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PRACTICUM: FORM AND POLICY

The *International Law Practicum* is a semi-annual publication of the International Section of the New York State Bar Association. The *Practicum* welcomes the submission of articles prepared by practicing attorneys. The length of an article, as a general rule, should not exceed 3,500 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent either (i) in laser printed triplicate accompanied by a 3½" disk formated in Microsoft Word or WordPerfect to: The *Practicum*, c/o Daniel J. McMahon, Esq., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096; or (ii) by e-mail in Microsoft Word or Wordperfect format to either the Editor-in-Chief (david.detjen@alston.com) or the Executive Editor (thomas.backen@alston.com). Both text and endnotes must be double-spaced. Endnotes must appear at the end of the manuscript and should conform to *A Uniform System of Citation* (the Harvard Bluebook). Authors are responsible for the correctness of all citations and quotations. Manuscripts that have been accepted or published elsewhere will not be considered. The *Practicum* is primarily interested in practical issues facing lawyers engaged in international practice in New York. Topics such as international trade, licensing, direct investment, finance, taxation, and litigation and dispute resolution are preferred. Public international topics will be considered to the extent that they involve private international transactions or are of general interest to our readership.

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International Dispute Resolution in Practice: Experiences, Trends, Tips

[Editor's Note: There follows an edited transcript of the program of the International Section of the New York State Bar Association (NYSBA) held on 27 January 2010 at the New York Hilton during the NYSBA's Annual Meeting.]

I. Introductory Remarks

OLIVER ARMAS: Good morning, everyone. I am a proud member of both the International Section and the Dispute Resolution Section. As a new member of the Dispute Resolution Section, I am very excited that we are having our first joint meeting. This is a great initiative, and I thank all of you for coming. I hope that you endure throughout what I believe is going to be a very exciting and interesting series of panels.

I would like now to turn over the floor to our dispute resolution colleagues. The Chair of the Section, Jonathan Honig, will address you first, and then I will introduce the first panel.

JONATHAN HONIG: Thank you, Ollie. We are also very pleased to put on this joint CLE program with the International Section. The nature of the Dispute Resolution Section is that we deal with process rather than the typical subject-matter area of the New York State Bar Association. We seek to cooperate with other sections, and our record speaks to that. We had a very successful joint fall program a few months back with the Labor and Employment Section at the Sagamore, and we will have a fall program this year with the Entertainment, Arts and Sports Law Section.

In particular, international arbitration, the subject of this meeting, obviously falls neatly within the jurisdiction of both the International Section and the Dispute Resolution Section. This program again is a natural outgrowth of that overlapping jurisdiction, if you will. We have a committee tasked with dealing with this area and hope to make it a more substantial part of our activities in the future.

We believe that the speakers are outstanding and that the program will make this an informative and highly useful program for all of us. We welcome you here on behalf of the Dispute Resolution portion of this team.

MR. ARMAS: It is time to get ready for your tour through international arbitration. We will be approaching the subject from many different perspectives. We are going to start with the basics if you will, that is, "International Arbitration 101."

As an international dispute resolution person, I do most of my work in international arenas, whether it involves arbitration or the courts. I spend a lot of time in my firm talking to my non-contentious, non-dispute-oriented partners about why they should pay attention to arbitration and why it is important for them to understand at least the basics of it. I believe that you cannot properly advise your clients unless you have at least a basic understanding of some of the issues that we see in arbitration every day.

So without further ado, I would like to hand the discussion over to Howard Fischer and the first panel.

II. International Arbitration "101"

A. Introduction

HOWARD A. FISCHER: Thank you. I want to introduce our panel briefly: we have Charlie Moxley; Gerard Meijer, William Brown, and Jessica Vanto.

Our panel will be discussing a hypothetical fact pattern involving several parties: there is Mr. Kellogg, who owns a business in the country of Sky; and Mr. Rodderick, who owns a business in the country of Sonia. Both of these gentlemen want to come to an agreement. As sometimes occurs in the world of business, things governed by the agreement do not proceed as smoothly as they would have liked, and, as a result, a dispute arises, and it needs to be resolved. Before we get into the specific facts of the hypothetical, I would like to ask Charlie Moxley to explain for us what exactly this international arbitration thing is and why we should care about it.

B. Overview of International Arbitration

CHARLES J. MOXLEY, JR.: My task is essentially to give an introduction to the introduction. What we are going to talk about is what differentiates international arbitration from domestic arbitration. There are many people in the Dispute Resolution Section who have spent many, many years in arbitration as arbitrators and as counsel in arbitrations and have experienced the reality that in recent years there has been a tremendous growth in international arbitration. At other programs like this—for example, the College of Commercial Arbitrators program, the CPR programs and the AAA programs—there is a big focus on arbitration best practices and what we need to do to enable arbitration to deliver on what is sort of its *raison d'être*: arbitration is supposed to be efficient and economical. There are a lot of general counsels and arbitration counsel in firms who are concerned that arbitrators are not always delivering on the promise of a quick and efficient process. And this is something that the Dispute Resolution Section—a high percentage of whose

members are practicing arbitrators and mediators—has focused much time on.

What we have realized is that addressing the issues as to how arbitration can deliver on its promises is a major concern in domestic arbitration. For international arbitration it is more than a concern: it is absolutely essential.

The reality is that for international arbitration the parties in many instances do not have anyplace else to go. There is no international commercial court. There is no international treaty of a broad nature for enforcement in country A of a judgment somebody might obtain in the court system of country B. This is what makes international arbitration so unique and exciting. We have something called the New York Convention, which was enacted back in the 1950s. It provides two essential things: First, it provides that arbitration agreements are enforceable internationally. Over one hundred forty nations have acceded to the New York Convention, so you have a very broad commitment to the principle that arbitration agreements are valid and enforceable. Second, the New York Convention provides that arbitration awards are enforceable, that is, you can take an award from country A and get it enforced in country B.

As we know, the reasons for arbitration are generally cited as being speed, economy, and flexibility: you can select your own arbitrator (i.e., your own fact finder), and you have finality, since there is limited opportunity for appeal, which some find to be an advantage, although obviously in some cases it may not be viewed that way. These are the general reasons for choosing arbitration. Yet, for international arbitration the reasons go far beyond these. The two main purposes of international arbitration are neutrality and enforceability. Many a party to international contracts may be concerned about agreeing to litigate in the other party's court system—sometimes due to a fear of corruption or out of a fear of encountering prejudice as the non-local party. Often, the concern is simply due to the fact that it is a foreign legal system that a party simply is not familiar with, where somebody else's rules apply and where foreign lawyers will need to be engaged who may not fully understand what the party wants. As a result, in international business transactions, parties typically provide for arbitration in a neutral state, where neither side has any concern about this kind of thing.

Now I would like to focus on what is distinctive about international arbitration. A certain number of international arbitrations proceed just as if they were domestic. You have U.S. lawyers on both sides or lawyers who are in our system essentially, and you almost would not know it was an international case even if there are foreign parties or the dispute has to do with something of a foreign nature. Then there are cases where the arbitration is quite different from the domestic setting, because you have different players. You have parties from disparate legal systems and cultures, and you have lawyers, and often arbitrators, from the same disparate systems and cultures. In these cases, obviously, you have the challenge of putting together something that works for everybody. And what we have learned is that this is a tremendous opportunity for the growth of international arbitration, because we find we can learn from what is done in other legal systems and arbitration systems. The process can be very innovative.

A chief characteristic of an international case is the language issue. You will have issues regarding translation of witnesses' testimony, interpretation of the testimony of witnesses, and the translation of documents. The parties may have provided for that, but it may have to be provided for in the arbitration.

You are also going to have significant choice-of-law issues in international arbitration, particularly because, if you have the arbitration hearing in a neutral state that neither side has any connection with, you may well need to address the issue of enforceability of the arbitration agreement. It is the site of the arbitration, this neutral site, that is generally going to provide the law of the arbitration itself and the proceedings for the arbitration, so there will be issues as to choice of law.

In my experience the site where a domestic arbitration is to be held is usually not controversial, since there is generally little concern about the fairness of a hearing held in Boston as opposed to one held in Philadelphia or New York, for example. In contrast, the site of an international arbitration can be very important. The fact of different legal systems and expectations, even of what is fair—and not just what the norm is—becomes very important in international arbitration, especially in the area of discovery.

We all know what has happened with respect to discovery in our litigation system. In domestic arbitrations, the parties, their counsel and the arbitrators try to avoid depositions except where they are really necessary and try to limit electronic discovery. But the concern over discovery is heightened in international arbitration where you have parties from civil law and other systems whose expectations are wildly different perhaps from ours. The idea that one should turn over documents that are harmful to one's own side is anathema to lawyers in many civil law countries. It is just not what they do. Thus, there are different expectations and there have to be different rules.

Part of the architecture of international arbitration is that we have various resources to resort to for handling things like discovery issues. One of these resources is something called the "IBA Rules on the Taking of Evidence in International Commercial Arbitration." That is the first place you would look to learn what the discovery will be in this international arbitration. These

guidelines put together different approaches. As to documents, for instance, these guidelines blend the civil law approach and the common law approach.

The International Centre for Dispute Resolution, or ICDR, which is the international counterpart to the American Arbitration Association (AAA), has issued its "Guidelines for Arbitrators Concerning Exchanges of Information," which became effective in all international cases administered by the ICDR begun after 31 May 2008. These guidelines also limit discovery in international arbitration.

In regard to motion practice, the extent to which motions are available in domestic arbitration varies greatly. In international arbitration, this is an area that is being examined, and the laws of England, the Netherlands, and other countries are being looked at to determine how motions should be handled in international arbitration.

In regard to the presentation of evidence at the hearing, I estimate that we have direct testimony by affidavit in perhaps five percent of the complex arbitrations we do, other than in the construction area. That is the norm, and that is the expectation of civil law practitioners. And so we have a need in international arbitration for procedures that work for the parties. There is a lot of discretion on the part of the arbitrators in this regard. Expert witnesses are also handled differently in international arbitration than they are in domestic arbitration. The IBA guidelines cover this.

In regard to the form of decision, the default rule in domestic arbitrations, although it is changing and evolving, is that the decision will be reasoned, and reasoned awards are expected in international cases.

There are also the arbitration rules of the U.N. Commission on International Trade Law (UNCITRAL) which are often used in ad hoc international arbitrations. These are a set of rules that also try to meld the common law and the civil law approaches. UNCITRAL has also developed a model arbitration law, which has been adopted by many countries around the world. Thus, if you are corporate counsel drafting an arbitration agreement, you could, for example, choose the arbitration law of a jurisdiction that has adopted the UNCITRAL model law. Then, subject to variations as to how the model law is implemented locally, you would have a body of arbitration law that you were familiar with.

To sum up, international arbitration offers great opportunities for using the best practices from both arbitration and litigation. Many disputes are not transnational, and international arbitration should really be the default choice. Thank you.

C. Drafting the Arbitration Agreement

MR. FISCHER: Let us talk about one of these disputes. One of your long-term clients, Gerard, is Mr. Kellogg. He owns a company called Payment Systems Inc. in the country of Sky, a fictional country. He wants to enter into a relationship with Mr. Rodderick, who is the CEO of a company in Sonia, a neighboring nation. It involves a payment system.

Mr. Kellogg is not at all concerned that the contract will not be performed or that there will be other problems, but, just in case something does go wrong, he asks you how a dispute should be resolved. In particular, he asks whether the agreement should call for arbitration, and, if so, what that arbitration clause should look like. What would be your advice?

GERARD MEIJER: That depends. I intend to deal first with how to draft an arbitration agreement, which place of arbitration to choose, and which rules to employ. As you will see, I am focusing on the pre-arbitral phase.

When drafting an arbitration agreement you need to be aware of what law is to apply to the arbitration agreement. This may not be easy to determine. The issue is governed by international conventions, arbitration statutes, and the applicable substantive law. As perhaps one of the few civil law attorneys here, let me set out the civil law view. The arbitration agreement, from our perspective, would be governed, for example, by Article II of the New York Convention, which contains a writing requirement. It is good to note that the writing requirement had been construed rather strictly under Article II of the New York Convention; however, it now is no longer so construed, based on a recommendation recently issued by the United Nations. The applicable arbitration statute often contains requirements as to the arbitration agreement, also often including a writing requirement.

WILLIAM J.T. BROWN: I would like to know why we place so much emphasis on the UNCITRAL model law. That law may be in effect in a few states, but it is certainly not generally in effect in the United States.

MR. MEIJER: I understood that four or five states in the United States have adopted the UNCITRAL model law. The UNCITRAL law has been quite successful: more than thirty-five countries have adopted it up to now, and it is a very solid law.

In the Netherlands we have had a long tradition of arbitration. As a result, we considered the model law when drafting our arbitration statute—that is, we did not implement the model law paragraph by paragraph. Other countries also considered the model law when drafting their own arbitration statutes.

MR. BROWN: Not in England or the Canadian provinces?

MR. MEIJER: In England they drafted their own arbitration act, but they also looked at the model law. In Germany they implemented the model law; they very

much favored the UNCITRAL model law. Also, for example, in the Netherlands Antilles nearby, a part of the kingdom of the Netherlands, they have adopted the model law.

MR. BROWN: It seems at these big conferences we always talk about this model law, but we have the Federal Arbitration Act (FAA), do we not? We are going to desert it.

MR. MEIJER: If you look at the model law and also at the FAA and other acts, you will see—and I know that the FAA is much older—that the features of arbitration are more or less similar. Although there are some detailed differences, I think the main features are the same everywhere. We will touch upon this issue later.

It is important to realize that the arbitration agreement is governed by several laws—based on conventions, the arbitration statute and substantive law. That substantive law could be the substantive law chosen by the parties or held to apply under the law of contracts.

The arbitration agreement should be drafted in light of the applicable law. You can keep your arbitration clause broad and general. Parties even use blank clauses, for example, "arbitration in London." The parties also sometimes draft detailed clauses adding all sorts of features. They might, for example, include an entry-of-judgment clause. I think in the United States—and perhaps Jessica can touch on this issue later—this may be necessary for the enforcement of the award within the U.S.

MR. FISCHER: A quick question: Mr. Kellogg hears you going through this and says, "Well, what do you recommend? Should I have a broad clause, or should I have a detailed clause?" Why does it matter and what do you think the considerations are?

MR. MEIJER: What I would conclude is that we should use the broad clause—a broad clause referring to proper arbitration rules. It is also advisable to use the standard clause of the arbitration institute or other group that will administer the proceedings.

Always draft the arbitration agreement in light of the applicable laws and the applicable rules.

Which arbitration act should one pick or choose? In that regard it is important to note that the place of arbitration determines the applicable arbitration statute. Thus, if the place of arbitration is to be in the Netherlands, the Dutch Arbitration Act will apply. If the place of arbitration is to be in France, the French arbitration statute will apply, and so on. It is quite simple.

In the arbitration statute one also finds provisions regarding the role of the national courts insofar as their support and supervisory functions are concerned. This is an important factor, and my advice would be to pick an arbitration-friendly country that is also party to the New York Convention.

It is important to note that the place of arbitration is a legal concept and not a factual one. In other words, if the parties have agreed to have the arbitration held in France, hearings can be held outside France and witnesses can be heard outside France.

MR. BROWN: If you have an arbitration agreement that says it is governed by French law but that arbitration will take place in the Netherlands, what law would apply to the procedures of the arbitration? Would it be French law that the parties agreed upon?

MR. MEIJER: One has to make a distinction between the substantive law that applies to the merits of the dispute and the applicable procedural law. The place of the arbitration determines the applicable arbitration law or procedural law governing the proceeding. You cannot make a direct choice of the procedural law: you can only choose your arbitration law by choosing the place of arbitration.

SPEAKER IN AUDIENCE: This may be an unfair question for you, but I think it would be helpful for the U.S. participants. If you have an international arbitration in a state of the United States, such as Connecticut, which has adopted the model law, what is the relationship between the Connecticut statute and the FAA?

MR. BROWN: I think it is a matter for the parties to agree upon. If the parties have agreed on Connecticut arbitration law, that would be applicable. They may, however, have agreed on application of the FAA.

MR. MOXLEY: But if the parties have not agreed, would not the FAA apply because it is international?

MR. BROWN: Well, I think that is a very difficult question.

SPEAKER IN AUDIENCE: I am confused. I come to this area having worked on pieces of an international arbitration, a construction case—that is my only experience. The contract provided for New York law to govern although the parties had nothing to do with New York. What is confusing me is that I thought you could provide for the parties to abide by the rules of the International Arbitration Association. I thought that all of the procedures would be based on the rules of whichever association you provided for in the contract.

MR. MEIJER: Right. However, the arbitration rules have to be distinguished from the applicable arbitration statute. The arbitration act is an enactment of the legislature, containing, for example, mandatory provisions from which the parties may not deviate. The arbitration rules, on the other hand, are established by agreement of the parties and are in addition to the applicable arbitration act. For example, if a provision in the arbitration rules

deviated from a mandatory provision of the applicable arbitration statute, the provision in the arbitration statute would prevail.

MR. FISCHER: You have an agreement that provides for arbitration pursuant to the rules of the London Court of International Arbitration (LCIA), with the locus of the arbitration to be the state of Sonia. However, Sonia has a law that says any arbitration taking place in Sonia cannot be subject to Rule 47(a)—I have just made that rule up—of the LCIA rules. What Gerard is saying is that, in this case, the Sonia statute would take precedence and bar the applicability of Rule 47(a).

The parties might be able to contract around this. They could provide, for example, that the arbitration take place in Singapore. And those of us who were recently at the Singapore meetings will know that in Singapore you can agree to a substantive law that ignores Singapore local law in terms of procedures. But there may be other jurisdictions, for example, the fictional place of Sonia, in which you are not allowed to legally do that.

SPEAKER IN AUDIENCE: I think at the end of the day what you want is the integrity of the award. You need to have the arbitration award recognized and enforced in some jurisdiction. It is more than likely that the place of the arbitration will be the place that matters.

SPEAKER IN AUDIENCE: My issue is this mandatory law that you talk about. If this is an international arbitration, we should be talking about international public policy and not national public policy. Thus, even though Rule 47(a) contradicts this mandatory law in jurisdiction X, if this is an international arbitration, it would seem that the international public policy would trump the mandatory law, which would be national public policy.

MR. FISCHER: I think that anyone who has ever arbitrated a case in the state of California, for example, which has many odd local rules that the California courts believe have international applicability, might present that argument but might have difficulty in being successful with it.

MR. MEIJER: I believe the international policy aspect applies to the enforcement in country A of the arbitral award made in country B. Through the New York Convention you get this notion of international public policy. However, if you are in country A, and there you deviate from a mandatory provision of law, then the award might be set aside in country A, such that the notion of international policy may not apply at all. It may happen that a deviation from a mandatory provision may lead to a setting aside of the award in the country of origin, and then the notion of international policy cannot be applied, because the matter is still within the country of origin.

SPEAKER IN AUDIENCE: I would like to comment on the interaction between the FAA and state arbitration laws. It is a very complex interaction. Part 2 of the FAA covers international arbitration; however, there are sections of Part 1 that also apply to international arbitrations. And when the FAA is silent, the local arbitration law, such as that of New York, if the venue of the arbitration is in New York, may come into play. There are definitely preemption issues. This is a complex issue, and there are hundreds of court decisions dealing with this interaction. What I would say to you is that venue in the United States can matter.

