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Jurisdiction Issues in International Arbitration

Mitchell L. Lathrop

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JURISDICTION ISSUES IN INTERNATIONAL ARBITRATION

MITCHELL L. LATHROP[†]

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I. ESSENTIAL ELEMENTS - DOMESTIC & INTERNATIONAL

It is a fundamental concept in law that jurisdiction must exist if a valid judgment or award is to be rendered by an adjudicative body. Because jurisdiction can be challenged at any stage of the proceedings, it is essential that jurisdiction be determined as one of the first orders of business in any dispute resolution forum. That is particularly important in arbitrations, whether domestic or international.

Parties entering into contracts in the English-speaking world are free to provide for the arbitration of disputes arising under the contract, although the scope of arbitral authority conferred may be broad or limited depending upon the specific wording of the arbitration agreement or provision. Included in the many choices which the parties may have is the choice of how an arbitration will be conducted and under whose statutes or rules. In addition to the principal statutes governing arbitrations, many independent entities provide arbitral services and have their own rules and procedures.¹

Arbitration, and particularly international arbitration, involves jurisdictional issues beyond those normally encountered in traditional judicial proceedings. The first and most obvious—applicable to both domestic and international arbitration—is whether there is an operable agreement to arbitrate. “Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he

[†] Mr. Lathrop is a Member of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and divides his practice between offices in New York and San Diego. He is a Fellow of the Chartered Institute of Arbitrators and serves as an arbitrator for a number of domestic and international arbitral providers. He is licensed to practice law in California, New York and the District of Columbia.

¹ For example, the following each have their own rules and arbitral procedures: The American Arbitration Association, see *Arbitration*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/arb_med; AIDA Reinsurance and Insurance Arbitration Society (ARIAS), see generally ARIAS-US, <http://www.arias-us.org/index.cfm>; the International Chamber of Commerce (ICC), see *ADR Rules*, INTERNATIONAL CHAMBER OF COMMERCE, http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf (updated as of July 1, 2011); the United Nations Commission on International Trade Law (UNCITRAL), see *UNCITRAL Arbitration Rules*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; and the London Court of International Arbitration (LCIA), see generally LCIA – The London Court of International Arbitration, <http://www.lcia.org>.

has not agreed so to submit.”² In other words, there must be an agreement by the parties to arbitrate disputes arising between them. It follows then that an initial, threefold determination must be made: (1) Is there a valid contract between the parties? (2) If so, does it contain a valid, enforceable arbitration provision? (3) Are the issues in dispute referable to arbitration?

Just as restrictions on the scope of an arbitration provision can be agreed upon by the parties entering into the arbitration agreement, so judicial decisions may impose restrictions. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the U.S. Supreme Court was confronted with the issue of whether a court could order a class to arbitrate.³ *Stolt-Nielsen S.A.* was an international shipping company which provided separately chartered compartments to its customers aboard its fleet of tankers.⁴ After the U.S. Department of Justice charged *Stolt-Nielsen* with price fixing, its customer, *AnimalFeeds*, brought a putative class action against *Stolt-Nielsen* in federal court in Pennsylvania.⁵ Another *Stolt-Nielsen* customer brought a suit in federal court in Connecticut.⁶ The Connecticut court ruled that the claims were not arbitrable, but the Second Circuit reversed.⁷ While the appeal was pending before the Second Circuit, the Judicial Panel on Multidistrict Litigation ordered consolidation of all pending actions against petitioners in the District of Connecticut.⁸ At that point, it appeared that all the consolidated cases would be subject to arbitration based upon a 1950 arbitration clause which read:

Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.⁹

The arbitrators permitted class arbitration to proceed and issued an award.¹⁰ They agreed to stay the proceedings to permit the parties to seek judicial review.¹¹ The

² *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648, (1986) (internal quotation marks omitted).

³ *See generally* *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

⁴ *Id.* at 1764.

⁵ *Id.* at 1765.

⁶ *Id.*

⁷ *JLM Indus. v. Stolt-Nielsen S.A.*, 387 F.3d 163 (2d Cir. 2004).

⁸ *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 296 F. Supp. 2d 1370 (J.P.M.L. 2003).

⁹ *Stolt-Nielsen*, 130 S. Ct. at 1765. The U.S. Arbitration Act is the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1947) [hereinafter FAA].

¹⁰ *Stolt-Nielsen S.A.*, 130 S. Ct. at 1766.

¹¹ *Id.*

U.S. District Court for the Southern District of New York vacated the award based upon “manifest disregard” of the law,¹² but was reversed by the U.S. Court of Appeals for the Second Circuit.¹³ The U.S. Supreme Court granted certiorari.¹⁴

The Supreme Court, in a 5 to 3 decision, reversed, holding that where an arbitration provision is silent as to the availability of class arbitration, class arbitration will not be permitted.¹⁵ The arbitration provision must expressly authorize class arbitration.¹⁶ Put another way, a federal court lacks jurisdiction to order a class arbitration in the absence of the express agreement of the parties.

If the parties agree that there is a valid contract between them which contains a provision referring disputes to arbitration, and arbitration has been requested by one of the parties, the dispute will proceed to arbitration. When one of the parties disputes either the existence of the contract or the validity of the arbitration provision, a different set of issues arises. Two questions which must be decided in the first instance are: (1) Do the parties dispute whether a valid contract exists between them? (2) Do the parties agree there is a contract between them, but dispute the validity or applicability of the arbitration provision to the dispute?

