International Commercial Dispute Resolution

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I. Introduction

The first section of this survey of developments during 2009 examines significant U.S. court decisions of interest to practitioners in the field of international commercial arbitration. In particular, the U.S. Supreme Court issued two noteworthy decisions construing the Federal Arbitration Act (FAA). The Court clarified in *Arthur Andersen LLP v. Carlisle* that the FAA does not bar a non-party to an arbitration agreement from moving to compel arbitration in reliance on that agreement[1] and held in *Vaden v. Discover Bank* that a federal court in determining whether it has subject matter jurisdiction over a motion to compel arbitration must "look through" the motion to determine whether it would have jurisdiction over the parties' actual controversy.[2] Several circuit courts reached different conclusions concerning when arbitration and choice-of-law clauses are invalid under U.S. public policy.

A number of significant cases dealt with enforcement of arbitration awards. The Second Circuit held that personal or quasi in rem jurisdiction is required to confirm a foreign arbitral award pursuant to the New York Convention.[3] In other decisions, courts addressed the scope of arbitrators' authority to make awards, as well as courts' jurisdiction to confirm awards that go beyond issues submitted to the arbitrators. Circuit courts continued to be divided over the question of whether "manifest disregard of the law" remained a viable ground for vacatur of arbitral awards following the Supreme Court's decision in *Hall Street Associates v. Mattel*, with a majority of circuit courts recognizing its continuing viability. Finally, a number of courts held that 28 U.S.C. § 1782 does not permit discov-

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1. Arthur Andersen LLP v. Carslile, 129 S. Ct. 1896 (2009).

2. Vaden v. Discovery Bank, 129 S. Ct. 1262 (2009).

3. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

ery in aid of international private arbitrations, despite contrary decisions from other courts.

The second section of this survey looks at major developments from 2009 in the field of investment treaty arbitration. A major focus of the International Centre for Settlement of Investment Disputes (ICSID) tribunals and committees this year—as in past years—was on the nature of qualifying investments under the ICSID Convention. In this regard, most tribunals moved away from a doctrinal approach, such as the one embodied in the so-called "*Salini* test." The *Phoenix Action* decision was a notable exception, with arbitrators applying a six-factor test to disqualify the claimant's investment from protection under the ICSID Convention. In a related development, the *Malaysian Historical Salvors* ad hoc committee annulled the award partly because the tribunal inappropriately elevated certain characteristics of qualifying investments to the level of jurisdictional requirements under the Convention.[4]

In the realm of merits decisions, the pendulum swung slightly back from fair and equitable treatment (FET), and towards expropriation as the most popular basis for liability. The NAFTA tribunal in the *Glamis* case determined, in contrast to several past tribunals, that the customary international law standard of FET was distinguishable from the treaty-based standard, and that the former had not evolved since the 1926 *Neer* decision.[5]

In other developments, a number of ad hoc committees wrestled with Argentina's non-compliance with its payment obligations under Article 53 of the Convention. And the *Renta 4* tribunal issued a notable decision finding that the Most Favored Nation (MFN) clause in the Spain-Russia bilateral investment treaty (BIT) could be viewed as an expansion of Russia's consent to arbitration based on more liberal jurisdictional provisions in other treaties.[6]

II. Arbitration Developments in U.S. Courts

A. Interpretation and Enforcement of Arbitration Clauses

1. *Invocation of Arbitration Clauses by Non-Parties*

In *Arthur Andersen LLP v. Carlisle*, the U.S. Supreme Court considered whether (1) the courts of appeals have jurisdiction over appeals from the denial of a motion by a non-party to an arbitration agreement to stay litigation pursuant to FAA § 3, and (2) a non-party to an arbitration agreement may invoke the protections of § 3.[7] The dispute arose when Arthur Andersen referred plaintiffs to another firm to design a tax shelter strategy.[8] After the strategy failed and plaintiff filed suit, Arthur Andersen invoked the arbitration clauses in the agreements between plaintiffs and the other firm.[9]

4. Malaysian Historical Salvors SDN BHD v. Malaysia, Decision on Application for Annulment, ICSID (W. Bank) Case No. ARB/05/10 (Apr. 16, 2009).

5. Glamis Gold Ltd. v. United States, Award, Ad hoc—UNCITRAL Arbitration Rules (May 14, 2009).

6. Renta 4 S.V.S.A. v. Russ. Fed'n, Award on Preliminary Objections, Arbitration V (024-2007), ¶ 122 (Mar. 20, 2009).

7. *Arthur Anderson*, 129 S. Ct. at 1899.

8. *Id.* at 1899.

9. *Id.* at 1900.

The district court denied Arthur Andersen's motion to stay the litigation, and the Sixth Circuit held that it lacked jurisdiction to consider the appeal.[10] The Supreme Court held that the FAA's "clear and unambiguous terms" granted *any* litigant the right to appeal the denial of a stay, regardless of whether the party met the substantive § 3 requirements.[11] The Court reasoned that lower courts, as well as the dissent, conflated the jurisdictional question with the merits issue of whether a non-party to an arbitration agreement is entitled to a stay under § 3.[12] The Court further held that while § 2 of the FAA requires a written arbitration agreement, state contract law controlled which contracts are enforceable and, in turn, whether a non-party may enforce the agreement under traditional theories of contract law, such as equitable estoppel or alter ego.[13]