You brought up California. California has some interesting state statutes that deal with international arbitrations and consolidation. Sometimes they will trump the FAA and sometimes they will not. Thus, again, when drafting an arbitration clause and choosing an international arbitration venue in the United States, you are well-advised to get counsel experienced in drafting these types of clauses, because there may be hidden pitfalls in picking a particular state, since you may be subjecting your client to local law, despite the fact that the matter involves an FAA international arbitration. There is no simple answer to that question, but it is something that you should be aware of.

I would like to make another point about local law. We had an experience with an arbitration in London. England provides that there can be no pre-arbitral agreement to waive the English rule of "loser pays." And we had an arbitration provision which provided for venue in London, and the parties had agreed that everybody would pay their own attorneys' fees. Well, English law says you cannot do that, and English law triumphed.

MR. MEIJER: That is an example of a mandatory provision just mentioned.

SPEAKER IN AUDIENCE: Yes. It is a mandatory provision of English law. You cannot agree prior to the dispute for each of the parties to pay its own counsel fees and fees of the arbitration, and, because venue of the arbitration was London, that contractual provision was invalidated.

OTHER SPEAKER IN AUDIENCE: What was the substantive law, the law governing the merits of the case?

SPEAKER IN AUDIENCE: I do not remember what law governed the merits, but it would not have mattered.

MR. MEIJER: It does not matter, since English arbitration law applies.

It is important that one always check the arbitration statute that applies on the basis of your choice of the place of arbitration. And you cannot assume that, because the place seems neutral, the statute will be acceptable. I can give you a good example. Brussels seems to be a very neutral place, but, if you arbitrate in Belgium, a challenge to the arbitrators can be brought before the courts, with

two levels of appeal, and during these challenge proceedings before the court the arbitration proceedings are automatically suspended. Thus, if you arbitrate in Belgium, the arbitrator could be challenged—even if it is on frivolous grounds—and it could take six years until you can continue your proceedings.

MR. BROWN: Is that true, even if the parties have agreed that that would not happen?

MR. MEIJER: This is a good example of a mandatory provision.

MR. BROWN: A few years ago we were told that Belgium had adopted a special law.

MR. MEIJER: You are probably referring to the Strasbourg Convention, and that is a very bad convention. Belgium is the only country in the world that applies the Strasbourg Convention. They are going to revise their arbitration act, but my advice would be, in fact, never to agree to arbitrate in Belgium. I experienced this in one of our cases, and the arbitration matter was suspended for years due to a frivolous challenge.

MR. FISCHER: I think what the client, Mr. Kellogg, would say upon hearing this is that this is a complicated issue, and that he needs to consider all of these concerns. Next, let us assume that the client then asks about the various organizations that offer arbitrations. How would you describe the difference between ad hoc arbitration versus institutional arbitration?

MR. MEIJER: Ad hoc proceedings are proceedings that are not administered by an arbitration institute, that is, where only the arbitration statute—based on your choice of the place for arbitration—applies. Do any rules apply at all in this case? No, in principle, no; however, the parties may apply the UNCITRAL arbitration rules, which are rules that may be applied in ad hoc proceedings. They are not administered by an arbitration institute but they form a proper set of rules that can be applied, and they can be used successfully. They are currently under revision. They are often applied in large proceedings.

MR. FISCHER: Would you recommend to Mr. Kellogg that they use an ad hoc procedure with UNCITRAL rules?

MR. MEIJER: No, but first let me note that, for ad hoc arbitration, it is very important to always include the place of arbitration, because that will determine the applicable arbitration statute, and the method of appointing the arbitrators. In the case of multi-party arbitrations you need to also include a provision, because, for example, the UNCITRAL rules do not deal with multi-party arbitration at all. You will also need to choose the language of the arbitration. It is advisable to choose one language only. I experienced an arbitration where both Spanish and English were the languages of the arbitration. It was a disaster.

I would advise Mr. Kellogg to opt for institutional arbitration, so that the arbitration would be administered by an arbitration institution. The International Chamber of Commerce (ICC) is a renowned arbitration institute, and the ICC rules can be applied anywhere. People find the ICC somewhat costly nowadays, but the ICC has maintained that most of the costs are spent on lawyers presenting the case and not on the arbitrators or administration of the case by the institute.

The "Terms of Reference" are a special feature of the ICC. These Terms are a document that needs to be drawn up at the beginning of the arbitration. Another special feature is the scrutiny of the award by the International Court of Arbitration.

In response to your question, I would recommend that Mr. Kellogg choose ICC arbitration. Yet, the other institutes may have advantages. A list of institutes would include the AAA (under the AAA International Rules), the Singapore International Arbitration Center, the center in Dubai, the Netherlands Arbitration Institute, and the Belgium Arbitration Institute. And then you have the World Intellectual Property Organization (WIPO), which is the institute that focuses on intellectual property disputes.

MR. HONIG: Over the years we have found that situations may be nuanced, and that there are really two kinds of arbitration disputes. There are certain situations in which both parties have a mutual interest in getting to a resolution in an efficient and orderly manner, and there are others where that is not the case, where, in fact, one party will want to drag the process on for twelve years, through the Belgian courts, for example. With respect to the former, we very often provide for ad hoc arbitration, with the lawyers very routinely filling in the particulars, but they know it is going to be in a spirit where both sides need to get to an answer (for example, for securities reporting purposes). If you have the classical case of a defendant who needs to be brought kicking and screaming to the arbitration, then you will need the rule framework.

MR. FISCHER: Generally, when you have businesses that have only intermittent or one-off relationships with each other, you may well get that kind of contentious fight every inch of the way. If the businesses have an ongoing relationship, there is often a mutual interest in resolving the dispute efficiently. Therefore, I think the advice to Mr. Kellogg will most likely be that the type of arbitration he should choose will depend on the kind of relationship he has with the other party.

Changing the topic slightly, Mr. Kellogg then asks me what I meant when I said that he needed to avoid "pathological clauses." He is a little bit concerned about that,

because the word "pathological" scares him. How would you respond?

MR. MEIJER: "Pathological clauses" are sometimes called "midnight clauses," because often at the end of the drafting process a colleague—sometimes a litigator or an arbitration practitioner—is asked to furnish an arbitration clause. As a result, the arbitration clause is pathologically deficient, especially when the drafting attorney drafts the clause himself without checking the applicable arbitration statute and without checking the arbitration rules. The arbitration rules often give the parties the freedom to deviate from the rules. You see this in Article (1)(a) of the AAA rules very clearly. Other rules contain provisions that expressly allow the parties to deviate from them. However, you need to be careful not to deviate from the rules when the rules do not specifically allow you to deviate, because in the end the arbitration institute might refuse to administer the arbitration, and the arbitration agreement itself may be invalid. In other words, you must check to see if you have any features in your arbitration clause that deviate from the mandatory provisions of the arbitration statute or the arbitration rules. You may need to contact the arbitration institute in order to do so.

MR. FISCHER: Wear off-the-rack clothes, not custom-made ones, because they may not fit.

MR. MEIJER: Exactly. Draft your arbitration agreement based on the applicable arbitration statute in the place where you have chosen to arbitrate. I see your point for ad hoc arbitration, but I always advise in fact to have institutional arbitration with proper arbitration rules chosen for explicit reasons. And keep it simple: make use of the model clause of a reputable arbitration institute. Avoid pathological clauses, such as the following, which was actually used in one case: "Disputes hereunder shall be referred to arbitration to be carried out by arbitrators named by the International Chamber of Commerce in Geneva [which does not exist] in accordance with the arbitration procedures set forth in the Civil Code of Venezuela [there are no arbitration procedures set forth in that Civil Code] and the Civil Codes of France, with due regard for the law for the place of arbitration." This clause is clearly invalid.

Here is another example of a pathological clause: "All questions which cannot be resolved by negotiations are the subject to consideration in the International Arbitration Court in the Hague, according to the legislation of the kingdom of the Netherlands." There seems a lack of clarity between the substantive law and the arbitration statute, and there is no International Arbitration Court in The Hague.

And here is yet another example: "All disputes arising out of or in connection with this bill of lading shall in accordance with the Chinese law be resolved in the courts of the People's Republic of China. All to be arbitrated in the People's Republic of China." The word "all"—it was later learned—should have been "or." However, the clause was dictated by someone who could not pronounce English very well and the person's "or" was understood as "all." This clause was actually used, and may well lead to extensive proceedings, and it may take years just to determine whether the courts or the arbitrators have jurisdiction.

SPEAKER IN AUDIENCE: There is a case where somebody picked Singapore under the ICC rules, and the Singapore Institution took it and conducted the arbitration under the ICC rules. Singapore was not just the place of arbitration: the Singapore Arbitration Institute was chosen to administer the administration, and it did so under the ICC rules.

MR. MEIJER: This demonstrates that, in the end, a court or arbitrator might agree to proceed on the basis of such a clause. But this type of provision could lead to a dispute around the question as to whether or not there is a valid arbitration agreement in the first place. You should avoid that. That would be my first piece of advice, because you cannot know what the outcome will be. While in some cases an arbitration-friendly court may accept this arrangement, a court in other cases my reject it. What is more, you can have the same problem at the enforcement stage.

MR. FISCHER: At the Singapore meetings this past fall we had a presentation by Maxwell Chambers of the Arbitration Institute in Singapore, which impressed me. He pointed out that, in Singapore, they will allow you to deviate from whatever laws you want. They will allow you to set the rules of your arbitration and set the arbitration in Singapore, without having to worry that local laws might create problems. Not only that, but under Singapore arbitration procedures, if the contract is under New York and English law, for example, they will let New York and English lawyers work on the case in Singapore, so long as the case involves questions of those nations' laws.

SPEAKER IN AUDIENCE: When would you advise your client not to have an arbitration clause? I see a lot of international credit applications where the creditor/seller provides that any disputes would be resolved by arbitration in Ohio. If the claim is a modest one of fifty or seventy thousand dollars, that clause may be great to have.

MR. MEIJER: That is always a very difficult question: Why arbitrate? In regard to "small" claims, I point out that you may not know in advance whether the matter involves a small claim or not. You raise a difficult question that cannot be simply answered. But sometimes you should indeed ask yourself whether to arbitrate, that is, whether to include an arbitration clause in an agreement. There is literature available on the issue. There is a concise treatment by Gary Born that is entitled "International

Arbitration and Forum Selection Agreements, Drafting and Enforcing." It is a practical book that also deals with your question.

D. Beginning an International Arbitration

MR. FISCHER: Mr. Kellogg is surprised at how complicated this whole issue is, especially since, insofar as he is concerned, there is never, ever going to be a problem. He thinks that Mr. Rodderick is a great guy, and that it is a great deal, and that it is in everyone's interest to push it forward. But guess what happens? Lo and behold there is a dispute! They try to negotiate a resolution, but, unfortunately, it looks as if they are not going to be able to do that. They inform Jessica that they appear to need to go to arbitration. What exactly does that mean, and what do we have to be concerned about?

JESSICA BANNON VANTO: The first foray into international arbitration will be very similar to a foray into domestic arbitration. First, I would tell Mr. Kellogg that we need to take a look at the arbitration agreement. As was indicated previously, the arbitration agreement can be either for ad hoc arbitration, where the clause contains specific negotiation provisions and a time period to solve the dispute by negotiation before you go to arbitration, or it could simply refer to the rules of an arbitration institute.

In many cases you will kick off an international arbitration much the way you would a litigation or a domestic arbitration. Thus, Mr. Kellogg would receive a request for arbitration, usually a short statement of the claim, which is filed with the filing fee (usually a minimal amount). If the rules required it, the request for arbitration would also include the party's nomination of the arbitrator to be chosen by it, if it is a three-person arbitration panel.

Under the rules, Mr. Kellogg would then most likely have to respond. You can answer and usually submit some counterclaims. If you have chosen whose rules are to govern, you will have the benefit of the administering body, which, as a neutral body, can provide some coordination and help. They will begin the process and thrust the arbitration into the arbitral tribunal appointment phase.

We would inform Mr. Kellogg that the arbitral tribunal appointment phase is strategically probably the most important part of the arbitration that is within his control. It is his one opportunity to make a decision that will dramatically affect the outcome of the arbitration: selecting the person or persons who are going to be deciding the dispute.

MR. FISCHER: Mr. Kellogg at this point interrupts you and asks about motion practice. He tells you that he had a friend who had a company that ended up spending three years in motion practice in regard to a dismissal. He asks you whether this is a concern with arbitration, and if it is, he observes, how then arbitration is any different from litigation?

MS. VANTO: The dispositive motion is a little bit up in the air. It is a hot topic. By dispositive, I mean that you will possibly be able to challenge the arbitration on jurisdictional grounds initially, if it is felt that this is an arbitration the jurisdiction of which is in question. That question is often bifurcated. We can deal with that question, and Mr. Kellogg would not have to pay the expenses of arbitration and jump through all the procedural hoops.

None of the arbitration rules really has the equivalent of a Rule 12(b)(6) or motion for summary judgment. The rules usually leave this to the discretion of the tribunal. There are motions submitted, and they are being submitted more frequently, particularly from Americans—which probably does not surprise you. Doing this seems to be a knee-jerk reaction of Americans. They will argue the statute of limitations, inconvenient forum, venue—anything coming to mind from their own legal system. A challenge of this kind can arise from the traditions of various legal systems and is something that the tribunal has to consider.

MR. BROWN: May I interject? Arbitrators and counsel that have had this experience would say that, if you have a good defense, you put in a summary judgment motion and ask the arbitrators to kick the case out. As you may know, there is a built-in problem with this, because the arbitrators have received the appointment and want to complete the process.

The arbitration tribunal is not like a court, which wants to clear its docket because it has many competing cases. You are taking on a big burden if you want to try to convince the tribunal to throw the case out early, because, if there is any reason not to do that, the tribunal will not do it, and you may have by then prejudiced your argument. You might win on the merits at the end of the process, but if you try to get an early, premature decision, the tribunal will see a problem with your motion.

MR. FISCHER: You appear to be pointing out an issue that I have suspected in a bunch of cases, which is that the arbitrators have nothing else to do with their time and are therefore so interested in your dispute that they want to spend as much time and money of yours hearing it as possible.

MR. BROWN: I did not want to go that far, but that is a concern. It is a psychological aspect of the process.

MS. VANTO: I do not come at it with quite that opinion. I think international arbitrators exercise caution, not because they are so desperate to be on the international stage, hearing an international arbitration, but because there are not the same safeguards and standards in arbi-

tration that there are in litigation in federal courts in the U.S.

It is difficult to conceive how in this context people coming from civil law and common law backgrounds could make a decision not based on facts or what they view as facts. How could they take the approach that facts do not matter, that the matter should be decided on the law. Arbitrators are cautious, desirous of protecting the system of international arbitration. At a subsequent time in the proceedings, for example, they might realize that an earlier decision was incorrect based on facts coming to light in the meantime. As a result, venerable international arbitrators are moving more towards exercising caution in regard to preliminary decisions, particularly with respect to jurisdiction.

Thus, along with these dispositive motions comes the issue of how to handle them. Should they be bifurcated? Should the proceedings be stayed? It is not like litigation, where there is discovery ongoing, so you can deal with the motion while you are simultaneously getting all your depositions and document production done and things are moving ahead towards a hearing. That is efficient, but it is different from the situation in arbitration.

MR. HONIG: In addition to the cynical view, which I know is widely shared, as both an arbitrator and as a party I have heard the view that the worst thing that can happen to an arbitrator is to have his or her award overturned. It happens very infrequently, but it can be career-ending if it does happen. It is certainly not helpful for future appointments.

One of the few bases for overturning an arbitration award—certainly under the FAA and under the New York Convention I believe as well—is the failure to consider evidence, as well as due process issues. There is a reticence to resolve a dispositive motion, not at all for the cynical reason of maximizing fee income, but to protect any eventual award from the worst-case scenario of its being overturned.

MR. MOXLEY: Can I offer sort of the defense of the non-cynical side of this? I think Jessica is getting at this. If one attends programs like this where there is discussion of the crisis in arbitration, and hears general counsel from large companies that have been major arbitration users over the years talk, they will say that what they want much more now are muscular arbitrators who are willing to make decisions up front, when it is clear. We may also need some action in terms of clearer rules. Because, as Jessica said, there is virtually nothing in the arbitration rules of the international or even the national providers in regard to motion practice.

But there are cases in which it is appropriate to handle such issues on a dispositive basis. For arbitration to fulfill its expectation of expedition and speed there needs to be an effort made to identify the issues that need to be addressed that way early on.

MR. FISCHER: Mr. Kellogg hears this discussion, and he says that he understands that what happens depends on the arbitrators. He then asks how they get appointed.

MS. VANTO: Well, there are different procedures provided under the various rules. Most rules will provide an opportunity for the parties to agree on their arbitrators. With a three-person panel it is very often the case that each party will nominate its own arbitrator, and then those two arbitrators agree on a president of the tribunal. By the way, I have never been involved in an arbitration where both parties were very happy about going to arbitration. The process is usually very contentious. No matter how friendly they were in the contract phase, by the time the dispute arises, the parties are usually quite annoyed with each other, and one side usually has an interest in a delay. For this reason, it is critical to have stopgaps in your arbitration clause to ensure that, at every step of the arbitration appointment stage, there is a mechanism in place to end the process, because the worst thing that can happen is that no tribunal is impaneled. This is another reason for choosing a set of rules to govern the arbitration, because the rules generally provide procedures for all sorts of crises—including, for example, if a party cannot decide on the person it is to name as an arbitrator, a situation that does actually arise at times.

MR. BROWN: I would like to raise an issue about an arbitration agreement that provides for each party to choose an arbitrator. The institutional rules say that the arbitrator must be neutral, even though he or she is appointed by a party. How does that play out?

MS. VANTO: Neutrality is interesting. I think we have a consensus now in international arbitration that there must be independence and impartiality. Even in the United States, as a matter of fact, we have seen that non-neutral arbitrators are now somewhat a thing of the past. The parties may, of course, agree that each will appoint a non-neutral arbitrator, with the president being the neutral one.

Nowadays the idea is that, when you are making the strategic choice of your party-appointed arbitrator, you want someone who is neutral and independent of your client, but at the same time you want someone who would be sympathetic to your client's position or would find the legal issues that you are arbitrating to be rational. You would want someone who would be somewhat predisposed to your way of thinking. Thus, for example, you might look at prior decisions written by that person to see whether he or she considered a similar matter under a similar law. If he or she did, you might be able to determine whether the person would be predisposed towards

your client. Of course, you cannot know how the person will actually rule in your case.

The other very critical issue in making the determination of who will be on your tribunal is the tribunal dynamic. This cannot be understated. For example, should Mr. Kellogg choose the young and hip techie, because the payment system at issue is a software system? On the tribunal that person will be the one who will essentially be an expert witness for the tribunal on the technical issues at play. The outcome will likely turn on the factual issue of how this payment software system works. Alternatively, should the choice be the venerable arbitrator who has done three hundred arbitrations and who commands the room when he speaks? The dynamic needs to be determined. You also need to keep in mind that you only need two in a three-person panel.

MR. FISCHER: Well, Mr. Kellogg responds that he understands that, but he asks why he would want three arbitrators. He wonders why the parties cannot just choose one, thinking that having one arbitrator would be cheaper and faster. What would you recommend?