Where the parties dispute whether a valid contract containing an arbitration provision exists between them, the issue will normally be decided by the arbitrator.¹⁷ As the U.S. Supreme Court pointed out in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, “the statutory language [in the Federal Arbitration Act]¹⁸ does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”¹⁹ However, “if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it.”²⁰ The Supreme Court reiterated three fundamental propositions in *Buckeye Check Cashing, Inc. v. Cardegna*:

First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.²¹

¹² *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 384-385 (S.D.N.Y. 2006).

¹³ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008). *But see* *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008).

¹⁴ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 129 S. Ct. 2793 (2009).

¹⁵ *See Stolt-Nielsen S.A.*, 130 S. Ct. at 1776.

¹⁶ *See id.*

¹⁷ The term “arbitrator” as used throughout this paper includes Arbitral Tribunals.

¹⁸ FAA, *supra* note 9, §§ 1-16.

¹⁹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

²⁰ *Id.* at 403-04.

²¹ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (quoting Syllabus) (citations omitted).

Deadlines for complying with arbitration clause provisions will be strictly enforced by the court or the arbitrator. A number of decisions suggest that the court or arbitrator may lose jurisdiction to take any action beyond the remedy specified in the arbitration agreement.²² For example, in *Universal Reinsurance Corp. v. Allstate Insurance Co.*, Universal Reinsurance (“Universal”) failed to appoint an arbitrator within the time prescribed in the arbitration provision.²³ Allstate objected when Universal attempted to appoint an arbitrator three days after the time specified in the arbitration agreement and after Allstate had already appointed an arbitrator for Universal.²⁴ The district court rejected Allstate’s position,²⁵ as did the Seventh Circuit initially.²⁶ On rehearing, the Seventh Circuit enforced the wording of the arbitration agreement and affirmed Allstate’s appointment of an arbitrator for its opponent, observing:

In this case the agreement is crystal clear, specifying a particular course for the appointment of a second arbitrator when one of the parties fails to make its selection within thirty days. This provision does not command less deference simply because it concerns a procedural rather than a substantive aspect of the parties’ decision to arbitrate. On the contrary, the [FAA] states in no uncertain terms that contractual provisions for the appointment of an arbitrator “*shall* be followed.”²⁷

II. INTERNATIONAL ELEMENTS

The foregoing principles apply to both domestic and international arbitration, but in international arbitration a number of additional considerations come into play. One of the most important is whether the non-U.S. contracting party is a citizen of a state that has signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, commonly referred to as the New York Convention.²⁸ Although the New York Convention was adopted in 1958, it did not enter into force in the U.S. until 1970. The Convention has been codified in the U.S. at 9 U.S.C. §§201, *et seq.*²⁹ The Convention and the implementing provisions of the FAA set forth four basic requirements to establish jurisdiction under the Convention:

²² See, e.g., *Bechtel Do Brasil Construções Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150 (2d Cir. 2011); *Argentine Republic v. Nat’l Grid PLC*, 637 F.3d 365 (D.C. Cir. 2011); *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994); *Certain Underwriters at Lloyd’s, London v. Argonaut Ins. Co.*, 444 F. Supp. 2d 909 (N.D. Ill. 2006).

²³ *Universal Reinsurance*, 16 F.3d at 126.

²⁴ *Id.* at 127.

²⁵ *Id.*

²⁶ See *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 995 F.2d 113 (7th Cir. 1993).

²⁷ *Universal Reinsurance*, 16 F.3d at 129 (emphasis original).

²⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. For a list of contracting states, see *Contracting States, NEW YORK ARBITRATION CONVENTION*, <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states> (last updated Sept. 1, 2011) [hereinafter NY Contracting States].

²⁹ 9 U.S.C. §§201, *et seq.* (1970).

(1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the Convention; (3) the subject matter must be commercial;³⁰ and (4) it cannot be entirely domestic in scope.³¹ In the words of the Convention itself:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.³²

It is the situs of the arbitration which governs the applicability of the Convention.³³ If the arbitration is held in the territory of a signatory nation, the award will be enforced under the Convention. For example, *La Societe Nationale Pour La Recherche v. Shaheen Natural Resources Co.*³⁴ involved the sale of crude oil by La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures (“Sonatrach”), a company partially owned by the Algerian government, to Shaheen Natural Resources Co., an Illinois company with its principal place of business in New York.³⁵ The contract between the parties provided for arbitration in Geneva,

³⁰ The New York Convention contains no explicit limitation to commercial disputes, but allows each contracting state to define in its national law the non-domestic matters to which the Convention would apply. See New York Convention, *supra* note 28, art. I(3).

³¹ See generally New York Convention, *supra* note 28; FAA, *supra* note 9. See also *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327 (5th Cir. 2004); *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002); *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88 (2d Cir. 1999); *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982); *S&T Oil Equip. & Mach., Ltd. v. Juridica Invs. Ltd.*, No. H-11-0542, 2011 U.S. Dist. LEXIS 44176 (S.D. Tex. Apr.25, 2011).

³² New York Convention, *supra* note 28, art.II.

³³ For a list of the States which have ratified the Convention and the dates of ratification, see NY Contracting States, *supra* note 28.

³⁴ *La Societe Nationale Pour La Recherche v. Shaheen Natural Res. Co.*, 585 F. Supp. 57 (S.D.N.Y. 1983), *aff’d*, 733 F.2d 260 (2d Cir. 1984).

³⁵ *Id.* at 60.