2. *Jurisdiction to Compel Arbitration Under the FAA*

Recognizing that the FAA does not provide an independent basis for subject matter jurisdiction, the U.S. Supreme Court in *Vaden v. Discover Bank* held that a federal court must "look through" a motion to compel arbitration to determine whether it would have jurisdiction over the underlying dispute between the parties.[14] In *Vaden*, the actual controversy related to the collection of credit-card debt, a claim that did not arise under federal law.[15] That federal law preempted the debtor's counterclaim did not change the analysis because jurisdiction must be predicated on the allegations in the complaint and not the preemption of a state-based counterclaim or defense.[16]

3. *Arbitration Clauses and the Potential Waiver of U.S. Statutory Claims*

In 2009, several courts reached different conclusions about how the presence of statutory causes of action impacted an agreement to arbitrate. The plaintiff in *Thomas v. Carnival Cruise Lines Inc.* brought statutory and common-law claims following injuries he sustained while working on a cruise ship.[17] Carnival sought to compel arbitration.[18] Plaintiff argued that compelling arbitration in a foreign forum that would apply Panamanian law constituted a prospective waiver of his statutory claims in violation of public policy.[19] Relying on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[20] the Court held that when paired with a foreign choice-of-law provision, the arbitration clause prevented plaintiff from vindicating his statutory rights.[21]

In *Mitsubishi*, the U.S. Supreme Court held that arbitration of a Sherman Act antitrust claim did not violate public policy but noted "that in the event the choice-of-forum and

10. *Id.* at 1900-01.
11. *Id.* (citing 9 U.S.C. § 16(a)(1)(A) (1990) ("[a]n appeal may be taken from—[ ]an order—[ ]refusing a stay of any action under section 3 of this title.")).
12. *Id.*
13. *Id.* at 1902.
14. *Vaden*, 129 S. Ct. at 1273.
15. *Id.* at 1272.
16. *Id.* at 1279.
17. Thomas v. Carnival Corp., 573 F.3d 1113, 1116 (11th Cir. 2009).
18. *Id.* at 1115.
19. *Id.*
20. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).
21. *Thomas*, 573 F.3d at 1120-21.

choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[22] Applying this language, the *Thomas* court denied the motion to compel, holding that arbitration could deprive plaintiff of the benefit of his statutory claim.[23]

In *Grynberg v. BP P.L.C.*, the Court analyzed the same section of *Mitsubishi* and reached a contrary result.[24] The parties commenced arbitration in Canada under Alberta law.[25] While the arbitration was pending, plaintiffs filed suit in Washington, D.C., alleging RICO violations.[26] In opposing the motion to compel arbitration, plaintiffs cited *Mitsubishi* and argued that arbitration in Canada under Alberta law was barred by public policy. The Court concluded that *Mitsubishi*'s language was dicta and that the forum-selection clause was presumptively enforceable because the agreement was "international in character."[27] Further, plaintiffs' RICO claims could be vindicated as "conspiracy, fraud, bribery, and theft" claims under Alberta law.[28]

The Second Circuit, in *In re American Express Merchants Litigation*, relied on *Mitsubishi* in concluding that an arbitration clause that included a class-action waiver was void on public policy grounds.[29] The Court determined that precluding collective action granted American Express "de facto immunity" from liability under the Sherman Act because prosecuting the claims on an individual basis was cost prohibitive.[30]

B. Enforcement Of Awards

1. *Personal Jurisdiction and Enforcement of Awards Against Sovereigns*

In *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, the Second Circuit held that personal or quasi in rem jurisdiction is required to confirm a foreign arbitral award.[31] Responding to the argument that there is no statutory or treaty basis for such a requirement and that the New York Convention requires a court to confirm an award "unless it finds one of the grounds for refusal. . . of recognition or enforcement" specified therein, the court held that the Convention "limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought."[32]

The court also held that foreign states are not "persons" for the purposes of the Due Process Clause and are thus not entitled to its jurisdictional protections.[33] Even though an instrumentality or agency of a foreign state would be deemed a foreign state for purposes of the FSIA, such statutory treatment "does not answer the constitutional question

22. *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19.
23. *Thomas*, 573 F.3d at 1123-24.
24. Grynburg v. BP P.L.C., 596 F. Supp. 2d 74 (D.D.C. 2009).
25. *Id.* at 78.
26. *Id.* at 77.
27. *Id.* at 78.
28. *Id.* at 80.
29. *In re* Am. Express Merch. Litig., 554 F.3d 300, 319-20 (2d Cir. 2009).
30. *Id.* at 320.
31. Frontera Res. Azer. Corp. v. State Oil Co. of Azer., 582 F.3d 393, 397-98 (2d Cir. 2009).
32. *Id.* at 397.
33. *Id.* at 399-401.

of [the entity's] due process rights."[34] If the foreign state "exerted sufficient control over [the entity]. . . to make it an agent of the State, then there is no reason to extend to [the entity] a constitutional right that is denied to the sovereign itself."[35] The court concluded that the analytic framework to be applied to determine "whether the instrumentality should have due process rights to which the state is not entitled" is the same as that applied to determine whether an instrumentality can be treated like its state for purposes of attribution of liability.[36]

In *United States v. Park Place Associates, Ltd.*, a case with an unusual and complex procedural history, the Ninth Circuit ruled that an award subject to the domestic chapter of the FAA could neither be vacated, because none of the vacatur requirements of 9 U.S.C. § 10(a) were met, nor confirmed, because the action to confirm was barred on sovereign immunity grounds.[37] There, Park Place entered into a Joint Venture Agreement (JVA) with LCP Associates (LCP) providing that disputes were to be resolved by arbitration and that any judgment on the award could be rendered "in any court of competent jurisdiction in the State of California."[38] LCP's majority interest was subsequently forfeited to the United States.[39]