MS. VANTO: A sole arbitrator for a $1.4 million case like this one is definitely a good way to go. You avoid having the need to get three people scheduled and sitting in the same place at the same time. There is no need for one arbitrator to argue with the others, which could also become the source of delay. Having one arbitrator can be faster, more efficient, and more economical.

On the other hand, Mr. Kellogg would only have one person and the opinion of one person. When significant amounts of money are involved—and perhaps to Neo-Tran and Mr. Kellogg $1.4 million could be very significant—you would want three people thinking about it. Oftentimes the arbitrators who are appointed by a party do try to make sure that the tribunal is deliberating about the facts and issues from the perspective of the people who appointed them. They constitute voices on the tribunal that make sure all views are heard in the deliberation.

MR. FISCHER: Could you briefly go through some of the issues in discovery? Are depositions permitted? Can witnesses be cross-examined?

MS. VANTO: I would like to respond by discussing a very important procedural vehicle, regardless of what is going on and where you are in arbitration, and that is the first session. The importance of the first meeting after the tribunal is impaneled cannot be overstated. For very practical reasons you can hash out most of the issues relating to discovery and how the hearing itself will progress once everyone is in the same room. It is very efficient and usually concludes with a procedural order issued by the tribunal that will govern the proceedings, so that everybody is on the same page.

With respect to discovery, under most of the rules in international arbitration, you will only get document production, and that document production will be very limited. A party will not be able to obtain all documents relevant to the issues in the case or, to give a specific example, all documents or communications (including e-mails) relating to board meetings that have ever been held. The party seeking production of documents will need to ask for specific documents, for example, those relating to meetings on January 3rd, 5th, and 6th, because a party's failure to appear at those meetings led to the breach of contract. The request must be very narrow and very specific: otherwise, most international arbitration panels will reject the request outright. At their discretion, they might ask for more detail to give you another shot at making the request. You have to know what you are looking for, since the document production process is not a fishing expedition.

MR. FISCHER: As it turns out, Mr. Kellogg wins and gets an award of $1.4 million in Sonia. He is happy and thinks that the case is over. Is that really so, William?

E. Court Involvement; Enforcement of the Arbitration Award

MR. BROWN: Since Sonia is a signatory to the New York Convention, Mr. Kellogg has a good award. If he brought the award here, it is very likely to be enforced.

But before I talk about the enforcement of that award, let me just note that the New York Convention applies both to international arbitration agreements and to international awards.

My part of this discussion is about where the polite rule of arbitration meets the more muscular world of court enforcement. The ambience is different, and it can be very confrontational, particularly if one party does not want to arbitrate, or they want to do it differently, or they don't want to pay.

Before the award is entered, and I am talking about the New York context, you have the possibility in New York, whether you are in federal or state court, to freeze the assets of a party in arbitration if that party is a non-resident alien with assets here. It used to be that, if you had an agreement to arbitrate under the New York Convention, New York courts, taking the position that the parties were limited to arbitration, would not interfere. That was the old New York Court of Appeals case, *Cooper v. Ateliers de la Motobecane, SA*. Just a few years ago the New York legislature, at the behest of some of the arbitration community in New York, changed that. Under CPLR 7502(C), you can now freeze assets under a state procedure. This is also used by the federal courts. The federal courts have no authority of their own to freeze the assets but rely on state court procedures to do so.

Section 202 of the FAA sets forth that, when an agreement or award falls under the New York Convention, it is because either you have an agreement for arbitration that is international in nature or you have an award arising from that. Federal court has jurisdiction under Section 203 of the FAA. If you find yourself drawn into state court, you can remove the action to federal court under the FAA, provided you do it within certain time limits. This does not mean that the state court has jurisdiction if you do not remove.

The other area where you can have court involvement early is if the tribunal makes a partial final award, such as a decree that the parties must put up security or do something that is denominated as partial but final. You can take that award to the court, and the court will enforce compliance with that.

You can also get the court involved—again most likely a federal court because you have that removal ability—in order to provide evidence in aid of the tribunal.

You have two kinds of arbitration awards that are subject to the New York Convention from the viewpoint of New York courts.

One is the type of arbitration award that Mr. Kellogg received: the Sonia award, rendered abroad in a country that is a signatory of the New York Convention, which Mr. Kellogg will seek to enforce in New York. The only grounds on which it would not be enforced are those set forth in Articles 5 and 6 of the Convention. One of these grounds is when the arbitrators decided matters not submitted to arbitration, that is, where they did not have the authority of the parties who agreed to arbitrate. There are very broad reasons for refusing to enforce an award. Another ground would be that enforcement of the award would be contrary to the public policy of the country in which enforcement is sought.

The other type of award subject to the New York Convention is an international award rendered in the United States. That includes an award in a dispute, for example, between a non-U.S. citizen and a U.S. citizen. That makes it international. It also has to be a commercial dispute. I think there is a question whether an arbitration between a U.S. company and its employee who is a foreign person with a U.S. visa would be considered an international arbitration, because it might not be considered commercial.

MR. FISCHER: What if there is an argument in regard to Mr. Kellogg's wanting to enforce the award against assets of his adversary in New York, with his adversary saying that, under the laws of Sonia, this kind of award would not be enforceable?

MR. BROWN: If this occurred before the award had been rendered, perhaps Mr. Kellogg's adversary could come up with a strong argument under Sonia law. But if you have a claim against a nonresident of New York, the broad ability to freeze that party's assets is specifically permitted now in international arbitration.

MR. MEIJER: Maybe it is good to mention that under the new Convention there is no requirement of double exequatur; thus, the fact that an award was not confirmed in the country of origin would not be an impediment under the New York Convention. I do not know whether there are external requirements under the Federal Arbitration Act, but in the New York Convention there is no requirement of exequatur in the country of origin.

MR. BROWN: There is no requirement of exequatur in the country of origin. But, under Article 6 of the New York Convention, the U.S. court can choose to defer recognition of the award while it waits to learn whether the award is going to be authorized in the country of origin. I believe that, in the 1998 *Europcar* case, somebody was appealing the award in the Italian courts, and the appeal was predicted to take a long time. The Second Circuit had some doubts about the validity of the award and waited for resolution of the appeal.

MR. FISCHER: So the U.S. court waited for the Italian court to decide.

MR. BROWN: But this is not necessarily what happens. More typically the American court would proceed to approve the award. If the award has been set aside in the country of origin, it is more likely that it would not be enforced here, but that is discretionary.

We have the *Chromalloy* case, where in the arbitration agreement the Egyptian government had agreed that an arbitration award in Egypt would be final and binding and not subject to any appeal. There the U.S. District Court for the District of Columbia enforced the award even after the Egyptian court of appeal had vacated it.

MR. HONIG: There was a 2009 case, *Steel Corp. of the Philippines*, involving an award made in Singapore but apparently set aside by a court in the Philippines, where the U.S. Third Circuit held that, since the Singapore arbitrator applied Singapore procedural law, Singapore, not the Philippines, was the country with primary jurisdiction, and the fact that the award appeared to have been vacated by a third country would not prevent the U.S. court from enforcing it under the New York Convention.

MR. BROWN: Yes, the courts at the situs of the arbitration have primary jurisdiction, and that is where you would look. If the award were set aside in some other country, a U.S. court would probably not give much weight to that.

MR. MEIJER: It may be interesting to note that Europe has now also copied your *Chromalloy* case. In the *Yukos* case in 2009, the Amsterdam Court of Appeal allowed enforcement of four Russian arbitral awards that

were set aside in Russia, with the Amsterdam Court of Appeal deeming the setting aside of the awards not to have been impartial.

MR. BROWN: That is somewhat unusual. In America we have been moving away from *Chromalloy*. In past years it was easy to say that country X is an unreliable country or that its courts are corrupt, and apparently the Dutch court has said this in connection with those Russian proceedings. But my sense is that our courts now would be less inclined to agree; they might, depending on the case, but it would be difficult.

MR. FISCHER: Mr. Kellogg now asks whether there are any other concerns he should have about enforcing this award.

MR. BROWN: One issue is personal jurisdiction. We will be able to enforce the foreign award only if there is personal jurisdiction over the party against which it is to be enforced.

MR. FISCHER: I cannot go to New York if they are not in New York.

MR. BROWN: Well, the party must have some assets in New York. Why would anyone want to enforce the award unless the party had a bank account here? It is not the case that we want to have this award in place so that we can seize your assets the next time you pass through New York, as if we were going to be on the lookout for you.

MR. FISCHER: If I know that my adversary is never in New York and has no bank account in New York, but he flies to Kennedy Airport every now and then on his way to Brazil. Can I just serve him there and do something that way?

MR. BROWN: You can give it a shot, but if he does not have assets here, why would you do that?

There is also the issue of *forum non conveniens* which I think is interesting. In the *NaftoGas* case in the Second Circuit, there was an arbitration award against a company, and the party here sought to enforce it against the state of Ukraine. They said that the company was really an alter ego of the Ukraine, which had a lot of assets. Under our arbitration law you can pierce the veil to show that an award against one entity should be enforced against somebody else. But the Second Circuit dodged the issue by finding that was not a convenient forum to decide the relationship between the sovereign Ukraine and the gas company.

There is also the possibility that the U.S. courts will issue anti-suit injunctions to stop you from trying to challenge the award in other countries, and there are special rules about this. You would probably be able to continue to challenge the award in the court of primary jurisdiction, that is, the jurisdiction where the award was rendered. But once a U.S. court has affirmed the award, there is precedent for the U.S. court to forbid parties from continuing to challenge the award in other countries where enforcement might be sought.

I would like to mention one other important point. If your arbitration award is made in the U.S., you can challenge it both under Section 10 of the FAA and under Article V of the New York Convention; thus, you have overlapping challenges. In addition, you might be able challenge it saying that the award is invalid due to a "manifest disregard of the law"; however, the validity of that doctrine after *Hall Street* is in question.

SPEAKER IN AUDIENCE: I just want to give a plug for the custom-tailored suit. You can use the ICC standard arbitration clause, which is what I would recommend if it is 3:00 o'clock in the morning and you cannot discuss the matter with anyone else. But it can really make a big difference to your client to have a comprehensive arbitration clause in an international case—a clause in which you provide for an appropriate situs, choice of law, and number of arbitrators, for example. I recommend taking two hours' worth of time of an experienced drafter in order to save your client millions down the road.

MR. BROWN: I note that your arbitration clause should not omit to provide that "judgment may be entered on the award." In one case, I had to go to the Second Circuit to overcome the omission of that statement. The Second and Fifth Circuits are clear about your not needing the statement in an international contract, but other circuits are not clear, and the domestic law is to the contrary, so I recommend you insert it.

MR. MEIJER: I agree.

MR. FISCHER: An argument for the custom-tailored suit.

III. Managing an International Arbitration

A. Introduction

AXEL HECK: I am Axel Heck from Berlin, and it is my pleasure to moderate the next panel, the subject of which is managing international arbitration.

Allow me to introduce to you our panelists: we have Fabien Gelinas from Montreal, and Dana Freyer, Joseph Neuhaus, Paul Friedland, Rona Shamoon, John Wilkinson and Daniel Rothstein, all from New York.

Because this is obviously a vast subject, we have decided to pick four specific topics.

Dana will be the first speaker, and she will talk on current developments regarding appointment of the panel. Dana will be followed by Joe, who will discuss the topic of discovery and disclosure. Paul will then speak about the advantages and limitations of expedited proceedings—fast-track cases in international arbitration,

and finally Fabien will discuss the ups and downs of case management.

B. Choosing the Arbitral Panel

DANA H. FREYER: The focus of this panel is the actual management of arbitration. We hope that it will be a practical how-to discussion of some of the issues that come up in managing international arbitrations. As we know, the parties and arbitrators play a role in that regard. In discussing the issues surrounding the selection of the arbitrator, I intend to focus on the role of the parties. In the panel discussion and in the Q&A portion, we can talk a bit about the issues that arbitrators face with their co-arbitrators once they have been approved.

I think it is fair to say that there is a consensus among arbitration practitioners that the appointment of the arbitrator is one of the most critical choices the parties will make. In fact, the ability to appoint an arbitrator and impact the selection of the chair is one of the great advantages of arbitration over litigation in the courts.

One of the first questions that arises concerns how many arbitrators there should be. Usually or very often that decision has been made before a dispute arises, because it is specified in the arbitration agreement. If it is not, however, the parties can influence that decision. The question is whether there should be one arbitrator or three arbitrators. The obvious advantages of having one arbitrator are that it is less costly and that scheduling issues are easier to resolve. But there might be a greater risk of an aberrational decision, which is an important consideration, given that there is no effective appeal on the merits in an arbitration. Also, the selection of the arbitrator could be more complicated because the sole arbitrator has to be acceptable to both parties. Often the sole arbitrator, absent an agreement otherwise, is appointed by the arbitral institution, which can reduce the influence of the parties on the selection process, although there are ways to get around that, which I will speak about below.

The typical selection process for a large, complex international arbitration calls for three arbitrators, with the typical procedure being for each party to select one arbitrator, and the two party-appointed arbitrators to select the third. Although it is subject to debate, I believe that there is general agreement that the deliberations that emerge from a three-arbitral panel can often result in better decision-making. There are many who will disagree with that, and it is something we can talk about. However, especially in high-stakes, complex cases, with parties of different national backgrounds and different legal systems, you can have perhaps better outcomes and at least better deliberations with three arbitrators than you might with one.

You should be aware that the arbitration rules of the various arbitral institutions specify what procedure is to be used as a default procedure in case the parties have not agreed on the number of arbitrators.

If you are appointing a sole arbitrator, then the question is how do you agree? Do you exchange lists? Do you try to discuss a profile that would be acceptable to both parties, and then exchange names that the parties feel would meet the profile? My preference when I am involved in the process as counsel is not to try to agree to a profile, but rather to exchange names. There are a number of reasons for that. I think a party may have an instinctive reaction. First of all, the parties may have very different views as to what kind of arbitrator they want and what the profile should be. As a result, right away you are likely to get into a dispute over that. Those issues may not emerge if you simply exchange lists.

Now, if the parties cannot agree, and the institution is going to make the appointment, there are several institutions that provide for a list procedure, whereby the institution will provide a list of potential candidates to the parties and each of the parties can strike and rank them. If the institution does not provide a list, the parties can ask for this procedure, and most of the institutions will agree to do it. At the same time, in the case of an institutional appointment, you should be certain to provide the institution with a profile of the type of arbitrator that you are looking for, so that the institution's list will be relevant to the dispute.

To repeat, the choice of the party-appointed arbitrator is one of the most critical decisions that a party is going to make. The party-appointed arbitrator in an international arbitration makes a vital contribution, both to the effective conduct of the proceedings and to the determination of the merits. The party-appointed arbitrator is not to be an advocate of the appointing party's case. In fact, a party-appointed arbitrator who is perceived as an advocate and partisan will undermine his or her effectiveness as an arbitrator in a truly neutral panel, which is what international arbitration panels, as well as domestic panels now, should be comprised of.

What is the role of the party-appointed arbitrators? One role is, together with the other arbitrator, to choose the third presiding arbitrator, typically after consulting with the respective party that appointed each of them, which is permissible. Another important aspect of the party-appointed arbitrator's role is to help assure that both the party's case and the legal culture of the party are understood by the other two arbitrators, and that these factors are given appropriate consideration in both the procedural and the merits-related stage of the case.

What are you looking for generally in an arbitrator, as far as qualifications are concerned, and to what extent should you specify that in an arbitration agreement or in discussions generally? First and foremost, independence and impartiality are required by the rules and the

applicable standards—the IBA guidelines on conflicts of interest in international arbitration and generally accepted standards embodied in international arbitration rules. And independent and impartial decision-making is really critical to safeguard the integrity of the arbitration process and to ensure that the parties have confidence in the tribunal and in the outcome.

What is independence? Independence requires the absence of a close relationship—financial, professional or personal—between an arbitrator and the party or counsel. Impartiality requires that the arbitrator not be biased in favor of or prejudiced against a party or its case. That being said, it is generally accepted that a party may want to appoint an arbitrator who has published views that generally may be favorable to the position taken by the party, as long as they were not written with the case to be arbitrated in mind, or to appoint someone who may be able to understand the legal culture of the appointing party and share that legal culture.

There are extensive disclosure obligations embodied in the IBA guidelines and embodied in practice in regard to conflicts of interest in international arbitration. These disclosure obligations vary in terms of the extent to which they are adhered to among arbitrators of different backgrounds. This is an area that you need to understand if you are appointed an arbitrator and dealing with disclosure.

You will also want an arbitrator with knowledge and experience, familiarity with the applicable laws, with the legal systems involved, and familiarity with the arbitration process. This is especially important when the parties involved in the dispute are from different cultures and have different expectations about the process. Sometimes you want an arbitrator who has in-depth knowledge of the industry or certain technical issues, which could well be the case in, for example, an Internet dispute, or a dispute involving the telecom or energy sectors. On the other hand, you may just want an arbitrator who has experience with commercial transactions.

The personality of the arbitrator is important. When you are appointing your arbitrator, you should also consider who the perspective chair candidates might be, because you want to make sure that there is a good relationship and understanding between the chair and your party-appointed arbitrator. Then, there is also the issue as to whether you want a lawyer or an expert.

Language skills may be another desirable attribute. Often international disputes involve witnesses with different native tongues or documents in other languages, so this is a factor to consider. Nationality may also be a concern. If it is an investment dispute, for example, the rules of the International Centre for Settlement of Investment Disputes (ICSID) preclude, absent party agreement, an arbitrator from having the nationality of one of the parties.

Availability is increasingly becoming a factor that needs to be looked at. As a matter of fact, the ICC rules now require arbitrator candidates to confirm their availability, and availability is a problem in terms of having the potential of delaying the arbitration.

How do you find arbitrators? If you have not had a lot of experience, how do you learn about people; how do you vet them? You cannot read the decisions as easily as you might do in the case of a judge. The record is not as public. As a result, you start with recommendations from others who have had experience in the field. There are many arbitrators who have Web sites; although not terribly informative, they will give you biographies and backgrounds.

There are rankings by, for example, Chambers International and Who's Who of Commercial Arbitration. Increasingly parties are looking to rankings of arbitrators by their peers.

Arbitral institutions typically do not make their roster of arbitrators available. The International Institute for Conflict Prevention and Resolution (CPR) does provide its members access to names and basic information; for a fee, other persons may obtain curriculum vitae and background information about arbitrators.

Increasingly awards are being published, and such published awards will become a more fertile source of information about arbitrators. The Yearbook Commercial Arbitration publishes arbitral awards, and the ICC has issued compilations of arbitral awards. The ICDR is also now planning to publish awards, with commentary about those awards by different arbitrators. ICSID awards are published, as are those pursuant to Investor-State Arbitrations under the North American Free Trade Agreement (NAFTA), and they do not remove the names of the arbitrators. This is a resource that you will be increasingly able to access. Of course, you can also seek to find articles written and presentations made at conferences like this by an arbitrator.

CPR has begun to undertake rating surveys, where, if the arbitrator agrees, they survey counsel on both sides of an arbitration that such counsel has been involved in and publish the surveys in terms of how the arbitrator has been ranked. Only five percent of the neutral arbitrators who are members of CPR panels thus far have agreed to this process. It is a new process; I think it was launched in December of 2009, but it is something to check to see if your candidates are listed there.