Switzerland, under Algerian law.³⁶ Switzerland is a signatory to the Convention, whereas at that time Algeria was not.³⁷ When Shaheen failed to make payments to Sonatrach, Sonatrach filed suit in New York Supreme Court and simultaneously commenced arbitration in Geneva.³⁸ The Arbitral Tribunal rendered an award in favor of Sonatrach, and Sonatrach sought to enforce the award in the U.S. District Court for the Southern District of New York.³⁹ Shaheen argued that Sonatrach could not invoke the Convention against it “because as an arm of the Algerian government,” Sonatrach was not a party to the Convention.⁴⁰ The court rejected the argument and enforced the award, noting “arbitration awards rendered by panels sitting in contracting countries have been confirmed consistently when the plaintiff is a national of a country which has not acceded to the Convention.”⁴¹ On appeal, the Second Circuit affirmed.⁴²

Where the arbitration provision calls for arbitration in a country which is not a signatory to the New York Convention, U.S. courts lack the jurisdiction to compel arbitration. For example, in *DaPuzzo v. Globalvest Management Company, L.P.*, the parties agreed to arbitrate disputes in the Bahamas, a non-signatory.⁴³ When a dispute arose, Globalvest moved to compel arbitration in the Bahamas, while DaPuzzo moved to compel arbitration in New York.⁴⁴ The U.S. District Court for the Southern District of New York denied both motions to compel arbitration, but ordered the case discontinued without prejudice pending completion of the arbitration.⁴⁵ The court noted that “arbitration of a dispute involving an international

³⁶ *Id.*

³⁷ Algeria subsequently ratified the Convention in 1989, but with the reservation that Algeria will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting State. NY Contracting States, *supra* note 28.

³⁸ *See Shaheen*, 585 F. Supp. at 60-61.

³⁹ *See id.* at 61.

⁴⁰ *Id.* at 64.

⁴¹ *Id.* (citing *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976)) (arbitration award obtained by Ethiopian government, not a signatory to Convention, confirmed); *Jugometal v. Samincorp., Inc.*, 78 F.R.D. 504, 505 (S.D.N.Y. 1978) (arbitration award obtained by Yugoslavian Corporation and rendered in France confirmed; Yugoslavia is not a signatory to the Convention, but France is).

⁴² *La Societe Nationale Pour La Recherche v. Shaheen Natural Res. Co.*, 733 F.2d 260 (2d Cir. 1984). *See also* *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998) (confirming arbitral award in favor of Pakistani corporation and against Chinese corporation regarding construction of a plant in Pakistan, a non-signatory until it ratified the Convention in 2005); *Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800 (D. Del. 1990) (enforcing an arbitration award in favor of a company in Libya, a non-signatory).

⁴³ *See DaPuzzo v. Globalvest Mgmt. Co.*, 263 F. Supp. 2d 714, 717-18 (S.D.N.Y. 2003).

⁴⁴ *Id.* at 718.

⁴⁵ *Id.* at 745. The court's order stated:

ORDERED that this case is discontinued without prejudice provided that DaPuzzo may reinstate the action in the event: Defendants have unreasonably refused to comply with their obligation to arbitrate or otherwise resolve the parties' dispute in accordance with the terms of

commercial transaction may not be compelled under an agreement calling for arbitration to occur in a country that is not a contracting party to the Convention.”⁴⁶

Similarly, state statutes cannot supercede the New York Convention. In *Ledee v. Ceramiche Ragno*, several Italian corporations entered into a distributorship agreement with a Puerto Rican company.⁴⁷ When the Italian company cancelled the agreement, the Puerto Rican company sued in the Superior Court of Puerto Rico, alleging that the Italians had unjustifiably terminated their distributorship.⁴⁸ The Italians removed the case to the U. S. District Court for the District of Puerto Rico and moved to compel arbitration.⁴⁹ The Puerto Rican company alleged that the arbitration provision was void and unenforceable because of the Puerto Rico Dealers Act.⁵⁰ The district court ordered arbitration in accord with the arbitration agreement and dismissed the complaint.⁵¹ On appeal, the First Circuit affirmed, holding:

The parochial interests of the Commonwealth, or of any state, cannot be the measure of how the “null and void” clause [in the New York Convention] is interpreted. Indeed, by acceding to and implementing the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation. Rather, the clause must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale.⁵²

Nevertheless, although the New York Convention provides that a court having jurisdiction under the FAA may direct that arbitration be held at any place provided

their prior or any subsequent agreement or otherwise to honor any such agreements; or the parties proceed to arbitration and such arbitration does not resolve all matters in dispute in this action, but leaves open particular issues subject to adjudication in this Court; or any final award or judgment enforceable in this Court is rendered in DaPuzzo's favor in connection with the parties' underlying dispute.

Id.

⁴⁶ *Id.* at 726. See also *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 331 (5th Cir. 1987).

⁴⁷ *Ledee*, 684 F.2d at 185.

⁴⁸ *Id.*

⁴⁹ *Id.* at 185-86.

⁵⁰ *Id.* at 186. Puerto Rico Dealers Act, 10 L.P.R.A. § 278, *et seq.* (2008). The Act reads, in pertinent part, “Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer’s contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void.” *Id.* § 278b-2.

⁵¹ See *id.* at 187. The arbitration agreement provided: “Any dispute related to the interpretation and application of this contract will be submitted to an Arbiter selected by the President of the Tribunal of Modena, [Italy,] who will judge as last resort and without procedural formalities.” *Id.* at 186.