Park Place sought to enforce its award against the United States in the Court of Federal Claims.[40] The United States opposed the action and moved to vacate the award in the Central District of California.[41] After the Federal Circuit confirmed the denial of Park Place's motion to confirm on the ground that authority to decide such motions is vested exclusively in the district courts and that the JVA provided that judgment on the award could be rendered in California courts, Park Place successfully moved to confirm the award in the Central District of California.[42] On appeal, the Ninth Circuit affirmed the Central District's denial of the motion to vacate, holding that the United States failed to meet the vacatur requirements of 9 U.S.C. § 10,[43] but vacated the confirmation of the award because the United States had not waived immunity to confirmation.[44]

The Ninth Circuit rejected Park Place's arguments that the United States had waived immunity both by assuming ownership of LCP's interest and assenting to the JVA and by filing a motion to vacate.[45] The court concluded that its holding "essentially return[ed] Park Place to the Court of Federal Claims," even though the Federal Circuit already held "that neither it nor the Court of Federal Claims may confirm the arbitration award."[46] While the court expressed sympathy for Park Place's jurisdictional predicament, it noted

34. *Id.* at 400.
35. *Id.*
36. *Id.*
37. United States v. Park Place Assoc., 563 F.3d 907 (9th Cir. 2009).
38. *Id.* at 913.
39. *Id.* at 914.
40. *Id.* at 915.
41. *Id.*
42. *Id.* at 917-18.
43. *Id.* at 935.
44. *Id.* at 932-934.
45. *Id.* at 919-20, 923.
46. *Id.* at 936.

that "a suit against the United States must start from the opposite assumption that no relief is available."[47]

2. *U.S. Decisions Addressing the Scope of Arbitrators' and Courts' Authority*

In *ReliaStar Life Insurance Co. v. EMC National Life Co.*,[48] the Second Circuit held that arbitrators could award fees as sanctions for bad faith conduct, even where the parties' agreement required each party to bear its own fees.[49] ReliaStar and National Travelers entered into two coinsurance agreements, each of which contained an identical agreement to arbitrate and provided that each party would bear its own arbitrator's and attorneys' fees.[50] National Travelers initiated arbitration seeking a declaration that the coinsurance agreements had been terminated.[51] The arbitration panel issued an award in ReliaStar's favor and ordered National Travelers to pay ReliaStar's arbitrator and attorneys' fees because it viewed National Travelers' conduct during the arbitration "as lacking good faith."[52]

The Southern District of New York vacated the award on the ground that the panel had exceeded its authority in awarding fees and costs.[53] The Second Circuit reversed, finding that a broad arbitration clause—like the one at issue in that case—"confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith, and that such a sanction may include an award of attorney's or arbitrator's fees."[54] The court stated that a challenged award would be upheld as long as the arbitrator had offered "a barely colorable justification for the outcome reached."[55] The court noted there was no indication that the parties intended to limit the arbitrators' authority to impose sanctions for bad faith conduct and that the parties' agreement indicated the intention to have the arbitrators follow the "American Rule," with each side bearing its fees and costs, only where there is good faith conduct.[56]

In *KX Reinsurance Co. v. General Reinsurance Corp.*, the court addressed whether the arbitral panel's jurisdiction continued beyond its issuance of the final award.[57] KX had entered into several reinsurance treaties containing arbitration clauses with General Reinsurance and North Star Reinsurance.[58] North Star and General initiated arbitration to collect money they contended was owed to them.[59] The panel found in favor of North Star and General and issued an interim order requiring KX to post a letter of credit for

47. *Id.* at 935.
48. Reliastar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81 (2d Cir. 2009).
49. *Id.* at 83.
50. *Id.* at 84.
51. *Id.* at 84.
52. *Id.* at 85.
53. *Id.*
54. *Id.* at 86.
55. *Id.* (quoting Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003)).
56. *Id.* at 88-89.
57. KX Reinsurance Co. v. Gen. Reinsurance Corp., No. 08 Civ. 7807(SAS), 2008 U.S. Dist. LEXIS 92717, at *1 (S.D.N.Y. Nov. 14, 2008).
58. *Id.* at *3.
59. *Id.* at *3-4.

outstanding balances and reserves.[60] KX agreed to do so.[61] The panel then converted the interim order into a provision of the final award, which included the right to retain jurisdiction over any remaining claims concerning the reinsurance treaties until all parties expressly requested that it desist.[62] KX complied with the arbitral award, moved to confirm the award except for the provision permitting retention of jurisdiction (which it sought to vacate) and requested that the panel be disbanded.[63] North Star and General opposed, and the panel rejected KX's request that it disband.[64]

The court granted KX's motion in its entirety.[65] After determining that the arbitral award was indeed final, the court found no reason under the FAA not to confirm the award in part, as KX requested.[66] The court also held that the panel had no right to retain jurisdiction, as it had already ruled on the specific issues submitted to it; thus, "by definition, it ha[d] no jurisdiction over any potential future disputes."[67] Accordingly, KX's motion to vacate the portion of the panel's award enabling it to retain jurisdiction over potential future disputes was also granted.[68]