There is also the question of interviewing prospective arbitrators. Can and should you interview candidates for party-appointed arbitrator and chair? There are guidelines and accepted practices with respect to this question.

The short answer is yes, arbitrator interviews are permissible, although some arbitrator candidates will not agree to participate in an interview. The Chartered Institute of Arbitrators, for example, has issued guidelines for interviewing prospective arbitrators. I believe that it is generally thought to be a good idea. You may not, however, discuss the merits of the dispute beyond a brief description of the general nature of the dispute and the issues involved. You may provide the arbitrator with the identities of counsel, witnesses and the parties, and you can speak about general qualifications of the arbitrator and availability. I think that a face-to-face meeting helps instill confidence in the process, but there are strict guidelines, which are not always bright lines, in terms of how far you can go in discussing merits and the like.

Interviewing candidates for chair should not be done *ex parte*, but should be done collectively by representatives of both parties.

MR. HECK: I might add that in a prospective ICC arbitration a lawyer recently asked me whether I would be prepared to meet with his clients, which I declined to do. I indicated that I would meet with the lawyer but that I did not think that I should be meeting with his clients. As was pointed out earlier, an arbitrator's final objective is to make sure that his or her award cannot be challenged.

C. Discovery

JOSEPH E. NEUHAUS: I am going to talk about several recent developments in the area of discovery in international arbitration. In particular, four arbitral institutions in the last two-and-a-half years or so have issued guidelines on disclosure and discovery. All of them are fundamentally aimed at the perception that U.S. discovery procedures are infecting international arbitration in a negative way. They are all trying to find a formula that will essentially stem the tide of domestic discovery procedures infusing international arbitration. The four institutions are (i) the ICC, (ii) the ICDR, which is the international wing of the AAA, (iii) the CPR, which is another arbitral institution based here in New York, and (iv) the Chartered Institute of Arbitrators. The guidelines or protocols differ; they each have a different scope and take a different approach. Only the ICDR ones are applicable by default: they apply in all international cases after May of 2008 that are brought before the AAA. In many respects the ICDR guideless will be the ones that are going to have the most effect, since they will affect just about every case that is brought before the ICDR. The others are all guidelines, protocols, suggestions—they can be adopted by the parties or the arbitrators but they do not apply of their own force.

My purpose here is not to compare and contrast but just to give a general overview of the direction that these guidelines are taking, because they do very much indicate a shared consensus among members of the international arbitration community on a number of important topics.

Allow me to deal first with document production. I will touch on three or four topics in that regard. In document production, the general standard of relevance in these guidelines is quite common, since they all more or less adopt the IBA rule of evidence standard that was promulgated in 1999. It is a two-part standard requiring that the document being sought be both relevant and material, and that it be reasonably believed to exist. This is in express contrast to the U.S. discovery standard, which generally requires only that the document be relevant and appear reasonably to lead to the discovery of admissible evidence. The CPR guidelines put a stronger point on it, providing that "it is expected the parties will ensure that their counsel appreciate that arbitration is not the place for an approach of 'leave no stone unturned.'"

What does this relevant-and-material-and-reasonably-believed-to-exist standard mean? It clearly means that evidence must bear directly, and not tangentially, on an issue. I suspect that most arbitrators would say pursuing evidence simply for impeachment is probably not relevant and material. It probably means that, with respect to a document that is reasonably believed to exist, it is the kind of evidence that a business or person in the target person's position would normally be expected to keep. It is not simply a document that exists only if the requesting party's theory is right. My own view is that, in regard to a request in an employment discrimination case, documents in which derogatory views about the protected class are expressed would probably not be viewed as reasonably believed to exist. However, personnel records in regard to the complainant are likely to exist and would be relevant and material.

E-discovery is another topic dealt with in the guidelines. Here, the protocols generally take the view that you need to be more specific in requests for e-mail and other electronic documents. For example, the ICDR states that, in regard to discovery of electronic documents, such as e-mail and documents on local area networks (LANs), the requests need to be narrowly focused and structured to make searching for them as economical as possible. The Chartered Institute of Arbitration speaks of a narrow and specific category of requested documents. Thus, while "relevant and material" is the general standard, the request must be somewhat more focused in regard to e-discovery.

A number of the guidelines suggest that the arbitrators require that you limit the custodians to be searched. Thus, one way to handle the realm of e-mail discovery is to provide that only the key people involved in the events at issue be subject to e-mail searches and not everybody in the company. There are strong admonitions in a few of the guidelines discouraging any requirement to restore backup tapes, unless there is concrete evidence of spolia-

tion or some other specific reason to require restoring them. Obviously there is a policy choice being made here about cost and about the kind of hearing one is to receive in arbitration. The guidelines suggest that e-mails of peripheral players are not worth looking for, even though I think everybody recognizes that in real life even e-mails of peripheral players can have an effect on a fact-finder. The policy choice focuses more on actions taken by key players.

Another topic dealt with in the guidelines to be aware of, particularly in the ICDR, is the question of privilege. The issue is what to do when you have differing rules for privilege for parties in different positions or jurisdictions. For example, in most of continental Europe in-house counsel do not have a privilege; in the United States, they do. The ICDR and the CPR both tackle this in a very similar way. They provide that the tribunals should adopt the most protective privilege rule and apply it to both parties. The ICDR seems clearer on the matter, but this is the thrust of both rules. It is interesting that the most protective privilege rule applies. Without intending to be critical at all, because I think it is a fine result, I note that these rules are drafted by practicing lawyers who value privilege very highly. I am not sure that a set of judges drafting these rules and protocols would have come out the same way.

Allow me to touch briefly on two other points. Depositions are universally frowned upon in these guidelines. The ICDR states that depositions are generally not appropriate. The CPR states that they should be used only in specified exigent circumstances. This reflects the widespread practice in international arbitration of using witness statements, so that you exchange your direct testimony in written form well in advance of the hearing. The thought is that these statements serve as something of a substitute for depositions. The overall message to be gleaned from the guidelines, which is widely shared among international arbitration practitioners, is that depositions are unusual.

To conclude, I would like to note that one topic that is not dealt with in the guidelines is one that was suggested in the earlier discussions. It is the fact that there is no protocol that speaks about how to deal with expert discovery as we know it in the United States. There is in some of the protocols (for example, the IBA rules and CPR protocols) discussion of the exchange of expert reports, very much like the federal rules have. But they do not address a question that arises often in U.S. litigation, which is whether one can require the disclosure of communications between a lawyer of the parties and the experts. Can an expert be required to produce work product that does not necessarily support that expert's conclusion? There is some question in U.S. litigation, as most of us know, whether you should be able to discover all material an expert might have considered and discarded—e.g., the tests conducted that did not support the desired results that the expert decided not to pursue. This area of discovery has worn a hole in the U.S. litigation industry of experts. Some firms providing experts now provide the services of a consulting expert separate from the testifying expert, but all drawn from the same analytical staff. The issue has also spawned a whole generation of litigators who are wary of communicating with their experts in any written form. This question is not dealt with in protocols. My own view is that such discovery would probably be viewed as inconsistent with the overall thrust of these protocols in their treatment of discovery in international arbitration. One could take the view that the protocols—by omission—exclude such discovery, since they only speak about the exchange of reports. Alternatively, one might take the view that this is simply impeachment evidence that is being sought and is not relevant or material to the topic of the expert's report.

D. Fast-Track Arbitration

PAUL D. FRIEDLAND: It is difficult to find anything to say against fast-track arbitration. If the parties need an early decision, by a fixed date, it is the way to go. If cost considerations are overriding, it is the way to go, because, as we all know, attorney time can often expand to fill whatever time is available. Arbitrators concerned about a track record for the speedy disposition of cases can look good by taking on fast-track cases. If they use the fast track, in-house counsel who are under pressure to control their spending on outside counsel will look good to their bosses.

Why, in light of all these considerations, do I find fast track so often such a bad idea in commercial cases? If we look at this from the perspective of when the parties are negotiating an arbitration clause in their contract, then, if cost considerations were the only consideration, every arbitration clause would and should be a fast-track clause, because it certainly saves some money. But to say that a company wants to save money on dispute resolution is actually to say nothing.

The question is what is a company willing to risk in order to save money? There is a risk in every cost control, and there is a risk in a fast-track arbitration clause. At the time of contracting, none of the parties can know whether the compression of time that comes about through fast-track arbitration will hurt its side. Many companies are not risk-taking companies, and many in-house counsel do not want to be asked at the end of the day why they agreed to an unusual procedure that turned out to favor the other side because of the compression of time. As a result, I have found that inside counsel, for good reason, are typically wary of including a fast-track clause in their (pre-dispute) contract.

The second opportunity the parties have to provide a fast-track arbitration is after a dispute arises and before

the arbitrators are appointed and involved in discussing the arbitral procedure. Theoretically, the parties could enter into an agreement amending an arbitration clause that was not a fast-track clause to begin with. I think we can set aside this scenario; it virtually never happens, since you cannot find that kind of common ground after a dispute arises.

The third scenario is during the three-way negotiations between the two sides of the dispute and the arbitral tribunal after the arbitrators are appointed. I have now done five cases, three as counsel and two as arbitrator, where these three-way negotiations have led to what I would call de facto fast-track arbitration. My experience has not been good in this scenario. I am using fast-track here not as a label for a case of a fixed duration (e.g., six weeks or six months), but rather for a procedure that calls for the compression of time in relation to the number and complexity of issues. I say this because a four-month case is not necessarily a fast-track case: it might just be a simple case. A case of one year or two years might not be a long case; it might actually be a fast-track case if it could otherwise have taken three or four years. And the cases I am discussing all fall into this latter category, and they are all what I call de facto fast-track, because no one used the term "fast-track arbitration." What happened is that one side used a very accelerated procedure, and the arbitration tribunal adopted it, although the other side opposed it. Or, one side proposed a very accelerated procedure, and the other side was unwilling to be seen as less eager to get to the final hearing and therefore did not much oppose it, and the arbitrators adopted the accelerated procedure. In none of these cases was there a real commercial necessity for a decision by a certain date. In all of these cases the fast-track procedure just happened because of a combination of posturing by the lawyers and the assumption by the arbitrators that speed is always good.

It is probable that the fast-track procedure led to some savings in all of these cases, although it is very difficult to quantify whether the savings was substantial. Did the savings make it worth it for the participants? The answer would vary, but I think on balance not.

First, not only the lawyers for the parties but also arbitration counsel suffered for the intensity of the schedule. The party witnesses and in-house counsel also suffered on account of the intensity of the schedule and clearly had not anticipated what they were getting into. To a lesser degree, the arbitrators also suffered due to the intensity of schedule and likely had not been able to foresee the number and complexity of the issues.

Beyond that, I believe that the process also suffered. The pre-hearing phases were so compressed in each of these five cases that pre-hearing submissions had to be simultaneous rather than sequential, and much of the value of the pre-hearing submissions was therefore lost because they were like ships passing in the night.

Did this determine the outcome? That is impossible to say. Would the result have differed if the arbitrators or the parties had had six more months? This is also impossible to say, but I believe that the quality of the process and perhaps the quality of the deliberative process was negatively affected.

I suggest there are other ways to pursue cost savings, other than fast-track. First, there is identification of threshold issues the resolution of which could dispose of all or part of a case without looking at the entire record. Second, in big cases where there will be two rounds of briefs, document production can be postponed to after the first round, which will permit and require the parties to justify any document request by reference to arguments actually made in the opposing parties' briefs. This can reduce the waste that comes from requesting and producing many documents that will never be used in a case: this is a major cost center. Third, there are creative fee arrangements. This is not really part of the arbitral process, although it is perhaps part of management of the arbitral process. It is not a matter for the arbitrators, but rather for counsel and client.

Finally, where fast-track arbitration is nevertheless the right way to go, I suggest three points. First, where possible—and it might not be possible—there should be sequential rather than simultaneous pre-hearing submissions. Second, use pre-hearing witness statements; they save time at the hearing and, like briefs, they enable issues to be joined, especially if they are done sequentially and not simultaneously. And third, use the chess clock approach to a hearing, whereby each side has fifty percent of the hearing time. This forces each side to weigh and exclude what is not essential, and, in my experience, it permits hearings to be done in much less total time than would otherwise be the case.

E. Case Management

FABIEN GELINAS: I am here to talk about the ups and downs of case management in arbitration. I thought I would focus on questions that we are now facing in a drafting committee for the new ICC rules of arbitration. And since these rules serve as a model for many other rules of arbitration, I thought it would be useful and relevant for you to hear about them.

We have been looking at the question of case management in that context. We have done this through a "user group." The drafting committee I belong to features a number of in-house counsel, and they meet with other in-house counsel in several other countries and bring their input from a "user group" of other in-house counsel to the drafting committee.

The input that we have received from the user group indicates that arbitration rules should be more directive when it comes to case management, and that the arbitrators should be informed that the institution cares about case management. The institution cares about this, because the clients care about this. I would like to review some of the ideas and concepts that we have been looking at on the drafting committee, and then I will highlight the issues that they raise in practice as well as in principle.

By way of background, first you should keep in mind the features of the ICC rules that bear on case management. I will briefly mention three. The first is the now standard provision that, when the arbitration rules are silent on a particular point, the proceedings will be governed by whatever the parties agree, or failing that, by the rules that the tribunal—the arbitrators—may settle on. This provision gives total independence from national rules of procedure and maximum flexibility to the arbitral tribunal, subject to the parties' agreement. I was amused to hear mention this morning of "muscular arbitrators." It is always important to consider the parties' agreement as prevailing over what muscular arbitrators would like to do.

The second feature of the ICC rules is peculiar to the ICC system: it is the requirement that terms of reference for the arbitration be drawn up at the beginning of the case. This is the first task of an arbitral tribunal. The origins of this are found in old rules requiring a submission agreement for arbitration, due to the failure for a long time of the continental legal systems to recognize arbitration clauses regarding future disputes. This explains the requirement of terms of reference in ICC arbitration. The terms of reference have morphed into a kind of case management tool, but they are a fairly limited case management tool—a very useful and important tool, but a fairly limited one. A requirement was added to the ICC rules in 1998 that forces the arbitral tribunal to produce a fairly detailed procedural timetable for the entire arbitration and to submit it to the institution, that is, to file it with the ICC. This has to be done when the terms of reference are being drawn up or shortly thereafter.

The third feature you should bear in mind is that the ICC rules do not specify how detailed a request for arbitration or an answer to the request needs to be. The idea behind this is to make the rules compatible with practices in a number of jurisdictions. What you find in practice varies greatly. I have seen hundreds and hundreds of such requests for arbitration, and you find the barest possible notice pleadings serving as requests for arbitration, as well as very elaborate statements of a case that leave very little unsaid. For our purposes, this means that "one size fits all" procedures and a sequence for the filing of briefs are not an option in this context, and that is clear from the day when the case is filed.

The first idea being explored by the task force is that of introducing the principle of proportionality in the rules. This means that the rules would state, as a clear objective, that there has to be proportionality not only with the value of the dispute, which is the most obvious thing to bear in mind, but also with the complexity of the dispute. If this idea is implemented, it would probably be introduced with the notion of cost-effectiveness and the obligation to ensure that the proceedings be conducted expeditiously. Although speed is not the only consideration one should bear in mind, I think it is a very important one.

The second idea is to introduce an obligation to hold a case management conference fairly early in the procedure. The timing of this is obviously important. We are talking about the first case management conference; there can be several during the course of an arbitration. The most logical point, we thought, was to peg it on the drawing up of the terms of reference. It is not always very useful to have a case management conference before you have a full statement of the case, because you do not know what the procedural requirements will be until you get a full statement of the case. In most cases, you do not have such a full statement when you are preparing the terms of reference. Yet, the requirement of a case management conference would be pegged somehow to the terms of reference. This would probably be done in the same way as the requirement for the procedural timetable has been pegged to the terms of reference.

We are all aware that there are many, many cases that are handled perfectly well without a case management conference. But the thinking of the task force is that it could probably not hurt to require at least a conversation between the arbitrators and the parties about this. So the idea is to require the conference, but to make it clear in the rules that the conference can be held by telephone or any other means, including by video-conferencing.

Another idea is for the rules to provide that arbitrators may request case management proposals from the parties. Many good arbitrators do that; it is what is done in a great number of cases. It was thought useful to include this as a suggestion in the rules. It is a way of ensuring that case planning is more efficient and that the parties do not fail to talk about their expectations of the case at the outset.

Another idea is more controversial: it calls for the rules to state that the tribunal can request the attendance of party representatives in person or through a management representative of the parties, so that the arbitrators do not have only the lawyers in the room but also the parties themselves.

One last idea that I would like to mention is that of making reference in the body of the ICC rules to a list of case management techniques that the parties and arbi-

trators should consider. Lists of case management techniques have existed for a long time. One such list was adopted with the UNCITRAL arbitration rules back in 1976. Many such techniques are detailed in the booklet on controlling costs in international arbitration, which was published by the ICC Commission some three years ago. It appears to be very useful and fairly current, and it relies on a vast body of knowledge and experience. Of course, none of the case management techniques works in all cases, and there is no one case where all of the case management techniques will be useful.

I thought I would simply finish by highlighting the "tensions" that we have identified while thinking about case management in the context of drafting arbitration rules for the ICC.

The first tension is that between flexibility and standardization. Each time you add a step or requirement to a set of arbitration rules, you narrow ever so slightly the range of procedural possibilities for the parties and the arbitrators. What works in one case or in a hundred cases does not necessarily work in the next case. Of course standardization of procedures involves standardization of expectations of the parties; what people expect from an arbitral procedure depends on how standardized the procedures are. What is more, standardization obviously can save money and improve efficiency in many cases. Yet, personally I think we should be aware of losing our creativity in fashioning the best procedure for every case that we deal with. That is, after all, one of the fundamental advantages of arbitration.

Now, the second tension is reflected in the old question as to who owns the arbitration. You might say that the parties own the arbitration. But the arbitrators do not always get to meet the parties, and sometimes arbitrators do wonder whether the parties would go along with their representatives if the parties were actually present. That is a reason why the proposal to suggest participation of the parties (or management representatives) in management conferences is so controversial. I think that trying to involve the parties at this particular stage of the procedure would be very helpful. It ensures that everybody is on the same page. It is also an excellent means of bringing the parties together and—without even mentioning it—having them think seriously about the possibilities of settling, at least on some of the issues.

MR. HECK: I would like to make one short comment if I may. As you said yourself, there is the problem between tying the arbitrators too much into rules that may not be workable, on the one hand, and the fact, on the other hand, that a good arbitrator will almost automatically do the right thing. I am a great believer in inviting the parties to a hearing, especially in cases involving a long-term relationship in an ICC agreement or joint venture. It is very useful, and, when you are the boss, the parties normally appear, although there is no way of forcing them to do that.

F. Compelling the Production of Evidence

DANIEL J. ROTHSTEIN: There is a problem in international arbitration of compelling the production of evidence. Let us take a typical situation where you are in a neutral country—at an ICC arbitration in Paris, for example—and one party is an American company and the other company is a Russian company, and each of the parties is arguing about whether the other has and can produce evidence. The arbitrators might not be able to know whether certain evidence that is requested really is in the parties' possession.

Since you are in France, if a party asks the arbitrators to make an application to the local court (or if one of the parties makes an application to the local court), the French court really cannot do much in regard to the American party or the Russian party because the evidence is not located in France.

