT, the ad hoc annulment committee rejected applications for partial annulment of the award submitted both by the investor and the host State.¹¹² The investor challenged the merits of the award partly on the basis that the tribunal had failed to apply governing law by not addressing Argentina's continuing refusal to honor its debt obligations following the termination of the emergency period resulting from the country's economic crisis.¹¹³ While the committee found that the tribunal did not expressly discuss the continued effect of Argentina's measures, it concluded that the tribunal's award implicitly determined that the investment treaty "did not apply to the continuing consequences of those measures even after the end of the economic crisis."¹¹⁴ Argentina, in turn, sought partial annulment of the award on the ground that the tribunal failed to state reasons for its dismissal of Argentina's invocation of the

107. *Lemire*, ¶¶ 380–83.

108. *Chevron*, ¶¶ 374–76.

109. *Duke Energy Int'l Peru Invs. No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Decision of the *Ad Hoc* Committee in Annulment Proceeding, ¶¶ 137, 255 (Mar. 1, 2011), http://italaw.com/documents/DukevPeruFinal_1Mar2011_Eng.pdf.

110. *Id.* ¶ 144.

111. *Id.* ¶ 258.

112. *Cont'l Cas. Co. v. Argentina*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (Sept. 16, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291_En&caseId=C13.

113. *Id.* ¶¶ 105, 108.

114. *Id.* ¶ 126.

BIT's emergency provisions.¹¹⁵ While the committee acknowledged that the tribunal addressed that specific issue in a mere two paragraphs of the award, it rejected Argentina's argument and stated that, "[t]he fact that reasons may have been short is not in the Committee's view a meaningful criterion for determining whether the discussion offered by a tribunal falls short of its duty to state reasons."¹¹⁶

IV. Other Developments

In 2011, the International Chamber of Commerce (ICC), one of the world's leading providers of institutional arbitration services to international commercial parties, published a revised version of its Rules of Arbitration (the 2012 Rules). The 2012 Rules went into effect on January 1, 2012, and apply to any ICC proceedings commenced on or following that date.¹¹⁷ The 2012 Rules include numerous additions and modifications intended to enhance the speed and cost-effectiveness of ICC arbitration while preserving the principle of party autonomy and ensuring transparency, efficiency, and fairness in the dispute resolution process. Among other changes, the 2012 Rules include new provisions designed to provide procedural standards for complex arbitrations involving multiple parties or multiple contracts; supplement arbitrator disclosure requirements; enhance case-management procedures; provide for the appointment of an emergency arbitrator to order urgent interim measures; and expand the scope of the Rules to facilitate the handling of disputes arising under investment treaties and free-trade agreements.

115. *Id.* ¶ 235.

116. *Id.* ¶ 261.

117. *Dispute Resolution Rules*, International Chamber of Commerce, <http://www.iccwbo.org/ICCDRSRules/> (last visited Feb. 12, 2012).