The scope of a court's jurisdiction to enforce an award was addressed in *Four Seasons Hotels & Resorts v. Consorcio Barr*.[69] Four Seasons sought to confirm an arbitral award conducted pursuant to the New York Convention.[70] The Southern District of Florida determined that an arbitration agreement could not be imputed into a new agreement that, while related to the prior agreement, explicitly superseded it.[71] Specifically, a Hotel Management Agreement between the parties contained an arbitration provision, but a later Loan Agreement superseded relevant portions of the Hotel Management Agreement, including the arbitration provision.[72] Accordingly, the court agreed with Consorcio's contention that the court lacked jurisdiction to confirm a final arbitral award in Four Seasons' favor "inasmuch as it award[ed] damages for claims under the Loan Agreement."[73] Because the Loan Agreement lacked an arbitration provision, the court found the portion of the arbitral award relating to that Agreement to be outside the terms of the submission to arbitration.[74]

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

One of the most significant developments in 2008 was the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, which held that parties to an arbitration agree-

60. *Id.* at *4.
61. *Id.* at *3-5.
62. *Id.* at *6-7.
63. *Id.* at *8.
64. *Id.* at *6-9.
65. *Id.* at *1.
66. *Id.* at *15-16.
67. *Id.* at *19-20.
68. *Id.* at *20.
69. Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A., 613 F. Supp. 2d 1362, 1364 (S.D. Fla. 2009).
70. *Id.* at 1366.
71. *Id.* at 1388.
72. *Id.* at 1368-69.
73. *Id.* at 1369.
74. *Id.*

ment may not contract for broader judicial review of arbitral awards than that provided for in the FAA.[75] The Court's decision questioned whether judicially created grounds not expressly set forth in the FAA, including manifest disregard of the law and complete irrationality, continued to be valid grounds for vacatur.[76] This question will likely depend on whether these grounds are deemed extra-statutory—which would call their viability into doubt—or whether they instead refer collectively to the grounds set forth in § 10 of the FAA, or are merely shorthand for, or a gloss on, FAA §§ 10(a)(3)-(4), which authorize vacatur when the arbitrators are "guilty of misconduct" or "exceed[ ] their powers."[77] The Supreme Court has not yet resolved this issue and circuit courts are divided. The Second Circuit has 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."[78] The Ninth[79] and Sixth[80] circuits have likewise held that "manifest disregard" remains a viable ground for vacatur, while the Tenth Circuit has applied the standard without squarely addressing its continued viability under *Hall Street*.[81] In contrast, the Fifth Circuit has held that it is no longer a viable ground.[82] 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*.[83]

4. *Other Enforcement Decisions*

The Ninth Circuit addressed the "manifest disregard" and "complete irrationality" standards for vacatur in *Bosack v. Soward*.[84] Following a dispute between the parties, the arbitral panel entered a series of five interim awards and a Final Award.[85] In one interim award, the panel determined the value of Soward's interest in a particular partnership on the basis that he remained a partner in the partnership.[86] In a subsequent interim award, the panel premised the imposition of punitive damages on findings that Soward had been removed as a partner years before.[87]

Appellants moved to vacate the panel's punitive damages awards,[88] arguing that they were irreconcilable with findings made in previous awards and thus violated the *functus officio* doctrine, and also that they were completely irrational in manifest disregard of the

75. Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1396 (2008).

76. *Id.* at 1398-99.

77. *Id.* at 1404.

78. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (2009).

79. *See* Comedy Club Inc. v. Improv West Assocs., 553 F.3d 1277, 1277 (9th Cir. 2009).

80. *See* Coffee Beanery, Ltd. v. WW, L.L.C., 2008 WL 4899478, at *1 (6th Cir. Nov. 14, 2008).

81. *See* DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc., 585 F.3d 1342, 1345 n.2 (10th Cir. 2009).

82. *See* Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 349 (5th Cir. 2009).

83. *Compare* Ramos-Santiago v. UPS, 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).

84. Bosack v. Soward, 586 F.3d 1096, 1104 (9th Cir. 2009).

85. *Id.* at 1101.

86. *Id.*

87. *Id.* at 1102.

88. *Id.*

law.[89] While tacitly recognizing the contradictory factual findings in the panel's awards, the Ninth Circuit upheld them, reasoning that an arbitral award may be vacated as in manifest disregard of the law only if it is clear from the record that the panel recognized the applicable law, yet ignored it—a showing that the court ruled had not been made.[90] The court determined that the award did not "fail to draw its essence from the agreement"[91] between the parties, and thus was not completely irrational because the panel had applied Delaware law rather than the parties' agreement in establishing the tort liability on which punitive damages were based.[92] Finally, the court followed the Eighth Circuit in ruling that the *functus officio* doctrine applies to final partial (or interim) awards, but found that the panel had not re-determined any findings made in the only final interim award.[93]

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

Recent Fifth Circuit and district court decisions indicate that no consensus yet exists on whether 28 U.S.C. § 1782, which authorizes district courts to compel discovery "for use in a proceeding in a foreign or international tribunal,"[94] can be used to obtain evidence in aid of international private arbitrations. Following the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*,[95] several district courts have held that a foreign private arbitration panel qualified as a "tribunal" for purposes of § 1782.[96] But in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, the Fifth Circuit explained that whether § 1782 applied to private arbitrations was not squarely addressed in *Intel*.[97] The court held that *Intel* did not disturb earlier precedent holding that § 1782 does not reach discovery sought for use in international private arbitrations.[98] District courts in *In re Operadora DB Mexico, S.A. DE C.V.*[99] and *In re Arbitration in London, England*[100] followed similar reasoning in rejecting applications for discovery under § 1782.