In the U.S. there is federal legislation—Section 1872 of Title 28 of the U.S. Code—the meaning of which is in dispute. That section provides that parties to a proceeding before a foreign or international tribunal can go to the U.S. district court in the district where the evidence is located and ask for an order compelling the production of that evidence. There has been a controversy going on for about twenty years as to whether this reference to a foreign or international tribunal contemplates an arbitral tribunal.

On the one hand, as I mentioned, there is difficulty in compelling the production of evidence if you do not have the help of a court. On the other hand, if you do compel production, all sorts of problems can arise. First of all, the arbitration community will complain that this leads to American-style discovery, that is, discovery with a scope far beyond what is contemplated by international arbitration. Second, if production is ordered against an American party, the American party might not have corresponding rights in the relevant foreign country. Certainly that would be a problem in Russia, but it would be a problem in many other countries that do not provide for this sort of judicial assistance, or at least not as broadly as this provision has been interpreted by some courts to provide.

The situation in the courts is that, in 1999, two federal courts of appeal, in the Second Circuit and in the Sixth Circuit, have said no, that is, the reference to a foreign or international tribunal does not include a private arbitral tribunal. But in the last several years several district courts have interpreted a U.S. Supreme Court decision, made in a very different context, as giving a signal that private arbitration should be deemed included in this discovery assistance statute.

The issue happens to be now before the Seventh Circuit Court of Appeals on an expedited appeal. If this case goes to the U.S. Supreme Court or if there is a consensus in the circuit courts that there is no discovery remedy in the U.S., then the practicing bar will have the interesting task of coming up with a policy recommendation. Should discovery be compelled or not? If it should be compelled, can we get other countries through the Hague Evidence Convention, through their national legislation, or through the model law governing international arbitration to provide for similar remedies? In other words, if there is to be compulsion of discovery or disclosure, then it should be reciprocal.

G. Questions and Answers

SPEAKER IN AUDIENCE: This is a question for Joe Neuhaus. From the comments I have heard about cultural differences and from your comments, I understand that you are ruing the absence of depositions. I see in the war of litigation no weapon as strong as a deposition. That is perhaps the strongest weapon, along with privilege of corporate counsel. My question is, why do you want to impose this "war culture" on the entire world? I understand that you win more easily if you have this weapon, but I believe that, in some countries (such as France), people do not like war or litigation. The French word for litigation, *contentieux*, alienates. My question is why not shift gears into a different mode internationally?

MR. NEUHAUS: I fear that you may have misunderstood me. I basically agree with you. I think that by and large discovery is unduly expensive. In addition, much of discovery does not uncover much, and the same can be said for depositions. It is also true of interrogatories and requests for admission, which are also incidentally dealt with in the ICR guidelines and discouraged. My own view is really in line with the suggestion you are putting forth. And this is the direction that international arbitration is taking. Yet, in the individual case, it is not always easy to adhere to this view, because American lawyers are very clever and can come up with rationales for a lot of what they want.

MS. FREYER: The practical problem for the arbitrator arises when, in an international case, there is U.S. counsel representing both of the international parties. In addition, sometimes the arbitration clause will provide for federal rules of discovery to apply, or, if the clause is silent in the matter, counsel may have jointly agreed to have twenty depositions on the side. What does the arbitrator do in that situation? The arbitrator needs to have a close conversation with them and push a little. If it is a matter of party agreement versus arbitrator control, it is a sensitive situation. Perhaps one of the ways to address the problem is to have management representatives at the preliminary conference, so they can hear what is taking place. I have seen this kind of open discussion lead to a different approach by counsel.

SPEAKER IN AUDIENCE: I would like to know how much of the discussion here is relevant to investor-state arbitration, as opposed to arbitration between two parties. For example, how much of this relates to NAFTA-type arbitrations or Iranian-claims arbitrations, as opposed to arbitration between two private parties?

MR. NEUHAUS: My own view is that most of it is applicable to sovereign arbitration, if not more so. In sovereign arbitration I think there is more of the kind of arbitration spirit that we have been speaking about than there is in private commercial arbitration. That would be my general response.

MS. FREYER: One of the differences is that, because of the nature of sovereign decision-making, it is much harder to fast-track an investor state arbitration than it would be an arbitration between private parties. There are protocols that have to be gone through, and there is often a real desire for delay on the part of the sovereign. What is more, the arbitrator selection process is usually different. If it is an ICSID arbitration, for example, there is just a more formal process. However, I agree with Joe that there is less of a desire for discovery on the part of the sovereign than there would be if it were a private party. There are some subtle differences, but overall there are many similarities.

MR. HECK: As Fabien mentioned, there is the issue of who owns the arbitration. I would like to give an example of how this issue might arise. Suppose, for example, that at the timetable conference the lawyers for the parties inform the arbitrator that they have agreed on a timetable, but the arbitrator concludes that the proposed time is too lengthy. What are the arbitrator's options? This actually happened to me: the parties had agreed that the next hearing would take place in six months, and I was planning on having it the following month.

MR. NEUHAUS: I have the same view as was expressed earlier. I think an arbitrator should be very cautious about overriding the choice of counsel on something like scheduling or, for that matter, discovery.

The arbitrators might think that they know what is going on, but, especially in that early stage, they probably have a very limited picture of what the case is about and what it means for the parties, as well as what other discussions might be taking place. The parties may be withholding some of this information from the arbitrator for all kinds of reasons (e.g., because they do not want to taint them). In brief, I think that the parties control the arbitration by and large, and that, in most situations, if the parties come to the arbitrator with a schedule worked out, it is not the arbitrator's place to try to radically upset it. If the arbitrator does so, especially if the schedule has been negotiated over time, the arbitrator might be upsetting a series of tradeoffs that have probably been made, and the arbitrator may well be strengthening one party in a way that the arbitrator does not entirely appreciate.

MR. HECK: Yes, but in my case—which was an actual case, not a hypothetical one—I was confronted with the lawyers only, so I asked the lawyers to have their clients confirm the schedule.

MR. NEUHAUS: And did they?

MR. HECK: No. The schedule was shortened.

MS. FREYER: I agree that that the arbitrator should not override the parties. In a recent case, before the parties came in for the preliminary hearing I had asked them to meet and to try to agree to a procedural schedule and timetable. This really makes the hearing go faster, and often the parties will agree beforehand. However, in this case, I saw that there was a six-month gap between the start of the hearings and the end of all other activities, and I simply inquired—and party representatives were present—whether that was really necessary. At the end of the day the hearing dates were moved up. I did not feel that I was imposing my will, but nobody objected. Was I exercising pressure just by asking the question? I do not think so; I think that this is a fair thing to do.

MR. HECK: That is a very good point. Whatever you do as an arbitrator you have to be diplomatic—not accommodating necessarily—but you have to be diplomatic and sensitive.

MR. GELINAS: No arbitrator would ever dream of overriding the parties' agreement. But it can be useful to raise questions diplomatically and to have a discussion with the parties to learn what is behind their agreement.

One slight qualification which would not be relevant in many cases is the fact that the arbitrator enters into a contract when he or she agrees to serve in an arbitration. And, that contract has terms—terms that are set out in part in the arbitration rules that the parties have agreed to and under which the arbitrator has agreed to serve. Thus, if the parties approached the arbitrator with a schedule calling for the arbitration to last fifteen years, I think it would perfectly acceptable for the arbitrator to refuse to accept it.

MR. MOXLEY: I wanted to pick up on the last point we talked about. Several months ago, the College of Commercial Arbitrators had their national arbitration summit in Washington, D.C. Representatives of all the players—institutions, arbitrators, counsel and so forth—were present. What they said was that, even though in a particular case counsel might want very extensive discovery, at the end of the arbitration users are often dissatisfied and tend to blame outside counsel and, to an even greater extent, the arbitrators. I think that a balance is needed—as has been discussed previously—in the sense that, if the parties really have a firm agreement, after they have met and discussed, the arbitrator can ask questions diplomatically and might also need to consider whether it might be appropriate at a given moment to speak about depositions or discovery and about what arbitration is supposed to deliver in terms of an expeditious process. In a good percentage of cases, I have found that people then back off. Often counsel has his or her primary experience in litigation, and those who have such a background sometimes have knee-jerk expectations. But if you have the discussion, and you suggest that the parties step back, often you can refine what the parties have agreed to with the consent of everybody.

SPEAKER IN AUDIENCE: I have a question for Dan about compelling discovery. My question goes back to the cross-cultural and cross-legal issues. It may be great in theory, but in practice, when you are dealing with a party from a culture that does not believe in this, can you obtain discovery? You may have in-house counsel that is not schooled in the necessity for turning over bad documents to the other side. A U.S. party, with its U.S. counsel, with the norms of discovery so ingrained, will likely turn over its documents. Yet, the other party coming from a culture that never turns over documents of that sort will be unlikely to do so in the arbitration context. Therefore, in fact, by compelling this discovery you may not really be doing your U.S. client a favor, because you are exposing your client to an uneven playing field: again, your client will end up turning over documents, and the other side will not. We have all experienced the situation where we knew the documents existed, but the other party did not turn them over.

MR. ROTHSTEIN: It is hard to come up with solutions by way of legislation or rules that are going to satisfy everybody in every case. Civil law lawyers who are not used to discovery learn that they love discovery when their clients need it. I agree, however, that the goal should be reciprocity as to whatever discovery can be compelled through legislation, arbitral rules, or the like.

MR. GELINAS: As an arbitrator, I would add that you can always point to an international standard. The IBA rules have become the international standard; nobody questions that. They set an international, not an American, standard. It can be very helpful to put that on the table at the outset. In terms of psychological tools for compelling discovery, the arbitrators may apportion costs, and that can be a threat to a party that does not wish to cooperate. The arbitrators could also draw adverse inferences from a refusal to produce.

IV. Discovery Versus Privacy

A. Introduction

MR. ARMAS: Now we are going to segue to our final panel of the day. It is a very interesting topic. We will be discussing discovery versus privacy.

EDNA SUSSMAN: As Chair-Elect of the Dispute Resolution Section, I would like to express our appreciation for the opportunity to co-sponsor this program with you: The program highlights a very clear intersection of

interests between international law and dispute resolution processes outside the courts.

Our subject is discovery and privacy in international arbitration. We are very pleased to have several real experts in this field: Jonathan Armstrong from Duane Morris in London; Phil Berkowitz from Nixon Peabody; Mitch Borger, who is in-house at Macy's, and Sherman Kahn from Morrison & Foerster.

I think the most apt quote for the day would be as follows: U.S.-style discovery is considered an affront to the expectations of privacy and confidentiality that private parties have in their business information. It is this clash that we are going to be talking. It is a clash that arises not only from the expectations of the parties from other cultures but also from their laws and regulations that protect that privacy. It is a clash between discovery here in the U.S. and discovery in the EU. It can lead to severe consequences in terms of sanctions: significant monetary, as well as criminal, sanctions have been imposed for violating EU privacy rules.

Perhaps the most compelling recent development based on secrecy law, as opposed to privacy law, is what has been going on with UBS. UBS had reached an agreement with the U.S. government to comply with U.S. requests for information regarding clients who had been involved in tax situations that were arguably fraudulent. The Swiss courts have recently overturned the UBS agreement as having been unlawful. Here, you have once again a company confronted with one set of laws saying you may not and another set saying you must and, if you do not, you face criminal sanctions. This has occurred in the context of secrecy laws; the same thing can and has happened in the context of privacy laws, which differ widely among different cultures.

I thought it would be interesting to start with a bird's-eye view of the historical and cultural predicate for the differences between the cultures in this regard. As you might imagine, there is really no particular universal norm as to what should be private. There are differences in perceptions between the U.S. and Europe—in regard to consumer credit, for example, or registration with the police, or nudity in public. Some countries restrict what names can be given a baby, because they want to have an inherently coherent system: one could not dream of doing that here. The rules for the seizure of evidence are different. There are differences in terms of whether or not it is appropriate to talk about salaries in a social setting. There are very different perceptions of what is appropriate or permissible, what is private, and what is not.

When asked where their notions of privacy come from, many Europeans would probably reply that they are a reaction to the Nazi occupation and the personal information that was divulged in that era, which led to atrocious consequences. There is a real fear in regard to any kind of collection of personal data, and there is a real concern for protection of the person. Others would say it has to do with Soviet domination and the collection of personal data by the Soviet Union. Scholars of history would probably say that it stems from the 17th and 18th centuries, and that it harks back to the core value of the civil system, which is individual dignity. It includes the right to respect, the protection of your public image, the protection of your name and reputation, the protection of information about yourself. The whole idea is not to lose public face, which derives from the old law of insult and dueling, something that is really not very much part of our culture but very much a part of the culture there. As a result you have the various statutes and regulations that have been passed in the EU: blocking statutes, Swiss banking laws, national privacy legislation, the convention of protection of human rights, and the EU privacy directive.

Conversely, what are the roots of our common law tradition in the U.S.? The core value here is different: it is not personal dignity; it is liberty. It is freedom from the government. It goes back to how the common law developed in England—having resort to the jury system, because the English government was not trusted. In the 1997 case of *Whalen v. Ray*, the U.S. Supreme Court stated that privacy is the right to be free from government surveillance in the private sphere; not to have private affairs made public by the government; the right to be free in action, thought, experience and belief from government compulsion. The two traditions have evolved from two very different bases, and these differences have led to dramatic differences in privacy rules. There is no overriding right to privacy in the U.S. It comes from a whole host of individual pieces of legislation.

We are going to examine this clash: how it manifests itself; what problems it creates for litigants in arbitration and the courts; how the courts in the U.S. have dealt with it; and how in-house counsel deal with it.

B. Background

JONATHAN ARMSTRONG: I am going to speak a bit about where I think all of this comes from, and I am not going to limit my comments to arbitration and mediation, because I think that the issue is broader than that.

There are strong feelings in Europe over these particular issues. There is some very emotive language being used. Alex Turk, the Chairman of the French privacy regulator, calls it a storm, with gusts of western winds blown in from the U.S. administration determined to have an extraterritorial effect. It started with U.S. Homeland Security laws, but the issue has become greater than that. Not only is there a conflict between the civil law system and the common law system, but there is also a conflict arising from the U.S.'s way of gathering information, its

law enforcement and anti-terrorist measures, and how all of that comes up against privacy regulations in Europe.

One ought not to underestimate how aggressive the U.S. court administration and judicial system are perceived in this area and how that perception will have a direct impact on arbitration and mediation. This is because, even though an arbitration is a consensual arrangement between two parties who wish to resolve their differences, others—the people who have privacy rights, i.e., the employees of both of those organizations, third parties engaged in connection with the contract that is under dispute—have not signed up for this consensual arbitral process. They have not waived their rights. In the UBS matter, this is a very important factor.

The French have specific objections partly in connection with the reach of the FCC and FTC, and litigation holds. But while these are specific objections, the problem is much wider than that and will have an impact on any investigation that touches French soil, and, as we will see later, European soil in general.

The *Commission Nationale de L'Informatique et des Libertés*, or CNIL, is the French privacy regulator, and it abhors what is referred to as "le fishing expedition," the American way of gathering documents and information. This is not a new problem. A French law prohibiting data from France from being used in foreign proceedings dates back to 1968. The penalties are severe: six months in prison. There is a case going through the U.K. courts, where the penalties could potentially hit the lawyers as well as the litigants. Thus, external counsel can be in difficulty if it gets this wrong, and the law can apply to non-French nationals. The French data protection law is also relevant, and it too provides for fines and jail terms.

Why is the French position relevant to the rest of Europe? Well, as Edna indicated, much of the French feeling stems from the oppression of the Nazi regime, and this attitude is reflected also in Italy, obviously because of Mussolini, and in Spain, because of the Franco regime.

Up until five years ago, this privacy concern did not matter in England, which, along with the Scandinavian countries, constituted more or less the majority view in Europe, and had a moderate view about privacy—providing for privacy rights but allowing them to be overridden by other considerations. When the former Serbian states joined the European Union, the make-up of the majority changed, and the French view became the dominant view in Europe, since the Serbian states had a similar cultural background because of the Soviet regime.

I was giving a speech in Bulgaria at the Conference of the European Commission organized upon the accession of these countries when the Latvian delegate told me that, as an Englishman, I would never understand their privacy concerns until my neighbors were taken away and shot. Now, I am from a pretty rough area of the U.K., but such a prospect is not within my cultural perspective. It is important to note that this is not just occurring in the EU, since countries like Switzerland are buying into this agenda as well.

The big mistake that a lot of U.S. lawyers make is to think that this has to do with the Europe Privacy Directive, but it does not. It has much more to do with a whole host of cultural considerations, non-data privacy legislation, national data-export rules, and secrecy legislation.

One of the objections of Europe is that the U.S. authorities are taking laptops from individuals at the borders. U.S. agents have allegedly taken laptops from two UBS individuals, who are facing criminal proceedings in the U.S. In addition to the information that the U.S. authorities already have, which was on Florida soil, the Swiss authorities are being asked for more data. The U.S. was seen to be embarking on "le fishing expedition." This became a diplomatic issue, because the Swiss government was involved, and, I note, the Swiss in many cases provide consular services to U.S. nationals in those countries where the U.S. does not have representation. Thus, this has become a fairly high-stake matter.

The Swiss Financial Market Supervisory Authority (FINMA), which is the Swiss banking regulator, intervened. As a result, UBS agreed with the U.S. authorities that UBS would transfer some (but not all) data to the U.S. UBS then requested FINMA to approve the agreement, so that UBS would not be prosecuted in Switzerland. After some negotiation, FINMA agreed. In the meantime, the Swiss court has invalidated the agreement, finding that FINMA did not have the power to approve the deal under the Swiss Constitution.

As I understand it, there may be another thirty-two proceedings this week that will follow that court's ruling. One of the opposition parties in Switzerland is stating that a referendum on the activities of the U.S. authorities in Switzerland is needed, since it is such a major constitutional issue.

As this story is unfolding, I think it is a concrete example of the clash of views.

What issues need to be considered in terms of arbitration? Generally speaking U.S. corporations that are involved in any form of dispute resolution tend to be headquarters-centric. That is where the heavy lifting is done on matters in dispute. On the other hand, Europeans generally want their disputes to be tried in Europe and the information to stay on the continent.

Anti-hacking legislation must also be kept in mind. In Belgium, for example, there are postal regulations regarding interception of the mails that apply to laptops as well.

You will need to lawfully obtain data to be used in the arbitration, and this means that the information request must be proportional to the issues in dispute, and you must deal separately with sensitive data, things like sex, race, and trade union membership. You may not hold the data for longer than is necessary, so you are going to have to prove that the dispute is still ongoing. If needed, employee consent is going to be difficult to obtain. As a rule, most multinationals have obtained employees' consent in this regard. The applicable employment contract may stipulate that, if there is a dispute, the employee consents to his or her data being used to resolve the dispute. This type of arrangement may not work for a number of reasons. For example, if the employee has left the firm, why would he or she cooperate? The employee may even have left or been discharged because of a dispute. How are you going to get that employee on your side? There is also something called a "Subject Access Request" or SAR. With a SAR, if an individual thinks that his or her data is going to the U.S. to be used in an arbitration, the individual can ask you that question, and you would have to answer it honestly.