⁵² *Id.* at 186. See also *Sedco, Inc. v. Petroleos Mexicanos*, 767 F.2d 1140, 1145 (5th Cir. 1985).

for in the agreement, whether that place is within or without the United States,⁵³ arbitration of a dispute involving an international commercial transaction may not be compelled under an agreement calling for arbitration to occur in a country that is not a contracting party to the New York Convention.⁵⁴

Commercial disputes between parties in States which are members of the Organization of American States may be governed by the Inter-American Convention on International Commercial Arbitration, commonly known as the Panama Convention.⁵⁵ Its rules are set by the Inter-American Commercial Arbitration Commission.⁵⁶ The Panama Convention has been implemented in the U.S. by Chapter 3 of the FAA.⁵⁷ It differs from the New York Convention in a number of aspects.

The Panama Convention provides no mechanism for confirming arbitration awards. Confirmation in the U.S. is governed by Section 207 of the FAA,⁵⁸ which provides that confirmation is mandatory “unless . . . [a court] finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . [Panama] Convention.”⁵⁹ Article 5 of the Panama Convention specifies the grounds for refusing to recognize or enforce arbitration awards.⁶⁰

⁵³ New York Convention, *supra* note 28, at § 206.

⁵⁴ *See Nat'l Iranian Oil*, 817 F.2d at 331 (noting that, under the Convention, federal courts were granted power to compel arbitration only in signatory countries); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001); *Smith/Enron*, 198 F.3d at 92; *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995) (arbitration in a state that has adopted the Convention is a prerequisite for compelling arbitration (citing *Sedco*, 767 F.2d at 1145) (both the FAA and the New York Convention provide that a district court may stay an action upon finding that a dispute in the pending lawsuit is subject to arbitration)); *Ledee*, 684 F.2d at 186 (if the district court resolves the four preliminary findings in the affirmative, then it must order arbitration unless it finds the agreement null and void, inoperative or incapable of performance).

⁵⁵ Inter-American Convention on International Commercial Arbitration [hereinafter Panama Convention], Jan. 30, 1975, 1975 O.A.S.T.S. No. 42, 14 I.L.M. 336, available at <http://www.adr.org/sp.asp?id=31620>.

⁵⁶ *See id.* art. 3.

⁵⁷ FAA, *supra* note 9, §§ 301-307. *See also* Implementation of the Inter-American Convention on International Commercial Arbitration, 101 P.L. 369, 104 Stat. 448 (1990).

⁵⁸ FAA, *supra* note 9, §§ 207, 301, 302.

⁵⁹ FAA, *supra* note 9, § 207.

⁶⁰ *See* Panama Convention, *supra* note 55, at art. 5. The Panama Convention states: “The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested.

- a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or if such law is not specified, under the law of the State in which the decision was made; or
- b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

One of the most important international agreements providing for arbitration is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).⁶¹ The Convention established the International Centre for Settlement of Investment Disputes (“ICSID”).⁶² ICSID’s jurisdiction extends to any legal dispute arising directly out of an investment, between a Contracting State⁶³ (or any constituent subdivision or agency of a

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- c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
 - d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
 - e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

- a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or
- b. That the recognition or execution of the decision would be contrary to the public policy (‘order public’) of that State.”

Id. art. 5.

⁶¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Aug. 27, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention]. Submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development on March 18, 1965. The Convention was entered into by the United States on October 14, 1966. *Id.*

⁶² International Centre for Settlement of Investment Disputes [hereinafter ICSID], available at <http://icsid.worldbank.org/ICSID/Index.jsp>.

⁶³ “National of another Contracting State” means

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

ICSID Convention, *supra* note 61, art. 25(2).

Contracting State designated to ICSID by that State) and a national of another Contracting State, to which the parties to the dispute consent in writing to submit to ICSID.⁶⁴ When the parties have given their consent, no party may withdraw its consent unilaterally. Contracting States enter into Bilateral Investment Treaties (“BITs”) with other contracting states.⁶⁵ The BIT creates a framework through which foreign investors can initiate arbitration against parties to the BIT.

There is a close relationship between the ICSID Convention, BITs and the New York Convention. All require an agreement in writing.⁶⁶ Under BITs, all that is necessary to form an agreement to arbitrate is for one party to be a signatory to a BIT and the other to consent to arbitration of an investment dispute. A typical BIT provides that an “agreement in writing” for purposes of the New York Convention is created when a foreign company gives notice in writing to a BIT signatory and submits an investment dispute between the parties to binding arbitration in accordance with the Treaty.

The recent case of *Republic of Ecuador v. Chevron Corporation* (“Ecuador”), highlighted the practical operation of BITs.⁶⁷ The case had its genesis in a dispute between a group of Ecuadorian citizens and Texaco Petroleum Company’s (“TexPet”) oil exploration and drilling operations in the Ecuadorian rainforest, which ended in 1992.⁶⁸ The oil operations were then taken over by Petroecuador, a state-owned oil company. The alleged result of TexPet’s operations was widespread environmental devastation which has been highly publicized since 1993.⁶⁹ Voluminous litigation ensued.⁷⁰ In 2001, the United States District Court for the

⁶⁴ A total of 157 nations have ratified the ICSID Convention as of this writing. Although the ICSID Convention has achieved wide acceptance, Canada, Ethiopia, India and the Russian Federation are among the states which have not ratified the Convention. *See id.*

⁶⁵ The United States is currently a party to 48 BITs. For a database of BITs, see *Treaties of the United States of America, ICSID Database of Bilateral Investment Treaties*, INT’L CENTRE FOR SETTLEMENT OF INV. DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main> (last visited Sept. 25, 2011).

⁶⁶ *See* ICSID Convention, *supra* note 61, art. 25(1): The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. *Id.* *See also* New York Convention, *supra* note 28, art. II(1): Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. *Id.*

⁶⁷ *See generally* *Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011).