III. Investor-State Disputes

A. Jurisdiction and Admissibility

1. *Investor Standing*

In one of the more significant decisions dealing with investor standing, the tribunal in *Renta 4*[101] addressed an objection to its jurisdiction on the basis that two of the claim-

89. *Id.*
90. *Id.* at 1104.
91. *Id.* at 1106.
92. *Id.* at 1107.
93. *Id.* at 1103.
94. 28 U.S.C. § 1782(a) (2006).
95. *See generally* Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466 (2004).
96. *See, e.g., In re* Babcock Borsig AG, 583 F. Supp. 2d 233, 240 (D. Mass. 2008).
97. El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, No. 08-20771, 2009 WL 2407189, at *2 (5th Cir. Aug. 6, 2009).
98. *Id.* at *3.
99. *In re* Operadora DB Mex., S.A. DE C.V., 2009 WL 2423138, at *9 (M.D. Fla. Aug. 4, 2009).
100. *In re* an Arbitration in London, Eng. between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda, 626 F. Supp. 2d 882, 885 (N.D. Ill. June 15, 2009).
101. Renta 4, *supra* note 6, ¶ 122.

ants—investment funds owning Yukos Oil Company American Depository Receipts—did not meet the requirement of the Spain-Russia BIT that an "investor" be a "corporate body" (*persona jurídica*).[102] The funds were operating under a tripartite Spanish investment structure that also involved management and depository companies. While the latter companies were potentially qualified investors, they had no right to bring the claims in question themselves, because they did not technically make the investments.[103]

2. *Qualifying Investments*

The existence of a qualifying investment continued to be a prominent issue in investor-state arbitration in 2009, particularly in the context of the so-called "*Salini* test."[104] There was a clear effort on the part of tribunals to take a fact-based, rather than a doctrinal, approach to what constitutes a qualifying investment. For example, the tribunal in *Toto*[105] emphasized that it sought to analyze the characteristics of the investment in a manner appropriate to the specific facts of that case.[106]

The *RSM*[107] tribunal determined that the *Salini* elements were not cumulative, noting that agreements to explore for natural resources may involve a significant commitment and outlay of investor resources without entailing a regular return or contribution to the development of the host state.[108]

The tribunal in *Pantechniki* likewise rejected the notion that the *Salini* factors constituted a test, suggesting that there was an "emerging synthesis" in ICSID jurisprudence and scholarship that eliminated two of those factors, namely, the requirements of duration and contribution to the development of the host state.[109]

On the other hand, the *Phoenix Action* tribunal seemed to take a more doctrinal approach to what constitutes a qualifying investment, summarizing what it deemed to be the "requirements for an investment to benefit from the international protection of ICSID" in the form of a list constituting six "elements [that] have to be taken into account."[110] Although the tribunal stated that these factors had to be analyzed "with due consideration of all circumstances,"[111] it proceeded to apply them in systematic fashion.[112]

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102. *Id.* ¶¶ 127-130. The third arbitrator dissented on this holding. *See* ¶¶ 25-32 (separate opinion of Charles N. Brower).

103. Renta 4, *supra* note 6, ¶ 132.

104. Salini Costruttori S.P.A. v. Morocco, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/00/4, ¶ 14 (July 23, 2001).

105. Toto Costruzioni Generali S.P.A. v. Leb., Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/07/12, ¶¶ 65, 69 (Sept. 8, 2009).

106. *Id.* ¶ 81.

107. RSM Prod. Corp. v. Gren., Award, ICSID (W. Bank) Case No. ARB/05/14 (Mar. 13, 2009).

108. *Id.* ¶¶ 243-244.

109. Pantechniki S.A. Contractors & Eng'r v. Alb., Award, ICSID (W. Bank) Case No. ARB/07/21, ¶ 36 (July 30, 2009).

110. Phoenix Action, Ltd. v. Czech Republic, Award, ICSID (W. Bank) Case No. ARB/06/5, ¶ 114 (Apr. 15, 2009).

111. *Id.* ¶ 115.

112. *Id.* ¶¶ 117-144.

3. *Most Favored Nation Clauses*

The use of MFN clauses to expand the scope of applicable dispute resolution provisions continued to be a contentious issue in 2009. The *Renta 4* tribunal examined claimants' argument that, by operation of the MFN provision in the Spain-Russia BIT, they could rely upon the jurisdictional provision in the Denmark-Russia BIT, which was considerably broader than the jurisdictional provision in the former treaty.[113] Citing the *Ambatielos Claim*, the tribunal found that the MFN clause in the Spain-Russia BIT evidenced Russia's consent to expand jurisdiction based on more liberal provisions in other treaties, even where such treaties were entered into later in time.[114]

In contrast, the *Tza Yap Shum* tribunal found that the MFN provision in the Perú-China BIT did not grant it jurisdiction to hear claims of violations of FET and full protection and security where the BIT specifically provided ex-ante consent only for submission of claims of expropriation to ICSID arbitration.[115]

4. *Rule 41(5): Objection That a Claim Is Manifestly Without Legal Merit*

In *Brandes*,[116] the tribunal heard an objection to jurisdiction brought under ICSID Arbitration Rule 41(5), which provides for expedited consideration of an objection that a claim is "manifestly without legal merit" and agreed with the tribunal in *Trans-Global*[117] that the word "manifest" required that the deficiency be clear and obvious.[118] Moreover, the *Brandes* tribunal found that the absence of a *factual* basis for the claim was insufficient to sustain an objection under the rule,[119] ultimately rejecting respondent's objection on the grounds that it would require an examination of complex legal and factual issues.[120]

B. Decisions on the Merits

The requirement for expropriation with compensation was the main ground of all three merits decisions rendered in favor of claimants in 2009, while FET was a partial basis for liability in only one decision.[121]

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113. Renta 4, *supra* note 6, ¶ 69.