C. How U.S. Courts Deal with the Issue

PHILIP M. BERKOWITZ: We know that arbitration is different from litigation. There may be some discovery in arbitration, or there may be no discovery in arbitration. In their particular agreement, the parties have the right to agree as to what the scope of discovery is to be. As we have seen, in international arbitration held in the United States there are different expectations with regard to privacy as viewed in the United States versus privacy as viewed oversees. In the U.S., the International Center for Dispute Resolution (ICDR) routinely hears disputes between U.S. and foreign companies or disputes between companies and foreign nations. But the arbitrators, more often than not, are U.S. lawyers, even retired U.S. judges, and they have their own expectations and notions of what discovery looks like. Thus, regardless of what your particular agreement or rules provide, regardless of what the parties may have expected when they signed their arbitration agreement with regard to the scope of discovery, sometimes you run into a group of arbitrators who may interpret things their own way. We therefore thought it would be helpful to talk about how the U.S. courts are treating this conflict between the broad rights of discovery found in the United States and the different expectations overseas.

First of all, the problem of course is exacerbated significantly by the presence of e-discovery. E-discovery is when we produce electronically stored information, which we call "ESI." E-discovery is the prevalent means of discovery these days. Most information is electronic, and certainly most requests that you get these days are either for e-mails or for electronically stored documents: Word documents and so forth.

So what makes e-discovery different? There is of course the sheer volume of e-discovery and its ease of replication. It is said that ninety percent of a company's information is stored electronically these days. There is also the notion called Moore's Law; according to this concept, the volume of electronic information is said to double every two years.

There is also the persistence of e-discovery. You cannot delete it. If you try to delete it, as you know, you are generally not destroying it. It is very hard to delete information from a hard drive. And of course, we all retain forensic experts to go into hard drives, to go into servers and try to get this information back, and we are usually reasonably successful at doing it.

Then there is the dynamic nature of e-discovery: you can permanently alter e-discovery, while on the other hand it is much more difficult to alter a written document. There is also the existence of hidden metadata, which is information about electronic information or data about data. We are dependent on hardware and software systems in order to access this material. Electronically stored material is portable and searchable; it can be sent across continents instantaneously. It can be stored in a small stick.

With electronic discovery I think that the cross-border issues have been even more important because of the ease of finding the material and the fact that it is difficult to hide.

Let me focus again on the key conflicts. I think Jonathan did a very good job of describing the different expectations overseas. There are data protection laws throughout the European economic area, as well as in other countries throughout the world. They have a much broader view of what is considered "personal data" than what we have in the U.S. In the U.S., apart from a few areas like Social Security numbers or the preservation of health records under the Health Insurance Portability and Accountability Act (HIPAA), there are state laws regarding preservation of things like automobile records. But, by and large, we look at privacy in the U.S. in a segmented way, as opposed to the global way that the Europeans and other nations tend to view it.

Jonathan has already spoken about the EU data protection directive, which protects against the unauthorized processing or transfer of personal data. "Processing" has its own definition under that directive. In the U.S. we think of processing as a technical action, as taking information and processing it in some way. But under the EU directive processing means collecting it, organizing it, retrieving it, or sending it; what is more, the definition of personal data is very different overseas than it is here.

The notions of discovery are very different in code, as opposed to common law, jurisdictions. In common law jurisdictions, like the U.S., the U.K., and Canada, gener-

ally the idea is that we have an adversarial system, and it is the individual litigants who can best direct discovery in a particular case. On the other hand, under civil code systems, which by the way vastly outnumber common law jurisdictions, the state through the judiciary is considered, in varying degrees, to play the more important and better role in terms of identifying and producing documents.

It is probably fair to say that pretrial discovery in the U.S. is the most intrusive and expansive of any common law country. The scope of discovery that is permitted in the U.S. is extraordinary. Our Federal Rules require that litigants turn over information that is not only relevant to a matter but also that will lead to the discovery of information that is relevant. So long as the request is reasonably calculated to lead to the discovery of admissible evidence and is not abusive or somehow protected by privilege, the discovery will generally be granted.

In civil code countries there is usually no formal discovery process. I am willing to be corrected by French or German lawyers in the audience, but my understanding is that in France, for example, the only information that is discoverable is that which is admissible at trial.

In Germany, and I believe in other countries as well, the only information that a litigant needs to turn over is information that the litigant chooses to turn over that will help the litigant's case, that it will use at trial.

MR. HECK: If you can clearly identify the document, by date and the parties concerned, for example, you can get it.

MR. BERKOWITZ: If you can identify it and if you explain why it is important that you have it, right?

MR. HECK: Yes, for example, if you lost your copy, but you know the other party has one, then you normally do not need to do that. You will receive it because the other party knows that the court will help you. This applies only with respect to specified documents that you can individualize.

SPEAKER IN AUDIENCE: In France the judge has a high level of discretion to decide whether to turn them over, after looking at them in camera. In France, if you can identify the documents and the judge determines it is fair for you to get them, you can get them.

MR. BERKOWITZ: You need to consider the cultural differences and the legal differences. When you are representing a foreign client who has completely different expectations as to how things will work, the issue is not only legal, but the issue is going to be cultural as well in explaining to that client the reason for seeking discovery.

The Hague Convention, on taking evidence abroad in civil or commercial matters, provides a uniform procedure for gathering certain information. But litigants in the U.S. and courts in the U.S. do not like this procedure, because they do not think it gives them the flexibility that the Federal Rules and other state discovery rules provide. They are right.

There have been a number of cases which have considered the Hague Convention and other foreign rules that limit discovery. Perhaps the best known is the *Aerospatiale* case, decided by a 5-4 conservative majority on the U.S. Supreme Court in 1987. The Court held that the Hague Convention is not the exclusive procedure for pretrial discovery. The case, which stemmed from an airline accident, was brought against the French company that manufactured airplanes. The Republic of France asserted in an amicus brief that the Hague Convention should be the exclusive procedure but the Court rejected the argument that the treaty was mandatory or that one needed first to go through the Hague Convention. The Court stated that the Hague Convention was unduly time-consuming and expensive and less certain to produce the needed evidence than the Federal Rules. In fairly strong language, the Court also referred to the notion of comity and the idea that comity requires consideration of the other country's laws. The Court also concluded that the French blocking statute, which prevents disclosure of information for use in the court of a foreign country and which can be asserted under the Hague Convention, did not deprive the U.S. courts of power, even if it violated the blocking statute. The Court held that courts in the U.S. are not required to adhere blindly to the directives of such a statute. The Court found further that the statute constituted an extraordinary exercise of legislative jurisprudence by the Republic of France over a U.S. district judge, and that it would be incongruous to impose a preference for a corporation, such as Aerospatiale, that was wholly owned by the enacting nation. The Court softened the blow by observing that U.S. courts should exercise vigilance to protect foreign litigants from abusive discovery, but at the end of the day the Court found that the French blocking statute did not bind U.S. courts.

There are a number of cases that have been decided subsequent to *Aerospatiale* and deal with bank secrecy law and privacy law. Generally speaking, the U.S. courts do not feel compelled to honor these restrictions.

MS. SUSSMAN: You have really highlighted the problem. If the courts here are going to require discovery and you have a multinational that is not allowed to produce what is over there, there is a problem.

"Personal data" includes what employees write in the workplace, that is, your everyday e-mails. They constitute personal data under protection laws in the EU. Thus, personal data includes the whole mass of documents that you are used to getting in U.S. discovery.

D. Confidentiality of the Arbitration Proceedings

MITCHELL F. BORGER: Let me try to give you the overview perspective on this. There is an inconsistency throughout the international community about whether or not arbitrations are confidential and, if they are not, what privacy issues flow from that. Because of this inconsistency there is frustration on the part of in-house lawyers.

Let me try to give you a sense of what I believe is the general consensus among corporations on how they view arbitration. Of course, there are pros and cons to arbitration, and it certainly becomes a bit more conflicted when you get into the international side. But, corporations tend to like arbitrations on the commercial side, because arbitration proceedings tend to be expedited, more efficient, and more cost-effective. Now, those three advantages can dissipate in any particular case; I mention them as the general view. However, when you start dealing with confidentiality and privacy issues, the conflict arises. Here in the U.S., you generally know what is going to be confidential and what is not, and generally in arbitrations things are confidential.

From a corporate standpoint, in the last ten years there has been real progress in transparency after Sarbanes-Oxley. Corporate governance is now supposed to be transparent. However, that is where the transparency ends, because companies do not want to be transparent with their business plans and strategy. Almost every business has a competitor, and, if that business is too transparent, its information gets out, and that can only harm that business. The confidentiality of strategic business decisions is really a key piece here.

We heard at one of the earlier panels that the arbitration decisions themselves are starting to be compiled and published. I do not think the corporate community is concerned with that, provided that confidential information is not disclosed in the ultimate arbitrator's decision.

Finally, the last point I want to make may seem obvious but it is important to include confidentiality provision as part of the underlying arbitration agreement. Often people rush to go to arbitration and use the arbitration panel's stock agreement, which does not contain confidentiality provisions. If you are going to go to international arbitration, make sure your arrangement provides for confidentiality of the proceedings.

E. Practical Ways to Address Privacy Concerns

SHERMAN W. KAHN: As we have heard from the speakers that have preceded me, European privacy rules and privacy rules in other parts of the world can create significant problems for the conduct of discovery in both litigation and arbitration. I would like to focus on some practical ways of approaching these problems. I will limit my comments to the arbitration context.

Because arbitration is not a court proceeding, generally parties will not be able to avail themselves of the Hague Convention to get documents and circumvent the privacy issues that, for example, are raised by the blocking statute in France. However, I believe that there is a good argument to be made that the blocking statute would not apply to a private arbitration proceeding. My primary suggestion is that in appropriate cases, where you have private parties who have an agreement, arbitration is a useful tool to avoid the conflicts between the privacy laws in Europe and U.S. concepts of discovery.

As participants in a private proceeding, the parties can decide how to conduct discovery. The general conception in arbitration is that discovery is going to be more limited than it would be in a U.S. court. That is particularly true in international arbitration. The parties can address and make agreements regarding privacy issues in the underlying arbitration agreement, or they can make an agreement in the procedural order that begins the arbitration with the consent and the participation of the arbitration tribunal to try to reconcile these issues in a way that works for everybody. And finally, arbitrators who are free of rigid statutory rules regarding scope of discovery and how to manage discovery can be more flexible with respect to how to deal with some of these problems.

The cases that go to arbitration often tend not to involve documents that cause problems with privacy: health-related documents, banking records of individuals, and the like. However, it is not difficult to conceive of an arbitration that would require someone to deal with those kinds of documents. For example, there could be a major business arbitration between two pharmaceutical companies about the proper conduct of clinical trials, and the evidence regarding how those clinical trials were conducted, including evidence concerning the subjects of those clinical trials, might be very important for resolving the issues in that arbitration. So we cannot assume that very sensitive data would not necessarily need to be used in an arbitration.

As we have heard before, however, even in a very typical arbitration, where that kind of documentation is not at issue, under European concepts of privacy there can definitely be issues with respect to the production of documents that would be relevant to the arbitration. Indeed, ordinary business e-mails are considered private documents of the individuals who wrote them, even though they were written for the purposes of the business, and those individuals have rights with respect to those documents, and those rights include the right to know that they are being used and the right to consent or withdraw consent to their use. These issues are best thought about and dealt with at the initial procedural stage of the arbitration.

In regard to this issue, I would like to draw your attention to a helpful document that was released by an entity in Europe called the Working Party, which was an entity that was created under Article 29 of the 1995 European Data Security Directive, that is, Directive 95-46 EC. The document is entitled "Working Document 1/2009 on Pretrial Discovery for Cross-Border Civil Litigation." It is not a binding document, and, in fact, the directive itself does not bind any individuals or entities. The Directive, which is directed at the various governments of the various countries in Europe, provides that they enact laws consistent with the Directive. If you are dealing with an arbitration involving parties who are residents in Europe or who have documents in Europe, it is important that, in addition to reviewing the Directive, you consult with a lawyer who is knowledgeable about the privacy law of the individual jurisdictions in which the documents are located. This is important because those laws are not all the same. In fact, they can differ widely, and it would be very important to make sure that you understand what the laws of the particular jurisdictions are.

With all of this in mind, I would like to offer just a few suggestions for how to manage an arbitration in a way that will reduce the likelihood that privacy issues will interfere with the conduct of the arbitration.

I have already mentioned the first suggestion: take up the privacy issue at the initial procedural hearing, and work with the parties, if you are the arbitrator, or, if you are a party, work with the arbitration tribunal, to try to resolve as many of these issues in advance as you can.

I would also recommend that in the initial procedural order the parties and the arbitration tribunal include any data security obligations that might be required under the applicable European law. That will protect the parties from any suggestion that they have wrongfully transferred or processed documents in the course of the arbitration.

The Working Party document states that these data security obligations would include taking all reasonable, technical and organizational precautions to preserve the security of the data and to protect it from accidental or unlawful destruction or accidental loss and unauthorized disclosure and access. I would suggest that these are all things that are really required in any event of an arbitration tribunal and the parties in arbitration, so including provisions to that effect in a procedural order would not alter the status quo very much, but it will help protect your process from attack.

Another potential tool would be to consider also incorporating into the procedural order language from the European Commission's model contracts for the transfer of personal data to third countries. The European Commission has issued two decisions in which it has approved model contracts to protect the transfer of data overseas. If you use that language, you have some protection.

At the initial procedural hearing it would also be helpful for the arbitration tribunal to discuss with the parties whether there is any sensitive information in documents that could be redacted or whether names could be removed from documents before they are used in the arbitration to protect the individuals named in them.

The parties should also try to obtain consent from employees who are involved in the arbitration. I say this with the proviso that the general thinking in Europe about consent is that employees cannot give informed consent because they fear losing their jobs. That is something that does not sound very sensible to Americans, but that is the way the issue is approached there. The Working Party has suggested that, with respect to employees who are actively participating in the arbitration, consent is potentially obtainable. The wrinkle that remains even in that situation is that there is always a right to withdraw consent; thus, you might want to try to use another way, such as the model contracts, in order to be able to rely on documents. Finally, it is important to keep employees apprised of what is going on with respect to an arbitration that might involve documents that belong to them. Keep them informed about how the documents are being used. That can help avoid a lot of problems.

I know that these suggestions are on a very high level, but I hope that they are somewhat helpful.

MR. ARMSTRONG: I would like to add a comment regarding the model contracts that Sherman has mentioned. I agree that in many cases the model contracts would be the answer, but one should bear in mind that in some European jurisdictions you have to register the agreement with the state authorities before the data starts to flow. As a result, you need a procedural stay, and you also need to consider whether you want to do that. If the object of going to arbitration, rather than litigation, is secrecy, the last thing you want to be doing is publishing the type of data that you are exporting and the nature of the dispute. The registered agreement is a public document accessible to all. Some jurisdictions make all of that information available on the Internet. With that caution in mind, I agree that in many jurisdictions the model contract will be the answer.

MR. KAHN: That is correct. As I said before, you need to understand the law of the individual jurisdiction with which you are dealing. The other problem with the jurisdictions that require you to give notice is that it can sometimes take a very long time to get approval. It can add a huge amount of time to your process, which is also inconsistent with the general goals of arbitration.

MR. ARMSTRONG: As an illustration, I think Austria is taking about eighteen months for nonstandard approvals.

MR. BERKOWITZ: I would like to add an unrelated observation. We are talking about discovery, and we are assuming that we have access to the data ourselves, that is, that our clients have granted us access to the documents that are being sought in discovery. When representing foreign companies, my experience has been that people have completely different expectations about discovery and about how their lawyers are going to work. The first step is often getting those documents yourself from the client, long before you might ever have to turn them over to the other party (if ever). You need to explain to the client that, regardless of whether the documents will need to be turned over, you need to see them in order to be able to present your case, because, for example, somebody else may have seen them beforehand.

This may be difficult if you are asking to see information that may not be helpful to the client's point of view or that does not completely support the picture that the client is painting. My response would be that I still need to see this information, and that we can work around it if need be, but, if I do not see it but somebody else has, we will have a big problem.

There is also the question of how to respond to a client who insists that, if there is a request for discovery, only those materials will be turned over that the client wants to turn over. There may be a need for a discussion of obstruction of justice in that case.

There are a lot of issues to be grappled with, and they sometimes start before any discovery has been requested. It starts in preparing your case.

MR. KAHN: I want to follow up with one point, namely, that these privacy laws are not about discovery; discovery is just incidental to them. Thus, in an arbitration or litigation, regardless of whether it is a matter of discovery or not, you need to deal with these issues if you want to use or to process or transfer documents, even if the client consents to the transfer. These laws are not a tool to resist discovery by foreign parties; they can create a problem even if a party wants to affirmatively participate in the process.

F. Questions and Answers

SPEAKER IN AUDIENCE: What happens if you end up with e-mails from the French party and its lawyer in an American client's files? If you are in an arbitration where that information is protected, is it protected in arbitration once it is in that file in New York and has been printed out as an e-mail?

MR. ARMSTRONG: I think there are a whole host of issues around that. I think what contributes to the complexity of this is the tendency of U.S. corporations, more than others, to suck everything into their headquarter offices in the U.S. before they decide what to do. This gives rise to many issues, including those relating to confidentiality and privilege. The U.S. attorneys may not be recognized as attorneys for privilege purposes in Europe, so that the privilege is then waived. And it might be that in the arbitration itself you can keep that information confidential, because of the contractual relationship between the litigants, but the information might come out five years later, for example, in a class action or in connection with an SEC request.

You need to be careful when advising a corporation about who is on a distribution or circulation list or about forwarding or copying e-mails to others. Commonly, whoever finds a potentially relevant e-mail, copies it to corporate headquarters. This can lead to issues regarding data export, data privacy, privilege, and confidentiality. An organization will need to examine carefully its policy about who is to be copied on documents and what the procedure should be for internal investigating. My view is that this will be done on a case-by-case basis, since I do not think there are hard and fast rules.

SPEAKER IN AUDIENCE: As a trial lawyer, I wanted to note that there is a huge difference in the U.S. between what is discoverable and what is competent evidence at trial. It is very difficult to get evidence that may be hearsay, for example, before the trier of fact. I think that people in Europe are not aware that the Rules of Evidence are an extremely important monitor in regard to this broad discovery.

For example, under Section 1782 of Article 28 of the U.S. Code, discovery in the U.S. was sought for a European proceeding, a proceeding in Germany. Subsequently, all of the information obtained in that discovery was accepted as part of the German proceeding. This would never happen in the U.S., because the information would be filtered through the Rules of Evidence.

MS. SUSSMAN: But when you think about the antecedents, the fact of the matter is we have a jury system for cultural reasons, and, in order to enable a lay jury to appreciate the evidence, we have very formal rules of evidence. The civil system is conducted by a trained judge, so the same issues are not presented, and our rules are very different from those of the civil system in terms of what evidence can be admitted.

SPEAKER IN AUDIENCE: An e-mail stating that this person said this to this person would not be something to be considered by a jury or a judge in a legal proceeding in the U.S.

MR. ARMSTRONG: Your point is well-taken. I would add that another thing that Europe does not understand is the ability to obtain protective orders. I think this will be more understood in coming years, and that may be the answer in some litigation.

MR. ARMAS: I would like to clarify one point. You cannot assume that your arbitration is necessarily confidential. Arbitration is a creature of contract. Therefore, if you provide for confidentiality in your contract or if the rules that you designate to apply for your arbitration provide for confidentiality, then you have confidentiality. If not, then you do not have confidentiality, unless you have the tribunal order confidentiality in the arbitration.