⁶⁸ *See id.* at 387. TexPet was a subsidiary of Texaco. Texaco was acquired by Chevron Corporation, which became ChevronTexaco, and today is simply Chevron Corporation. For convenience of reference, Texaco, ChevronTexaco and Chevron are referred to as “Chevron.”

⁶⁹ A New York documentary filmmaker ultimately released a documentary film about Lago Agrio called *Crude* (Entendre Films, 2009). *See In re Chevron Corp.*, 709 F. Supp. 2d 283, 287 (S.D.N.Y.), *aff’d sub nom.*, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2010).

⁷⁰ *See generally* *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334

Southern District of New York dismissed the Ecuadorian citizens' action on *forum non conveniens* grounds⁷¹ and the Second Circuit affirmed the dismissal.⁷² The Ecuadorian citizens then re-filed their claims in Lago Agrio, Ecuador, and obtained a multi-billion dollar judgment against Chevron.⁷³ That case is on appeal in Ecuador.

The litigation has been fraught with accusations of improper activities, many of which were well-founded.⁷⁴ Although Chevron initially had the New York action dismissed on *forum non conveniens* grounds, it later argued that the courts in Ecuador were corrupt and their judgment should not be enforced.⁷⁵ The district court in New York agreed and after a detailed examination of the evidence presented, entered a sweeping preliminary injunction against a host of defendants:

All defendants . . . be and they hereby are enjoined and restrained, pending the final determination of this action, from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered in *Maria Aguinda y Otros v. Chevron Corporation*, No. 002-2003, in the Provincial Court of Justice of Sucumbios, Ecuador (hereinafter the "*Lago Agrio Case*"), or any other judgment that hereafter may be rendered in the *Lago Agrio Case* by that court or by any other court in Ecuador in or by

(S.D.N.Y. 2005); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

⁷¹ See *ChevronTexaco Corp.*, 376 F. Supp. 2d at 379-80. Chevron also sought dismissal on the ground that the Republic of Ecuador and Petroecuador were indispensable parties because: (1) the requested equitable relief within Ecuador could not otherwise be ordered, and (2) Petroecuador's own actions would be at issue in the case. *Id.*

⁷² *Aguinda*, 303 F.3d at 473.

⁷³ The judgment awarded (1) \$600 million for groundwater remediation, (2) \$5.396 billion for soil remediation, (3) \$200 million for damages to the native flora and fauna, (4) \$150 million for drinking water remediation, (5) \$1.4 billion for the delivery of health care, (6) \$100 million for indigenous cultural damages, and (7) \$800 million for excess cancer deaths, for a total of \$8.646 billion. *Chevron Appeals Ecuador Judgment: Verdict tainted by fraud*, Chevron Corp. (Mar. 11, 2011), http://www.chevron.com/chevron/pressreleases/article/03112011_chevronappealsecuadorjudgment.news.

⁷⁴ See *In re Chevron Corp.*, 749 F. Supp. 2d 141, 147 n.20 (S.D.N.Y. 2010) (finding "that . . . discussions trigger the crime-fraud exception, because they relate to corruption of the judicial process, the preparation of fraudulent reports, the fabrication of evidence, and the preparation of the purported expert reports by the attorneys and their consultants."); *In re Application of Chevron Corp.*, No. 10-cv-1146-IEG, 2010 U.S. Dist. LEXIS 94396 (S.D. Cal., Sept. 10, 2010), (crime-fraud exception applies because "[t]here is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own."); *Chevron Corp. v. Camp*, No. 1:10-mc-0027, 2010 U.S. Dist. LEXIS 97440 (W.D.N.C., Aug. 30, 2010), ("While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.").

⁷⁵ See generally *Aguinda*, 303 F.3d 470.

reason of the *Lago Agrio Case* (collectively, a “Judgment”), or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon a Judgment.⁷⁶

Because the United States and Ecuador are parties to a BIT, in 2009 Chevron demanded arbitration against Ecuador before the Permanent Court of Arbitration (“PCA”) in The Hague.⁷⁷ On February 9, 2011, Chevron obtained an order from the PCA directing the Government of Ecuador “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio Case. . . . and . . . to inform this Tribunal, by the Respondent’s legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of this order for interim measures”⁷⁸

The scope of ICSID jurisdiction was discussed by the court in *Liberian Eastern Timber Corp. v. The Government of the Republic of Liberia*.⁷⁹ The Liberian Eastern Timber Corporation (“LETCO”), a French entity, entered into an agreement with Liberia whereunder Liberia granted a concession to LETCO to harvest and exploit over 400,000 acres of Liberian timber.⁸⁰ Liberia subsequently reduced the concession area by 279,000 acres and finally terminated the concession altogether.⁸¹ LETCO commenced arbitration under the ICSID Convention.⁸² Liberia appointed counsel to represent it, but then refused to participate in the arbitration and sued LETCO in the Liberian courts.⁸³ The arbitration proceeded and awarded LETCO \$8,793,280, plus interest.⁸⁴

LETCO then caused a judgment to be entered *ex parte* in the U.S. District Court for the Southern District of New York and obtained a Writ of Execution on Liberian assets in the United States.⁸⁵ Liberia moved to vacate the judgment and sought a preliminary injunction enjoining the enforcement of, and execution upon, its

⁷⁶ *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011).

⁷⁷ The Permanent Court of Arbitration was established by treaty in 1899 as an intergovernmental organization providing a variety of dispute resolution services to the international community. See generally PERMANENT COURT OF ARBITRATION, www.pca-cpa.org (last visited Sept. 25, 2011).