114. *Id.* ¶ 101.

115. Tza Yap Shum v. Peru, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/07/6, ¶ 199 (June 19, 2009).

116. Brandes Inv. Partners, LP v. Bolivarian Republic of Venez., Decision on Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, ICSID (W. Bank) Case No. ARB/08/3, ¶ 73 (Feb. 2, 2009).

117. Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, ICSID (W. Bank) Case No. ARB/07/25 (May 12, 2008).

118. Brandes, *supra* note 116, ¶ 63-64.

119. *Id.* ¶ 70.

120. *Id.* ¶¶ 71-72.

121. Claimants succeeded in full or part on the merits in three arbitrations in 2009: Funnekotter v. Zimb., Award, ICSID (W. Bank) Case No. ARB/05/6 (Apr. 15, 2009) (expropriation); Siag & Vecchi v. Egypt, Award, ICSID (W. Bank) Case No. ARB/05/15 (May 11, 2009) (expropriation, full protection and security, FET, unreasonable measures); and Saipem SpA v. Bangl., Award, ICSID (W. Bank) Case No. ARB/05/7 (June 20, 2009) (expropriation). Respondents successfully defended liability claims in four arbitrations in 2009: Glamis, *supra* note 5; Pantechniki, *supra* note 109; Bayindir Insaat Turizm Ticaret ve Sanayi A S v.

1. *Expropriation*

The claimants in *Funnekotter*[122] were faced with a situation involving direct and indirect land expropriations as a result of, *inter alia*, laws permitting the taking of farming properties for transfer to military veterans and other nationals. Unlike most expropriation cases, the main issue was not whether there was an expropriation, but whether compensation had been paid "without delay," as required by the treaty.[123] Although the claimants alleged that *none* of the cumulative requirements for a legal expropriation were met by Zimbabwe, the tribunal concluded there was an illegal expropriation solely on the basis of respondent's failure to compensate the claimants in a timely manner.[124]

The *Bayindir* tribunal, like the *Saipem* tribunal, confirmed that an expropriation claim is "potentially applicable not only to tangible property but also to contractual and other rights."[125]

Also, the *Glamis* NAFTA tribunal took a strict interpretation that the deprivation required for an expropriation must render the investment effectively "useless," such that "mere restrictions on the property rights do not constitute takings."[126] The *Bayindir* tribunal placed particular reliance on the holding of the *Tecmed*[127] award in making a similar point.[128]

2. *Fair and Equitable Treatment*

It has been widely accepted by tribunals and commentators that the principle of good faith underlies the FET standard,[129] particularly with regard to the duty of states to respect investors' legitimate expectations. In this vein, the *Siag* tribunal provided a useful summary of the content of the FET standard, stating:

> The general, if not cardinal, principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard. While its precise ambit is not easily articulated, a number of categories of frequent application may be observed from past cases. These include such notions as

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Pak., Award, ICSID (W. Bank) Case No. ARB/03/29 (Aug. 24, 2009); and EDF (Servs.) Ltd v. Rom., Award, ICSID (W. Bank) Case No. ARB/05/13 (Oct. 2, 2009). Note that FET was the basis for claimants' claims in five of the seven arbitrations (*Siag*, *Glamis*, *Pantechniki*, *Bayindir*, and *EDF*), with the claimant in *Siag* making the only successful FET claim.

122. Funnekotter, *supra* note 121, ¶¶ 21, 26.

123. *Id.* ¶ 75.

124. *See id.* ¶ 101.

125. Bayindir, *supra* note 121, ¶¶ 441-442, 456. The Saipem tribunal held that claimant's "right to arbitrate and the rights determined by the [ICC] Award are capable in theory of being expropriated." *See* Saipem, *supra* note 121, ¶ 122.

126. Glamis, *supra* note 5, ¶ 357 (citing OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 11 (OECD Working Papers on Int'l Inv., 2004/4)).

127. Tecnicas Medioambientales Tedmed S.A. v. United Mexican States, Award, ICSID (W. Bank) Case No. ARB(AF)/00/2, ¶ 115 (May 29, 2003).

128. Bayindir, *supra* note 121, ¶ 443.

129. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 5-6, 144-47 (2008).

transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment.[130]

Similarly, the EDF tribunal "share[d] the view expressed by other tribunals that one of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made."[131]

With respect to other aspects of the scope of the FET standard, the *Bayindir* tribunal held that a breach of FET "need not necessarily arise out of individual isolated acts but can result from a series of circumstances."[132] The tribunal also disagreed with Respondent's argument that the often-applied *Tecmed v. Mexico* award should be relegated in favor of the *Thunderbird v. Mexico*[133] award as representing the preferred position on the issue of whether FET has a high "egregiousness" threshold.[134]

In a particularly notable decision, the *Glamis* NAFTA tribunal[135] addressed the content of FET as reflected in customary international law, also relying on the *Thunderbird* award.[136] Although many tribunals and commentators have concluded that there is effectively no difference between the content of the customary and treaty standards, the *Glamis* tribunal identified the customary standard as being so strict in scope that one observer described the decision as a "clear break with the overwhelming jurisprudential consensus that had been achieved over a decade on the issue."[137] The *Glamis* tribunal particularly relied on the 1926 award of the Mexican Claims Commission tribunal of *Neer v. Mexico*[138] as representative of the "customary" standard, as well as concluding that the customary standard has not evolved since this 1926 decision.[139]

3. *Full Protection and Security*

The *Siag* tribunal acknowledged that the full protection and security standard requires that states exercise "due diligence" in preventing harm to an investment,[140] holding that the failure of police to heed claimant's requests for protection from the expropriation of its hotel investment, and the failure of respondent to return that investment after the courts had struck down the expropriatory measures, supported the finding of a breach of the full protection clause in the Italy-Egypt BIT.[141]

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130. Siag, *supra* note 121, ¶ 450.