MS. SUSSMAN: Absolutely, and the rules of the institutions vary. I think all of them provide for confidentiality on the part of the arbitrators. The arbitrators have to keep matters confidential, but there is no restriction in terms of party confidentiality.

MR. HECK: But it can get worse in fact, because, even when you have done everything you could to protect the privacy and confidentiality of the proceedings, it can all blow open in court during another action. This is sometimes abused just to damage a party. Therefore, there is no absolute protection in this regard.

MS. SUSSMAN: Let me close with a final question for the panel. The Working Party that Sherman referred to did recognize in its report the conflict that companies face, and stated that there needs to be a reconciliation between the requirements of litigation in the U.S. and the data protection statutes in Europe. Where do you think this is headed? What do you think the future is going to hold; is there going to be progress in this respect?

MR. KAHN: I think that in the long term probably there will be progress. In the short term it will probably get worse for a while. I think the U.S. courts are not going to be very receptive to the idea of foreign courts or foreign governments telling them what to do, and they are going to be very protective of their jurisdiction over parties in those courts. The issue is going to get worse before it gets better.

MR. BERKOWITZ: My sense is that the folks in Europe are also reasonably stubborn about what they want to protect, and that there is an inherent conflict here that is difficult to resolve. I think that the idea that the U.S. is going to tackle the issue of privacy in a big way and make it a much more important social matter for us is not realistic. There are some states that have moved in this direction. Notably, Massachusetts, for example, recently passed a new groundbreaking law on privacy. But I think that things are not going to change here, and I do not think they are going to change there either. I am not quite sure how the conflict gets resolved.

MR. KAHN: Even if you look at the Massachusetts law, it is just fundamentally different from the idea of what is private information in the European laws.

MR. ARMSTRONG: I fundamentally agree with Sherman. I think part of the equation, without depressing you too much, has to do with the fact that the EU Directive itself is being amended. The Commission issued a new Directive at the end of 2009. There is a theoretical eighteen-month process—which may turn out to take three to five years—of amending the whole data protection regime. This could not happen at a worse time, since many European countries have suffered significant data breaches or spying scandals, like Germany. The process is going to be very political. The introduction of this new legislation is not going to be easy because of the cultural issues, and the new legislation is going to be tougher than the current regime. As we say in the U.S., you ain't seen nothing yet.

The Swiss Justice Minister has said that the secrecy issue is not about UBS but about the stability of the financial center and economic situation of Switzerland. It is clear that this is a nation-by-nation issue.

Commentary: The Challenges of Cross-Border Information Flows

By Jonathan P. Armstrong and Andreas Kolb

I. Introduction

At the New York State Bar Association Annual Meeting in New York in January 2010, one of the International Section's panels, "Discovery v. Privacy in International Arbitration," discussed the challenges of information flows in an international setting. As the panel was in progress, there was a dramatic illustration of such challenges, in the form of the developing saga of the issues that the Swiss bank, UBS, has had with the U.S. Internal Revenue Service (IRS). This commentary, written by one of the panelists at that event, Jonathan Armstrong, a partner with Duane Morris LLP, and Andreas Kolb, a Swiss tax specialist and partner at Eversheds Schmid Mangeat, looks at the events that led to the current litigation and the implications for cross-border business.

II. How did it all start?

In 2001 Bradley Birkenfeld started working for UBS in Geneva, handling private banking issues primarily for an important U.S. client he had brought with him to the bank. After some sort of falling out with UBS, he resigned in October 2005. He then blew the whistle on what he said were UBS's secret dealings with U.S. customers, secret dealings which he claimed violated an agreement that the bank had reached with the IRS. He made his complaints to UBS's General Counsel, Peter Kurer, and when he felt that the investigation was not given the importance he wanted it to be given, he took a plane to the U.S. and registered as an IRS whistleblower in June 2007. Birkenfeld was arrested in 2008 and sentenced in August 2009 to 40 months in jail.

III. What happened next?

The IRS was determined to investigate not only Birkenfeld's charges but UBS as a whole. In 2008 the FBI made a formal request to travel to Switzerland to investigate. In February 2009 (with Kurer now as Chairman) UBS agreed to pay a fine of U.S. $780 million to the U.S. Government and entered into a deferred prosecution agreement on charges of conspiring to defraud the U.S. by impeding the work of the IRS. The agreement included the transfer of some three hundred client files to the U.S. Department of Justice (DoJ).

Since the transfer of the files by UBS would have violated Swiss law, UBS asked its regulator, the Financial and Market Supervisory Authority (Finma), to authorize the transfer. Finma granted the authorization. Nevertheless, the day after the transfer of the client files, the U.S. authorities started proceedings against UBS demanding the names of around fifty-two thousand American customers, who the U.S. alleged had signed up to UBS schemes to avoid U.S. taxes.

To settle these proceedings, UBS announced in August 2009 the formal signing of a Settlement Agreement with the IRS that involved UBS passing over details on 4,450 of their clients. The Swiss Government sanctioned the agreement between the U.S. and UBS in a separate agreement. Based on this agreement, the Swiss Federal Tax Administration took a decision to transfer bank files in several cases of "tax fraud and the like," as defined in the annex of the August 2009 Agreement.

IV. The first January 2010 Court Ruling

Finma's role in the deal was challenged on 5 January 2010, following a case brought by UBS clients to the Federal Administrative Court of Switzerland. The five-member panel which heard the case declared that *Finma* did not have the right to order UBS either under the Swiss Banking Act or under any rights of "constitutional necessity" to release information concerning its clients to the U.S.. *Finma* has brought the case to the Federal Supreme Court, which has not yet made a decision.

V. The second January 2010 Court Ruling

In a second decision of 21 January 2010 the Federal Administrative Court stated that the August 2009 Agreement did not permit the sending of UBS client data to the U.S.. The crux of the decision came down to the "tax fraud or the like" provision in the annex of the August 2009 Agreement. This said that a client's behavior was fraudulent when the client either hid ownership through trusts or other methods, or committed tax evasion for considerable amounts. The Federal Administrative Court thought that this definition was not in line with the double taxation treaty between Switzerland and the U.S..

The decision of the Federal Administrative Court cannot be brought to the Federal Supreme Court and is final. As a result, tax information could only be lawfully exchanged in around two-hundred-fifty cases.

VI. What happens next?

It is rumored that there are more than thirty plaintiffs lined up to institute similar proceedings to prohibit their details being given to the U.S. authorities. Since the Swiss Government does not see an alternative way of observing the August 2009 Agreement, it has recently decided to bring it before the Parliament. If the Swiss Parliament approves the Agreement, it would apply retroactively. This has caused much consternation in Switzerland. The

Parliament will then decide if the Agreement (which will have the same quality as the double taxation treaty of 1996) will have to pass the test of a national referendum—something at least one of Switzerland's opposition parties says it will press for.

If the Agreement is not approved either by the Swiss Parliament or by the Swiss population at large, the Swiss would argue that it would seem to be unfair to blame UBS for that and to continue the proceedings. This seems true all the more when one considers, as some Swiss commentators have pointed out, that the whole incident has already persuaded more than 14,700 people to make voluntary disclosure—thus giving the IRS to a substantial degree what it wanted.

VII. The consequences

In the last edition of the NYSBA's *New York International Chapter News*, we discussed the growing pressure on cross-border transfer of data. The Swiss difficulties are just a further illustration of the problems which have been encountered in areas like internal investigations, whistleblower help lines, and e-discovery. There is real concern in Europe about the perceived extraterritorial reach of the U.S. authorities. Additionally, Europe regards the U.S. as having a culture of irresponsibility with personal data. In addition to national governments and courts seeking to limit America's use of personal data on European individuals, the European Parliament in February 2010 blocked a key agreement which had allowed the U.S. to monitor European banking transactions as part of the war against terror. The European Commission had spent nine months negotiating with the U.S. to allow the U.S. authorities access to data held by the SWIFT money transfer system. Top U.S. officials, including Vice President Joe Biden, Secretary of State Hillary Clinton and Treasury Secretary Timothy Geithner, had apparently personally contacted members of the European Parliament to try and get them to approve the Agreement. The Parliament voted 378-196 against the deal. The refusal to sanction the SWIFT deal follows similar action by the European Parliament over a deal that the European Commission had done with the U.S. on airline passenger data.

It seems clear from recent developments that there are no easy answers. The U.S. Government is trying to show itself as a more responsible custodian of personnel data. However, with privacy so entrenched in Europe, these divergent views are likely to continue.

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Responding to Differing Procedural Concepts in U.S.–German Cross-Border Disputes

By Tobias Kraetzschmar and Philipp K. Wagner

I. Introduction

At the last Annual Meeting of the New York State Bar Association, one of the topics discussed during the session of the International Section was U.S.-style discovery in Europe, with a focus on document production. The discussion made it very clear that procedural cross-border issues between the U.S. and Europe are as relevant and critical as ever: Differing procedural concepts may affect the chances to succeed on the merits and, thus, must be considered and responded to—not only when litigating in a foreign court but also in cases pending in the U.S. that involve a foreign party.

This article gives an overview of the major cross-border issues arising in a German-American context, including jurisdictional issues, service of process, questions of evidence, recognition and enforcement proceedings of a U.S. judgment in Germany, and—last but not least—handling differing costs schemes.

II. The Various Cross-Border Issues

A. Jurisdiction

Even though a U.S. court may assume jurisdiction over a dispute involving an American and a German party, the German party may nevertheless file a *forum non conveniens* motion, attempting to transfer the case to a German forum. Both federal and state courts in the U.S. have regularly held that, despite all differences between the U.S. and German legal and judicial systems, including in regard to procedural rules, the available remedies, the role (and powers) of the parties and their legal counsel vis-à-vis the judge, Germany provides for an independent judicial system based on the rule of law and containing constitutional due process guarantees without bias in favor of German governmental agencies or against foreign parties. Consequently, a German court is considered to be an appropriate alternative forum and, provided that the German forum is more convenient based on applicable criteria, a lawsuit pending before a federal or state court in the U.S. against a German defendant may very well be dismissed for reasons of *forum non conveniens*.

In Germany, however, the concept of *forum non conveniens* is unknown. Thus, in the reverse case, a U.S. defendant in a proceeding before a competent German court would not be able to have the case dismissed in favor of a more convenient American forum. Any attempt to bring such case before an American court would likely face the issue of *lis pendens* or trigger an anti-suit injunction.

B. Service of Process

Another issue which becomes relevant in a cross-border context is service of process. Even though one may observe a tendency toward direct postal service in domestic cases in Germany, in a German-American context, Germany will still request that the service formalities of the Hague Service Convention be respected. Consequently, service must be effected via the German central authorities, since Germany has objected to the direct service by postal channels provided for in the Hague Service Convention.

In addition, as the latest decision rendered by the German courts in the *Bertelsmann-Napster* case shows, the competent German authorities in charge of effecting service upon a German defendant do have some discretion in scrutinizing the complaint to be served as to whether the relief sought may be violative of German principles of public policy. As a result, service may be denied in certain cases, such as where there are claims for punitive damages, which are unknown in German law.

Even if the American court, despite the lack of proper service in Germany under the Hague Service Convention, proceeds with the case (on the ground that service has otherwise been validly effected under the Federal Rules of Civil Procedure or applicable state law), it is unlikely that a default judgment rendered against a German party who does not make an appearance in court will be recognized in Germany.

C. Obtaining Evidence

German procedural law provides for a limited number of means of collecting or presenting evidence: (i) witnesses; (ii) documents; (iii) expert witnesses; (iv) interrogation of the parties; and (v) inspection by the court. In the previous issue of the *International Law Practicum* it was pointed out that discovery (in particular with respect to witnesses) is quite difficult to obtain in Germany.[1] This results, in part, from the fact that the issues to be proven in a German court proceeding have to be brought forward in full detail in the parties' pleadings. A party relying on a piece of evidence has to specify in detail which allegation it wants to prove by it. To use evidence for the mere instigation of an investigation for information would be considered a non-admissible "fishing expedition." On the other hand, information and documents containing evidence are more easily admitted into evidence in German judicial proceedings than under American rules on evidence, and German courts have broad discretion in that

respect. For every disputed fact a party alleges, that party is requested to offer evidence in its pleadings, whereupon the court will order which evidence it will hear.

As far as document production as part of U.S.-style discovery is concerned, the issue of data protection comes into play not only in Germany but in many other European jurisdictions—as was pointed out by the International Section's session during the 2010 NYSBA Annual Meeting. A European party to a U.S. judicial proceeding who may be ordered to disclose a vast variety of documents as a result of a discovery order may inevitably have to disclose information with regard to third parties, such as personal data of customers, which is subject to German or other European data protection laws. Data protection laws in Germany are very restrictive when it comes to disclosure of information. It is, therefore, practically impossible for a German party to comply with a discovery order issued by a U.S. court without running afoul of data protection constraints in Germany. However, a German party, aware of the risk that its noncompliance with the discovery order may lead to a detrimental outcome of the pending proceeding in the U.S., may nonetheless be willing to provide such information under the condition that the other party will bear any risk of potential claims of third parties for violation of data protection laws resulting from such disclosure. In practice, however, this risk is rarely assumed by the other party.

D. Recognition and Enforcement of U.S. Judgments

When it comes to recognition and enforcement of U.S. judgments in Germany, an exequatur proceeding will be required to render the judgment enforceable. In that context German courts will *ex officio* look as to whether the court in the U.S. rendering the judgment had jurisdiction, and will verify whether the judgment, either procedurally or in its substance, violates German principles of public policy. As mentioned above, German courts will regularly not recognize awards for punitive damages, since penal damages or damages of a deterrent nature are unknown to the German legal system.

Problems arise when the damage award is not distinguishable into a compensatory part (which will be recognized) and a punitive part (which violates German public policy and will likely not be recognized). As a result, the German court may recognize less than the amount that serves compensatory purposes. Therefore, one may have to consider, when suing a German party in an American court and intending to enforce the judgment in Germany, whether the relief sought should be limited to, or at least specify the portion of, actual, consequential and/or liquidated damages. Alternatively, the claimant could look for assets of the German defendant in the U.S. or another jurisdiction recognizing punitive damages.

E. Costs

Costs may become an issue in a cross-border setting when the U.S. court calls upon a German court to assist it in obtaining certain evidence, e.g., in hearing witnesses. The general rule in Germany is that the costs for such judicial assistance are to be borne by the state, which is seeking such judicial assistance, and not by the parties. However, the U.S. court may request that one of the parties be ordered by the German court to bear the costs.

Even more relevant is the cost issue arising in connection with recognition and enforcement proceedings commenced in Germany. In such cases, court costs and lawyers' fees may have to be paid in advance. These costs may be quite substantial, since in Germany both court costs and attorneys' fees are calculated in relation to the amount in controversy, according to statutory law. The good news for the American party seeking enforcement is that, under German law, costs are to be borne by the losing party: The so-called "American Rule"—that each party bears its own cost, no matter who prevails—does not apply in Germany.

Therefore, if recognition or enforcement of a U.S. judgment is granted by the German courts, the enforcing party will be entitled to have the court costs and lawyers' fees (up to the statutory amount) reimbursed by the other party. However, if recognition and enforcement are denied, the defendant will be able to recover any costs of the enforcement proceeding, including lawyers' fees up to the statutory amount, from the U.S. plaintiff. Consequently, the U.S. plaintiff should carefully investigate in advance whether and to what extent an award will be recognized for enforcement in Germany.

In this context, it may also be of interest that, with only a few exceptions, contingency fees are generally not permitted under German law. The cost risk can, however, otherwise be avoided or substantially reduced under German law. First, German law provides for financial aid for both court fees and attorneys' fees at all stages and in regard to all forms of judicial proceedings.

Furthermore, as mentioned above, costs are calculated in relation to the amount in controversy. A claimant may, thus, "test the waters" by bringing a claim for only a small fraction of the damages at low cost. German rules of *res judicata* will not bar the claimant from amending its claim later or from filing a subsequent action for the remaining amount. To this end, under German law, and provided that the claim for damages can be divided into separate parts, it is not the entire "claim" that merges in the judgment; rather, *res judicata* attaches only to such part of the claim that was the actual subject matter of the proceeding, as defined by the claimant's pleading.

F. Arbitration

In the event that the parties have agreed to dispute resolution by arbitration and the place of arbitration is located in the U.S., with American arbitrators or arbitrators from other common law jurisdictions, the issues regarding obtaining evidence from a German party by means of pre-trial discovery, as well as recognition and enforcement of the arbitral award in Germany, will be the same as outlined above. Even though arbitration, with its flexible procedural rules and accordingly broader possibilities for handling an evidentiary dispute, is much less regulated than civil procedure in judicial proceedings, parties usually experience the same conflicts as exist between U.S. and German rules of civil procedure, because such conflicts are founded on the differences between common law and civil law jurisdictions. As a result, most arbitrators still tend to rely on the procedural tools and concepts they are familiar with under their respective legal systems.

III. Conclusion

As a result, it is clear that various problems may arise in a cross-border context involving an American and a German party, which should be carefully reviewed by legal counsel in order to be reasonably accommodated. Basic knowledge of different foreign concepts—or at least an awareness of their existence—is necessary to best serve the interests of the client.

Endnote

1. See Gebhardt, *Practical Aspects of U.S.-Style Discovery Within Germany*, 22 INT'L L. PRACTICUM 42 (2009).

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Cross-Border Insolvencies and Chapter 15: Recent U.S. Case Law Determining Whether a Foreign Proceeding Is "Main," "Nonmain" or Neither

By William H. Schrag and William C. Heuer

I. Introduction

Chapter 15 of the United States Bankruptcy Code[1] (the "Bankruptcy Code") provides a statutory framework within which the "foreign representative" of a debtor in foreign insolvency proceedings may come to a United States bankruptcy court for assistance in dealing with the foreign debtor's assets, operations or claims located or based in the United States. While the Bankruptcy Code has included provisions designed to assist foreign debtors for quite some time,[2] Chapter 15 is a relatively new addition to the Bankruptcy Code (it applies only to matters commenced on or after 15 October 2005), and it puts in place a considerably more comprehensive, detailed statutory framework than existed under the prior laws.[3]

In cases where Chapter 15 has been invoked, a frequent area of dispute has been whether a case commenced in a foreign jurisdiction is entitled to foreign "main" or "nonmain" status, or neither, in the United States. This distinction is important because it has an impact on the nature and scope of relief which United States bankruptcy courts automatically grant foreign debtors upon recognition of the "foreign proceeding." This paper discusses case law addressing this pivotal, threshold determination.

II. The Chapter 15 Framework

There are two types of foreign proceedings that qualify for recognition under Chapter 15: foreign "main" and foreign "nonmain" proceedings.[4] The distinction between foreign "main" and foreign "nonmain" proceedings determines the nature and scope of relief to which a foreign representative is automatically entitled. While broad relief is available in either a foreign "main" proceeding or a foreign "nonmain" proceeding, recognition as a foreign "main" proceeding provides the debtor immediately and automatically with the benefit of the automatic stay (among other forms of relief) and allows the foreign representative to operate any of the debtor's businesses located in the United States.[5] In a foreign "nonmain" proceeding, the same relief may be granted, but it is not automatically put in place. Rather, whether any such relief is appropriate is determined by the bankruptcy court after notice and a hearing and at the court's discretion.