⁷⁸ *In the Matter of an Arbitration Before a Tribunal Constituted in Accordance with the Treaty Between the United States of America And the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, Signed 27 August 1993 (The “Treaty”) and the UNCITRAL Arbitration Rules 1976*, Case No. 2009-23, at 3 (Perm. Ct. Arb. Feb. 9, 2011) (Order for Interim Measures), available at <http://www.chevron.com/documents/pdf/ecuador/TribunalInterimMeasuresOrder.pdf> [hereinafter *United States v. Ecuador*].

⁷⁹ *Liberian Eastern Timber Corp. v. Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986).

⁸⁰ See *id.* at 74-75.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 75.

⁸⁴ *Id.*

⁸⁵ *Id.*

property located in the United States on the ground that Liberia did not waive sovereign immunity.⁸⁶

LETCO argued that the ICSID Convention provides that “[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”⁸⁷ The court held:

Liberia, as a signatory to the Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention. When it entered into the concession contract with LETCO, with its specific provision that any dispute thereunder be settled by arbitration under the rules of ICSID and its enforcement provision thereunder, it invoked the provision contained in Article 54 of the Convention which requires enforcement of such an award by Contracting States.⁸⁸

The *Liberian Eastern* court was careful to note that the Foreign Sovereign Immunities Act “provides exceptions to the immunity of a foreign state from execution upon a judgment entered by a Court of the United States if the property is or was ‘used for a commercial activity in the United States.’”⁸⁹ The court enjoined LETCO from issuing executions against property not used for a commercial activity, but permitted LETCO to issue executions with respect to any Liberian properties which are used for commercial activities.⁹⁰ The case is significant because it permitted a French entity to use U.S. courts to satisfy an arbitration award against the Liberian government even though no U.S. entity was involved.⁹¹

Those cases before U.S. courts which have involved international arbitration have followed the same principles as those for domestic arbitration in determining what should be decided by the arbitrator. If a challenge is made to the validity of the contract as a whole, the issue is for the arbitrator to decide. On the other hand, if a challenge is made to the validity of the arbitration provision, then the court will decide the issue. For example, in *Bechtel Do Brasil Construções Ltda. v. UEG Araucária Ltda.* (“*Bechtel*”), Bechtel contracted to construct a power plant in Araucária, Brazil.⁹² The plant was accepted by UEG Araucária Ltda. (“UEGA”) on

⁸⁶ *Id.* at 74. See also Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (2011) [hereinafter FSIA].

⁸⁷ *Liberian Eastern*, 650 F. Supp. at 76 (quoting ICSID Convention, *supra* note 61, art. 54(1)).

⁸⁸ *Id.* at 78.

⁸⁹ *Id.* at 77. See FSIA, *supra* note 86, § 1610(a).

⁹⁰ *Liberian Eastern*, 650 F. Supp. at 78.

⁹¹ See generally *S&T Oil Equip. & Mach., Ltd. v. Juridica Invs. Ltd.*, No. H-11-0542, 2011 U.S. Dist. LEXIS 44176 (S.D. Tex. Apr.25, 2011); *M.B.L. Int’l Contractors, Inc. v. Trinidad*, 725 F. Supp. 52 (D.D.C. 1989).

⁹² See *Bechtel Do Brasil Construções Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150 (2d Cir. 2011). As used here, the term “Bechtel” includes Bechtel do Brasil, Bechtel Canada, and Bechtel International.

September 27, 2002, but was not put in service until December 2006.⁹³ On January 13, 2008, a major component of the plant failed, and on September 29, 2008, UEGA demanded arbitration.⁹⁴

Bechtel filed an action in New York Supreme Court seeking a permanent stay of arbitration on the ground that the New York statute of limitations⁹⁵ had run.⁹⁶ UEGA removed the case to federal district court and filed a counter-application to compel arbitration.⁹⁷ UEGA asserted two theories with respect to the statute of limitations: (1) using the acceptance date, six years later would fall on September 27, 2008, and since September 27, 2008 was a Saturday, UEGA had until the following Monday to demand arbitration; (2) If Brazil's three-year statute of limitations was applied, it would run from discovery of the defect and New York's borrowing statute would apply.⁹⁸ UEGA also argued that the determination of whether the statute of limitations had run was for the Arbitral Tribunal, not the court.⁹⁹

The district court rejected UEGA's arguments and entered a permanent stay of arbitration.¹⁰⁰ On appeal, the Second Circuit reversed.¹⁰¹ The court noted that, in order to vary from the presumption that arbitrability should be decided by the court, the court must find "clear and unmistakable evidence from the arbitration agreement, as construed by relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator."¹⁰² The *Bechtel* court summed up its holding:

⁹³ *Id.* at 152.

⁹⁴ *Id.* The arbitration provision provided, in pertinent part: "Any dispute, controversy, or claim arising out of or relating to the Contract, or the breach, termination or validity thereof . . . shall be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC") then in effect (the "Rules"), except as these rules may be modified herein. . . . Any arbitration proceeding or award rendered hereunder and the validity, effect and interpretation of this agreement to arbitrate shall be governed by the laws of the state of New York." *Id.* at 152.

⁹⁵ See N.Y. C.P.L.R., § 213(2) (McKinney 2003).

⁹⁶ *Bechtel*, 638 F.3d at 153 (citing N.Y. C.P.L.R., *supra* note 95, § 7502(b) (stating, "[i]f, at the time that a demand for arbitration was made or notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court . . .").

⁹⁷ *Bechtel*, 638 F.3d at 153.

⁹⁸ *Id.* See also N.Y. C.P.L.R., *supra* note 95, § 202, which provides, in relevant part, "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued."

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 158.