131. EDF (Servs.) Ltd., *supra* note 121, ¶ 216.

132. Bayindir, *supra* note 121, ¶ 181. The *Glamis* tribunal reached an opposite conclusion, holding that for a tribunal to address acts as a whole rather than individually, it would be necessary to additionally find some form of intent by respondent. Glamis, *supra* note 5, ¶¶ 824-829.

133. Int'l Thunderbird Gaming Corp. v. Mex., Arbitral Award, UNCITRAL Arbitration Rules (Jan. 26, 2006).

134. Bayindir, *supra* note 121, ¶¶ 174, 179.

135. In the interest of full transparency, it should be disclosed that members of the firm Crowell & Moring LLP were counsel to the claimants in the *Glamis* arbitration.

136. Glamis, *supra* note 5, ¶¶ 560, 614, 621, 623, 625.

137. *See* Todd Weiler and related discussion on OGEMID following the release of the *Glamis* award, 3 July 2009, OGEMID Archive, *available at* http://www.transnational-dispute-management.com.

138. Neer v. Mex., 4 R.I.A.A. 60 (U.S.-Mex. Gen. Claims Comm'n 1926).

139. Glamis, *supra* note 5, ¶¶ 22, 600-604, 612-616, 627.

140. Siag, *supra* note 121, ¶ 450.

141. *Id.* ¶ 448. Article 4(1) of the Italy-Egypt BIT provided: "Investments by nationals or companies of either Contracting Party shall enjoy full protection in the territory of the other Contracting Party." *Id.* ¶ 445.

The tribunal in *Pantechniki* raised the controversial question, "Should a state's international responsibility bear some proportion to its resources?"[142] Other tribunals have answered this question in the affirmative, particularly with respect to FET claims.[143] While the *Pantechniki* tribunal rejected this proposition as applied to a denial of justice, it accepted that there is a "modified objective standard" with respect to full protection and security, subsequently rejecting the latter claim on the basis that the police were *unable* to intervene, as opposed to having *refused* to intervene when asked (which would have provided a basis for the claim).[144]

4. *Damages Awards*

No tribunals awarded punitive or moral damages during 2009. In *Siag*, the tribunal rejected claimants' request for such damages, holding that an unlawful expropriation did not warrant punitive or moral damages, which are "reserved for extreme cases of egregious behavior."[145] Similarly, *Europe Cement* held that an abuse of process was not enough to trigger moral damages,[146] which could only be justified by "exceptional circumstances such as physical duress . . . ."[147] *Cementownia* found that although "symbolic compensation for moral damages may indeed aim at indicating a condemnation for abuse of Process . . . the Arbitral Tribunal deems it more appropriate to sanction the Claimant with respect to the allocation of costs."[148]

C. Annulment and Enforcement Actions

Four decisions were issued by ICSID ad hoc committees in 2009 involving the enforcement of ICSID awards against Argentina during the pendency of annulment proceedings.[149] These decisions merit special attention in light of the ongoing speculation as to whether—and how—increasing numbers of ICSID award creditors will receive payment of the amounts owed to them by Argentina. In addition to the Argentina cases, the decision in the *Malaysian Historical Salvors (MHS)* annulment proceeding[150] was also notewor-

142. Pantechniki, *supra* note 121, ¶ 76.

143. *See, e.g.*, MTD Equity Sdn Bhd & MTD Chile SA v. Chile, Award, ICSID (W. Bank) Case No. ARB/01/7, ¶ 171 (May 25, 2004).

144. Pantechniki, *supra* note 121, ¶ 76-83.

145. Siag, *supra* note 121, ¶ 545.

146. Eur. Cement Inv. & Trade S.A. v. Turk., Award, ICSID (W. Bank) Case No. ARB(AF)/06/2, ¶¶ 180-181 (Aug. 13, 2009).

147. *Id.* ¶ 181.

148. Cementownia "Nowa Huta" S.A. v. Turk., Award, ICSID (W. Bank) Case No. ARB(AF)/06/2, ¶ 171 (Sept. 17, 2009).

149. *See* Enron Creditors Recovery Corp. v. Arg., Decision on Request for a Continued Stay of Enforcement of Award, ICSID (W. Bank) Case No. ARB/01/3 (May 20, 2009); Sempra Energy Int'l v. Arg., Decision on Request for Stay of Enforcement, ICSID (W. Bank) Case No. ARB/02/16 (Mar. 5, 2009) [hereinafter Sempra Stay Request]; Sempra Energy Int'l v. Arg., Decision on Request for Termination of Stay of Enforcement of Award (Aug. 7, 2009) [hereinafter Sempra Stay Termination]; Continental Cas. Co. v. Arg., Decision on Stay of Enforcement of Award, ICSID (W. Bank) Case No. ARB/03/9 (Oct. 23, 2009).

150. Malaysian Historical Salvors v. Malay., Decision on Application for Annulment, ICSID (W. Bank) Case No. ARB/05/10 (Feb. 28, 2009).

thy, as only the third such decision of a "modern" ICSID ad hoc committee to substantially annul an ICSID award.[151]

1. *Decisions on Stays of Enforcement*

Argentina—by far the most common respondent in ICSID cases filed to date—has sought annulment in every case in which a final award has been rendered against it. Notably, in each of the cases where Argentina has sought annulment, it was granted an initial stay of enforcement of the awards pending conclusion of the annulment proceeding. In keeping with recent practice of annulment committees, these stays were granted without Argentina being required to post any financial security.

In March and August 2009, respectively, the *Sempra* ad hoc committee became the first to (1) require Argentina to post a financial security as a condition for continuation of a stay,[152] and (2) explicitly terminate a stay against Argentina during the pendency of an annulment proceeding.[153] Notably, the latter decision ran contrary to that of the *Enron*[154] committee, which continued the stay in that case. Although the *Enron* decision has not been published, it was apparently heavily relied upon by Argentina in contesting Sempra's application.[155]

In *Continental Casualty*, the ad hoc committee affirmed the decisions of the committees in *Vivendi*, *Enron*, and *Sempra*, in rejecting Argentina's argument that an ICSID award could be subject, pursuant to Convention Article 54, to the provisions and mechanisms of national law.[156] Due to Argentina's position on this issue, the committee concluded that there was "no prospect that Argentina will comply with its obligation under Article 53 of the ICSID Convention" if the award was not annulled.[157] Furthermore, like the *Sempra* committee, it found this to be a "fundamentally important consideration in determining whether to impose a condition of security as a requirement for any stay of enforcement."[158] Ultimately, the *Continental Casualty* committee declined to terminate the stay or to impose any condition of security, due to what it considered to be the special circumstances of the case.[159] Nevertheless, its conclusions with regard to Argentina's non-compliance with the Convention—echoing those of the *Sempra* committee—may signal the development of a new trend toward requiring Argentina to post a financial security in the absence of special circumstances.

151. The other two decisions are Compañía de Aguas del Aconquija S.A. v. Arg., Decision on Annulment, ICSID (W. Bank) Case No. ARB/97/3 (July 3, 2002), and Mitchell v. Dem. Rep. Congo, Decision on Application for Annulment of Award, ICSID (W. Bank) Case No. ARB/99/7 (Nov. 1, 2006).

152. Sempra Stay Request, *supra* note 149, ¶ 105.

153. Sempra Stay Termination, *supra* note 149, ¶ 23. The stay in the *Vivendi* annulment proceeding was also presumably terminated automatically, upon expiration of the time limit set by the committee for Argentina's fulfillment of conditions imposed upon its continuation. *See* Compañía de Aguas del Aconquija S.A. v. Arg., Decision on Stay of Enforcement, ICSID (W. Bank) Case No. ARB/97/3, ¶ 46C (Nov. 4, 2008).

154. Enron Creditors Recovery Corp., *supra* note 149, ¶ 46.

155. Sempra Stay Termination, *supra* note 149, ¶¶ 9, 17.

156. Continental Cas. Co., *supra* note 149, ¶ 12.

157. *Id.*

158. *Id.* ¶ 13.

159. The committee placed emphasis on two factors: (1) both parties had cross-applied for annulment of different aspects of the award, and (2) the amount of the award being contested was only $2.8 million. *See id.* ¶¶ 14-16.

2. *Decisions on Applications for Annulment*

The committee in the *MHS* case became the third modern ad hoc committee to annul an ICSID award in its entirety. Of these three modern annulments, two have now turned on the same issue, namely, the tribunal's approach to the question of whether the claimant had made an "investment" for purposes of the ICSID Convention. Notably, the two committees to decide this issue—the first in *Mitchell* and the second in *MHS*—reached what were, in many ways, opposite conclusions.

On the one hand, the *Mitchell* committee annulled the tribunal's affirmation of jurisdiction *ratione materiae*, determining that the award was "incomplete and obscure as regards what it considers an investment."[160] In this regard, even though the *Mitchell* committee found that "the elements identified by the Award for purposes of affirming the existence of an investment fall well within the scope of application of the [BIT]," it opined that this was not sufficient to "affirm the existence of an investment within the meaning of the Washington Convention," because for that purpose "it is necessary for the contribution to the economic development or at least the interests of the State. . .to be somehow present in the operation."[161]

On the other hand, the *MHS* committee annulled the tribunal's *rejection* of jurisdiction, determining that the tribunal's analysis of the *ratione materiae* issue inappropriately "embroider[ed] upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention," while "ignor[ing] or depreciat[ing] the importance of the jurisdiction" that had been "bestow[ed] upon ICSID" by the terms of the relevant BIT.[162] The tribunal had declined jurisdiction on the basis that MHS's contractual endeavor to locate and recover a valuable sunken cargo for the Government of Malaysia did not meet certain implied requirements of an investment under the Convention, including, in particular, that the operation entail a "significant contribution" to the host State's economic development.[163] The *MHS* committee noted the controversy over the correct approach to the issue of what, if anything, may be excluded from the definition of "investment" under the ICSID Convention.[164] Indeed, the controversy was manifest in the very circumstances of the decision, from which one of the committee members dissented in its entirety.[165]

160. Mitchell, *supra* note 151, ¶ 40.

161. *Id.* ¶¶ 36, 39.

162. Malaysian Historical Salvors, *supra* note 150, ¶ 73.

163. *Id.* ¶ 22.

164. *Id.* ¶¶ 75-79.

165. *See id.* (Mohamed Shahabuddeen, J., dissenting).