¹⁰² *Bechtel*, 638 F.3d at 155 (citing *Painewebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996)).

[O]ur own reading of the language and our prior decision in *Bybyk* lead us to the conclusion that contracts between UEGA and Bechtel are ambiguous as to whether or not timeliness disputes can be decided by a court. As Bechtel conceded at oral argument, such ambiguities must be resolved in favor of arbitration. (Citation omitted.) We therefore conclude that the district court erred in holding that it, rather than the arbitrator, was authorized under the contract to decide the timeliness of UEGA's claims.¹⁰³

The assignment of patent licenses containing arbitration provisions raises some unique jurisdictional issues. Some courts have held that in order to enforce an arbitration clause in a patent license which is assigned, the assignor must expressly assume the duty to arbitrate.¹⁰⁴ Other courts have taken a different view and held that when an assignee assumes the obligations of an assignor under a license agreement, the assignee is bound by the arbitration clause in the license agreement even in the absence of an express assumption of the arbitration provision.¹⁰⁵

The nature of the relief sought can affect the arbitrability of a dispute even where the parties have agreed to arbitrate. For example, an arbitral tribunal lacks the jurisdiction, *i.e.*, power, to grant prospective relief where to do so would make finality of the arbitral award impossible. In *Broughton v. Cigna Healthplans of California*, the California Supreme Court pointed out the distinction between the arbitrability of a statute providing for money damages and a statute calling for permanent injunctive relief.¹⁰⁶ The court in *Ottley v. Schwartzberg* held it was improper for the district court to remand the proceedings to the arbitrator for a determination of the parties' compliance.¹⁰⁷ "A remand for further arbitration is

¹⁰³ *Bechtel*, 638 F.3d at 158.

¹⁰⁴ See *Datatreasury Corp. v. Wells Fargo & Co.*, 522 F.3d 1368, 1372-73 (Fed. Cir. 2008) (an assignee is not bound by an arbitration clause in assignor's patent license); *Case Int'l Co. v. T.L. James & Co.*, 907 F.2d 65, 67 (8th Cir. 1990) ("[we] are not inclined to find that a party has waived its right to ordinary judicial process without an express and specific agreement."); *Lachmar v. Trunkline LNG Co.*, 753 F.2d 8, 9-10 (2d Cir. 1985); *Gruntal & Co. v. Steinberg*, 854 F. Supp. 324, 335 (Dist. N.J. 1994) (an assignee must expressly assume the duty to arbitrate); *Wonder Works Constr. Corp. v. R.C. Dolner, Inc.*, 901 N.Y.S.2d 30 (App. Div. 2010) (even having assumed duties in a contract with an arbitration clause, a party cannot be required to arbitrate without an express and specific agreement to arbitrate); *Saturn Constr. Co. v. Landis & Gyr Powers, Inc.*, 656 N.Y.S.2d 367 (App. Div. 1997) (even having assumed all "obligations and responsibilities" in contract with an arbitration clause, "in the absence of an express and specific agreement to arbitrate, the [party] did not waive its right to ordinary judicial process.").

¹⁰⁵ See *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 533 (3d Cir. 2005) (broad assignment of license agreement includes arbitration clause); *Thomson-CSF v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995); *Delmore v. Ricoh Americas Corp.*, 667 F. Supp. 2d 1129, 1135 (N.D. Cal. 2009). See generally *Shainin II, LLC v. Allen*, No. C06-420P, 2006 U.S. Dist. LEXIS 61024 (W.D. Wash. Aug. 28, 2006); *Ryan, Beck & Co. v. Fakhri*, 268 F. Supp. 2d 210, 219-220 (E.D.N.Y. 2003); *Shaw Group, Inc. v. Triplefine Int'l Corp.*, No. 01 Civ. 4273, 2001 U.S. Dist. LEXIS 11143 (S.D.N.Y. Aug. 3, 2001).

¹⁰⁶ See generally *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 78 (Cal. 1999).

¹⁰⁷ *Ottley v. Schwartzberg*, 819 F.2d 373, 376-77 (2d Cir. 1987).

appropriate in only certain limited circumstances such as when an award is incomplete or ambiguous.”¹⁰⁸ The court observed:

However, we are directed to no authority for the proposition that arbitrators may review compliance with their own awards. “The scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission. Such an agreement or submission serves not only to define, but to circumscribe, the authority of arbitrators.” 6 C.J.S. *Arbitration* § 69, at 280-81 (1975). Because there is no indication that the parties agreed to submit the issue of compliance to the arbitrator, we think it clear that the arbitrator was without authority to rule on that issue. Allowing the remand in this case “would require the arbitrator to pass upon issues of compliance which were not within the scope of the matters originally presented to him,” *United Papermakers & Paperworkers, Local 675 v. Westvaco Corp.*, 461 F. Supp. 1022, 1024 (W.D. Va. 1978). Moreover, “as a general rule, once an arbitration panel decides the submitted issues, it becomes *functus officio* and lacks any further power to act.” *Proodos Marine Carriers Co. v. Overseas Shipping & Logistics*, 578 F. Supp. 207, 211 (S.D.N.Y. 1984). See 5 Am. Jur. 2d *Arbitration & Award* § 96, at 593 (1962) (“Since the final determination by the arbitrators of matters in dispute fulfils the purpose of the submission, the authority of arbitrators terminates with the making of a valid, final award.”). Because the parties did not submit issues of compliance to arbitration, and because the issuance of a final award terminated the arbitrator’s authority, the district court’s remand to the arbitrator was error.¹⁰⁹

Section 10(a)(4) of the FAA requires that an arbitration award be “final, and definite . . . upon the subject matter submitted”¹¹⁰ “To be considered ‘final,’ an arbitration award must be intended by the arbitrator to be [a] complete determination of every issue submitted.”¹¹¹ Under the doctrine of *functus officio*, once an arbitrator issues a final award, the arbitrator loses the power to reconsider or make amendments to the award.¹¹²

¹⁰⁸ *Id.* at 376 (citing *United Steel Workers v. Adbill Mgmt. Corp.*, 754 F.2d 138, 141 (3d Cir. 1985)).

¹⁰⁹ *Ottley*, 819 F.2d at 376.

¹¹⁰ Arbitration, General Provisions, 9 U.S.C. § 10(a)(4). See also *Local 338, RWDSU v. Farmland Dairies, Inc.*, 89 Fed. App’x 748 (2d Cir. 2003).

¹¹¹ *Millmen’s Local 550 v. Well’s Exterior Trim*, 828 F.2d 1373, 1376 (9th Cir. 1987).

¹¹² See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Bayne v. Morris*, 68 U.S. 97, 99 (1863) (summarizing the strict version of the rule that prevailed at common law); *ABC Int’l Traders, Inc. v. Fun 4 All Corp.*, 79 Fed. App’x 346, 347 (9th Cir. 2003); *Brown v. Witco Corp.*, 340 F.3d 209, 218 (5th Cir. 2003); *Office & Prof’l Emps. Int’l Union v. Brownsville Gen. Hosp.*, 186 F.3d 326, 331 (3d Cir. 1999) (discussing the modern relevance of the doctrine of *functus officio* in labor cases); *Int’l Bhd. of Teamsters v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997); *Allied Workers Int’l Union v. Excelsior Foundry*, 56 F.3d 844, 848 (7th Cir. 1995); *Domino Grp. v. Charlie Parker Mem’l Found.*, 985 F.2d 417, 420-21 (8th Cir. 1993) (invoking the doctrine of *functus officio* in the context of commercial arbitration); *Colonial Penn Ins., Co. v. Omaha Indem. Co.*, 943 F.2d

Issues of conflict-of-laws often intersect with issues of jurisdiction in international arbitration. Unlike purely U.S. domestic arbitration where certain substantive laws and conflict-of-laws rules may dictate the power of an arbitral tribunal,¹¹³ international arbitration presents a different picture altogether. As the United States Supreme Court pointed out in *Scherk v. Alberto-Culver Co.*, “[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”¹¹⁴

In *Scherk*, the parties agreed that disputes between them would be settled by arbitration in Paris under the rules of the ICC Court of International Arbitration of the International Chamber of Commerce.¹¹⁵ Scherk was a businessman with companies in Switzerland and Liechtenstein which had been sold to Alberto-Culver Company.¹¹⁶ When Alberto-Culver discovered that certain of the warranties and representations made in connection with the sale were untrue, it sued Scherk in a federal district court in Illinois.¹¹⁷ Scherk moved to dismiss based upon *forum non conveniens* or, alternatively, to stay the action pending arbitration.¹¹⁸ Because the case involved certain provisions of the Securities Act of 1933,¹¹⁹ the district court held the provisions of that Act governed and enjoined Scherk from proceeding with arbitration.¹²⁰ The Seventh Circuit affirmed¹²¹ and the Supreme Court granted certiorari.¹²²

The high court reversed with a sweeping statement:

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying

327, 332 (3d Cir. 1991) (arbitrator retains limited authority to “correct a mistake which is apparent on the face of [the] award.” “The exception for mistakes apparent on the face of the award is applied to clerical mistakes or obvious errors in arithmetic computation.”); *Trade & Transp., Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991); *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1220 (5th Cir. 1990); *Local P-9, United Food & Commercial Workers Int’l Union v. George A. Hormel & Co.*, 776 F.2d 1393, 1394 (8th Cir. 1985).

¹¹³ See generally *Wilko v. Swan*, 346 U.S. 427 (1953).

¹¹⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

¹¹⁵ *Id.* at 508.

¹¹⁶ *Id.* at 508-09.

¹¹⁷ *Id.* at 509.

¹¹⁸ *Id.*

¹¹⁹ § 14 of the Securities Act of 1933 bars “[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title” Securities Act of 1933 § 14, 15 U.S.C. § 77n.

¹²⁰ *Id.*

¹²¹ *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 615 (7th Cir. 1973).

¹²² *Scherk*, 417 U.S. at 510.

by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.¹²³

Citing both the Federal Arbitration Act¹²⁴ and the New York Convention,¹²⁵ the Court held that an agreement to arbitrate any dispute arising out of an international commercial transaction must be respected and enforced by U.S. federal courts.¹²⁶ At the same time, where grounds exist to refuse to recognize and enforce an award, the rule of *Scherk* will not apply.¹²⁷

¹²³ *Id.* at 516-517.

¹²⁴ *See generally* FAA, *supra* note 9.

¹²⁵ *See generally* New York Convention, *supra* note 28.

¹²⁶ *See Scherk*, 417 U.S. at 520.

¹²⁷ *See, e.g.*, *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691, U.S. Dist. LEXIS 22729 (S.D.N.Y. Mar. 7, 2011); *Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007); *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (App. D.C. 2007); *Nissho Iwai Corp. v. M/V Joy Sea*, Civil Action No. 98-1655 Section "C"(1), 2002 U.S. Dist. LEXIS 877 (E.D. La., Jan. 8, 2002,); *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001).

Recognition and enforcement under the New York Convention may be refused where:

(a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. New York Convention, *supra* note 28, art. V.