The determination whether a foreign proceeding is "main" or "nonmain" is fact–driven. A "foreign main proceeding" is an insolvency proceeding in the foreign country in which the debtor has its "center of main interests."[6] Although the phrase "center of main interests" is a new concept to United States courts, it has been used for several years in European laws. Accordingly, Chapter 15 enables bankruptcy courts to consider the international nature of Chapter 15 and the manner in which foreign jurisdictions have interpreted these same terms.[7] In taking that approach to statutory interpretation, courts have noted that the term "center of main interests" was "intentionally designed to promote international uniformity."[8] United States bankruptcy courts also look to the UNCITRAL Model Law on Cross-Border Insolvency for guidance.[9] Indeed, the "main" versus "nonmain" concept that exists in Chapter 15 was adopted in the UNCITRAL Model Law, which, in turn, was based upon these same concepts as used in the European Union Convention on Insolvency Proceedings (the "EU Convention").[10] The regulations implementing the EU Convention reveal that the "center of main interests" concept relates to "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[11] Some United States bankruptcy courts have concluded that the phrase "center of main interests" in Chapter 15 "generally equates with the concept of 'principal place of business' in United States law."[12] The foreign representative bears the burden of demonstrating where the debtor's center of main interests lies. Further, the debtor's center of main interests is to be determined at the time the Chapter 15 case is commenced, without regard to the debtor's past interests,[13] and a debtor has only one center of main interests.[14]

A "foreign nonmain proceeding," on the other hand, allows the debtor to have less of a connection to the foreign jurisdiction where the insolvency proceedings are pending. A "foreign nonmain proceeding" is defined as an insolvency proceeding filed in a foreign jurisdiction where the debtor has a mere "establishment," which in turn is defined as "any place of operations where the debtor carries out a nontransitory economic activity."[15] As compared with the automatic nature of relief that is immediately available upon recognition of a "foreign main proceeding," in order to obtain relief in a "foreign nonmain proceeding," the foreign representative must prove, among other things, that the relief requested is "necessary to effectuate the purposes of [Chapter 15] and to protect the assets of the debtor or the interests of creditors."[16]

The practical distinctions between foreign "main" and foreign "nonmain" proceedings are significant. However, as discussed below, if a foreign debtor lacks

even an "establishment" in the foreign country where its proceedings are pending, the foreign proceeding may not be recognized under Chapter 15.

III. Cases Where the Status of the Foreign Proceeding Has Been at Issue

A. *Bear Stearns*: Not "Main" and Not "Nonmain," Either…

Curiously enough, the current state of the law regarding whether a foreign proceeding is "main" or "nonmain" evolves from the *un*successful Chapter 15 proceedings of two Bear Stearns & Co. investment funds.[17] The *Bear Stearns* proceedings were "unsuccessful" in that the United States courts ruled that the foreign proceedings were entitled to *neither* "main" nor "nonmain" status. Instead, recognition was denied.

Both investment funds (the "Funds") in *Bear Stearns* were Cayman Islands limited liability companies with registered offices in the Cayman Islands.[18] However, the Funds were administered in the United States by a United States corporation and the Funds' asset manager was located in New York (as were the assets it managed).[19] On 31 July 2007, each of the Funds caused winding-up proceedings to be commenced in the Cayman Islands, and voluntary Joint Provisional Liquidators were appointed. Thereafter, the Joint Provisional Liquidators filed Chapter 15 petitions in the United States Bankruptcy Court for the Southern District of New York, seeking recognition of the Cayman Islands proceedings as "foreign main proceedings" or, in the alternative, as "foreign nonmain proceedings."[20]

In analyzing whether to grant recognition under Chapter 15, the bankruptcy court recognized that "Chapter 15 accords the court substantial discretion and flexibility."[21] The bankruptcy court also noted that "the process of recognition of a foreign proceeding is a simple single step process incorporating the definitions in sections 1502 and 101(23) and (24) . . . ."[22] However, the bankruptcy court added a dimension to its statutory analysis that many practitioners had not previously considered: it pointed out that the outcome of its analysis could result in "either a main or nonmain proceeding *or nonrecognition*."[23]

Despite the fact that the Funds were registered in the Cayman Islands, the court denied foreign main status.[24] Although in the absence of other evidence, the location of a debtor's "registered office" is presumptively its center of main interests,[25] the court emphasized that (i) the Funds had "no employees or managers in the Cayman Islands," (ii) "the investment manager . . . is located in New York, the Administrator that runs the back-office operations of the Funds is in the United States along with the Funds' books and records," and (iii) prior to the Cayman Islands proceeding having been commenced, "all of the Funds' liquid assets were in the United States."[26] The court also noted that the location of investors and the application of United States law were relevant to its analysis.[27] Considering these factors, the court found that the statutory presumption regarding center of main interests had been overcome (based on the court's own inquiry and analysis), even though no creditor had objected to foreign main status being granted.[28]

The court also, however, denied foreign nonmain status.[29] Section 1502(5) defines a "foreign nonmain proceeding" as "a foreign proceeding, other than a foreign main proceeding, pending in a country *where the debtor has an establishment*."[30] The court focused on the "establishment" requirement and reasoned that, in order for the Cayman Islands proceedings to qualify for nonmain status under Chapter 15, the Funds needed to conduct "*nontransitory* economic activity" in the Cayman Islands.[31] In other words, the Funds had to have a local place of business in the Cayman Islands in order for the foreign proceedings to qualify even for nonmain status.[32] In its analysis, the court said "the bar is rather high," and determined that there was "no (pertinent) nontransitory economic activity conducted locally in the Cayman Islands by the Funds; only those activities necessary to their offshore 'business.'"[33] As a result, foreign nonmain status was denied.

Having found that neither main nor nonmain status was appropriate and that the court would not recognize the Cayman Islands proceedings, the natural question became whether *any* relief was available to the Joint Provisional Liquidators under other sections of the Bankruptcy Code. In its conclusion, the court touched on this point, commenting that "[n]onrecognition of the Foreign Proceedings . . . does not leave the [Joint Provisional Liquidators] without the ability to obtain relief from U.S. courts," citing Bankruptcy Code sections 303(b)(4) and 1509(f).[34] Section 1509(f) grants foreign representatives the right to sue in United States courts, and section 303(b)(4) allows foreign representatives to commence involuntary bankruptcy cases, without the need for recognition of foreign proceedings. However, in a footnote, the court then called into question whether relief is, in fact, available to a foreign representative under section 303(b)(4). The court stated: "It would appear that the failure to repeal section 303(b)(4) along with section 304 may be a drafting error in view of the newly enacted section 1511(b) which likewise addresses the commencement of a case under sections 301 and 303. The inconsistencies of the two statutes have not been conformed."[35] How courts will resolve this issue remains to be seen.[36]

In a more recent case,[37] the court refused to recognize a foreign proceeding as either main or nonmain, focusing its analysis on the *type* of foreign proceeding, rather than on the location of the debtor's main interests. In September 2008, Gold & Honey Ltd. and Gold & Honey LLP commenced Chapter 11 proceedings in the Eastern District of New York. At the time, an action was pending in Israel for the appointment of a receiver to take con-

trol of the debtors' assets in Israel. After the Chapter 11 cases were commenced, two receivers were appointed in the Israeli proceedings; and the receivers thereafter commenced Chapter 15 proceedings against each of the debtors, seeking recognition of the Israeli receivership proceedings as foreign main proceedings.

The bankruptcy court concluded that the receivers failed to establish that a receivership action under Israeli law is "collective" in nature, as is required to meet the definition of "foreign proceeding" under 11 U.S.C. § 101(23). The court rejected the notion that a properly commenced action in a foreign jurisdiction, proof of which is provided to the bankruptcy court, presumptively qualifies for recognition as a foreign proceeding. Instead, the court held that recognition of a foreign proceeding is not automatic and that the Israeli receivership action was designed to permit the lender to collect its individual debt, rather than for the debtor to pay off its creditors, generally, with court supervision.

B. *Tradex*: Foreign "Nonmain" Status Granted

As compared with the finding in *Bear Stearns* that recognition should be denied in its entirety, a recent example of a proceeding where foreign nonmain status was granted to the foreign proceeding is *In re Tradex Swiss AG*.[38] *Tradex* arose out of an interesting set of facts. Tradex was an Internet-based foreign exchange trading company registered in Switzerland but also with an office in Boston, Massachusetts. Over time, Tradex's operations were transferred from Switzerland to the Boston office. The company's trading platform was located in Boston, as were *Tradex's* important documents. Trading agreements with customers were sent to and maintained by the Boston office, which also confirmed customer deposits by electronic mail.

On 3 July 2007, the Swiss Federal Banking Commission ("SFBC") appointed two individuals (the "Examiners") to investigate Tradex's activities because of allegations that insiders of Tradex were stealing investors' deposits and funds. Under Swiss law, the SFBC acts "as a bankruptcy court for the restructuring or liquidation of banks and securities brokers…."[39]

After the Examiners filed their initial report, a lawsuit was commenced by Tradex's Boston employees for Tradex's failure to pay wages. The Examiners participated in that state court action, and the state court advised the parties that if United States-based bankruptcy proceedings were not commenced, it would appoint a receiver. Shortly thereafter, the Boston-based employees commenced an involuntary Chapter 7 liquidation bankruptcy case against Tradex. After that, the Examiners filed Chapter 15 petitions. By that point, Tradex had eighteen employees in Boston, and in Switzerland it employed just one technology consultant, an insider, and the insider's girlfriend. The Examiners challenged the involuntary Chapter 7 filing and sought to have the Chapter 7 case consolidated with the Chapter 15 proceedings, which they contended were entitled to foreign main status.[40]

The bankruptcy court found that the Examiners were "foreign representatives" for purposes of Chapter 15 and that the SFBC proceedings were "foreign proceedings" under the Bankruptcy Code.[41] Based on the facts noted above, however, the bankruptcy court also found that Boston, rather than Switzerland, was where Tradex's "center of main interests" was located. In doing so, the court recognized the presumptive center of main interests based on the location of Tradex's registered office (i.e., in Switzerland), but found that the presumption had been overcome. Considering Tradex's considerable Boston-based presence at the time of the Chapter 15 filing, as compared with its marginal presence in Switzerland, the court's finding seems practical and well-founded. Accordingly, the bankruptcy court refused to grant foreign main status.

The court did, however, find a sufficient presence in Switzerland upon which to grant foreign nonmain status to the SFBC proceedings, based upon "evidence of some presence in Switzerland."[42] While the decision does not contain an express finding that Tradex had an "establishment" in Switzerland, the court noted throughout the decision facts upon which this conclusion could be based.

C. Klytie's Development Inc. and ROL Manufacturing: Foreign "Main" Status Granted

Two recent Chapter 15 cases in which foreign main status was granted are *In re Ernst & Young, Inc.*[43] ("*Klytie's*") and *In re ROL Manufacturing (Canada) Ltd., et al.*[44]

Klytie's involved Canadian and United States-based companies (Klytie's Developments, Inc. and Klytie's Development, LLC., respectively) in the real estate investment fund business. Efrat and Hidai Friedman (the "Friedmans") were eighty-percent owners of the Klytie's business and were Israeli citizens who had lived in Canada and at the time of the Chapter 15 filing lived in California. The twenty-percent equity holder was Jason Sharkey, who was a resident of Denver, Colorado.

Most of the investment funds paid to Klytie's were deposited in the United States–based Klytie's account, but were then transferred to the Canadian-based Klytie's accounts or to the Friedmans directly. In 2006, the Securities Commissioner of Colorado (the "Commissioner") investigated allegations that Klytie's had defrauded investors of approximately $7.6 million. The Commissioner sued the Friedmans and Sharky and shared the information he gathered with the Alberta Canadian Securities Commission (the "ASC").

The ASC then sued the Friedmans and the Canadian-based Klytie's and, on 5 June 2007, entered into a settlement with them. Shortly thereafter, United States-based investors sued each of (i) the United States-based and

Canadian-based Klytie's, (ii) the Friedmans, and (iii) Sharkey, in federal district court in Colorado.

In August 2007, the Canadian court appointed Ernst & Young as receiver (the "Receiver") for the Canadian-based Klytie's and, two months later, expanded that appointment to include the Friedmans and the United States-based Klytie's. As part of its retention, the Receiver was authorized by the Canadian court to seek the "aid and recognition" of the United States courts. Thereafter, the Receiver filed a Chapter 15 petition in the Colorado bankruptcy court.

In its Chapter 15 petition, the Receiver alleged that the Canadian proceedings were foreign main proceedings "because [the Canadian-based Klytie's] was incorporated in Alberta, Canada under [Canadian law], because the operations of [the Canadian-based and United States-based Klytie's] were conducted primarily from Calgary, Alberta, Canada and because the principal assets of [both Klytie's entities were] located in Alberta."[45]

The Receiver's request for recognition of the Canadian proceedings was opposed. United States-based creditors argued that, despite Klytie's strong connection to Canada, recognition of the Canadian proceedings would violate the public policy of the United States embodied in the Bankruptcy Code. These creditors contended that, under Canadian law, United States-based creditors would receive comparatively less of a distribution of estate assets with higher administrative expenses in Canada. Nevertheless, the bankruptcy court considered the following factors in its decision granting recognition as a foreign main proceeding: (i) the principals directed the debtor's affairs from Canada; (ii) the clients of Klytie's understood the company operated in Canada; (iii) the principal assets of the debtor were located in Canada; and (iv) the debtor's cash management system ultimately transferred money from accounts in the United States to Canada. The court also found that recognition of the Canadian proceedings with "foreign main" status promoted the goal of Chapter 15 to facilitate cooperation between the United States courts and the courts of foreign countries.

In a case that in many ways paralleled the experience of *Klytie's*, the cross-border insolvency proceedings of ROL Manufacturing (Canada) Ltd., ROL Holdings (Canada) Inc., ROL Holdings USA, Inc., ROL Manufacturing of America, Inc., and Marwil, Inc. (collectively, "ROL" or the "Company"), provide another recent example of Chapter 15 proceedings in which "foreign main" status was granted.[46]

ROL manufactured and distributed automobile components and other fabricated metal goods, and it had operations and customers in Canada**,** the United States, Eastern Europe, Israel and Mexico. ROL had businesses and subsidiaries operating in both Canada and the United States. In June 2007, ROL undertook an acquisition of a facility located in Ohio and entered into an agreement with the seller to facilitate the transition of the product lines ROL had purchased. The acquisition proved unsuccessful.

On 7 March 2008, ROL commenced Canadian-based restructuring proceedings by filing petitions in the Quebec Superior Court of Justice (Commercial Division) (District of Montreal) under Canada's Companies' Creditors Arrangement Act.[47] Immediately upon seeking relief in Canada, ROL also sought permission from the Canadian Court to seek relief under Chapter 15. The Canadian Court approved ROL's request and ROL filed a petition under Chapter 15 in the United States Bankruptcy Court for the Southern District of Ohio (Dayton Division) to aid in the Canadian restructuring. ROL sought recognition of the Canadian restructuring proceedings as foreign main proceedings under Chapter 15.

ROL, like *Klytie's*, involved companies that had affiliates or subsidiaries that were located in the United States but that were also subject to jurisdiction in the foreign proceeding due to the presence of a parent or affiliated company in the foreign jurisdiction. These United States-based entities could have filed plenary cases in the United States under Chapter 11 or 7, but instead chose to seek relief under Chapter 15. In seeking recognition, ROL argued that its "center of main interest" was located in Canada, at its global headquarters, and that recognition as a "foreign main proceeding" was warranted. ROL's "center of main interest" arguments focused on the following facts: (i) the principal administrative functions and back-office operations for *all* of the ROL entities were performed in Canada; (ii) the collection of *all* receivables occurred in Canada; (iii) accounts payable for *all* of the ROL entities were processed and disbursed from Canada; (iv) principal bank accounts for *all* of the ROL entities were located in Canada, as were the key employees; (v) accounting books and records of *all* of the ROL entities were maintained in Canada: (vi) the cash management system for *all* ROL entities was maintained in Canada; (vii) the ROL Entities' Board of Directors met in Canada for their annual board meetings; and (viii) the ROL entities' secured credit facilities, giving rise to the majority of *all* of ROL's debt, were negotiated and signed in Canada. Based on these facts, ROL argued that "[t]he Canadian Proceeding offer[ed] the most practical means to achieve a global, equitable resolution of the ROL Entities' liabilities and to restructure, rather than liquidate, the Debtor."[48]

ROL's request for recognition of the Canadian proceedings as "foreign main proceedings" was contested by the seller from the unsuccessful acquisition (who was also a substantial creditor of one of ROL's United States-based entities). The seller argued that the United States-based subsidiaries of ROL should be considered separate and apart from the Canadian-based entities. The seller noted that the United States-based entities were incorporated in

the United States and pointed to anecdotal evidence, such as marketing statements made on ROL's website, as warranting denial of recognition in its entirety. Ultimately, the seller's objection was resolved and, after a hearing, the bankruptcy court accepted ROL's proof and arguments; and the court entered an order recognizing the Canadian proceeding as a foreign main proceeding under Chapter 15.[49]

IV. Conclusion

Analysis of case law involving the question whether a foreign proceeding will be recognized by United States bankruptcy courts as foreign "main" or "nonmain" proceedings—or neither—for purposes of a Chapter 15 proceeding reveals some important, fundamental propositions that must be considered before seeking relief under Chapter 15.

Bear Stearns made clear that there is no such thing as a "rubber stamp" in Chapter 15 proceedings. Even in the absence of objection, bankruptcy courts must undertake their own jurisdictional analysis and grant or deny recognition under Chapter 15 as the facts of each case warrant.

Bear Stearns also made clear that simply filing a Chapter 15 petition is not a guarantee that recognition will be granted; and on appeal, the District Court made clear that the determination whether to recognize a foreign proceeding requires objective application of the statutory factors, not consideration of open-ended concepts such as comity (which is relevant in the *post*-recognition context). In *Bear Stearns*, the petition was filed by a "foreign representative" in a "foreign proceeding." Before *Bear Stearns*, it seems fair to say that many practitioners believed—based on section 1515—that by making these two showings, the statutory requirements for commencing a valid and proper Chapter 15 proceeding had been met. *Bear Stearns* revealed, however, that when a foreign debtor commences a proceeding in a jurisdiction where it has no real "presence"—i.e., no non-transitory business activity—the foreign proceeding will *not* be recognized under Chapter 15, either as a "main" or "nonmain" proceeding. The "establishment" requirement for "nonmain" status requires, as a prerequisite for any relief under Chapter 15, a base level of connection between the foreign debtor and the foreign jurisdiction that prevents a debtor from commencing a case in a jurisdiction where it has nothing more than a "mail-drop" presence.

Tradex demonstrates how a foreign debtor's "center of main interests" may not, in fact, be the foreign country in which the debtor is "registered" and where the underlying "foreign proceeding" has been commenced. In *Tradex*, the manner in which the debtor's assets and operations had migrated from Switzerland to the United States led the Bankruptcy Court to find that the foreign debtor's center of main interests was in the United States and that the statutory presumption that a debtor's "center of main interests" is where the debtor is "registered" can be overcome. Accordingly, only foreign "nonmain" status was granted in *Tradex*.

In *Klytie's* and *ROL*, Canadian-based insolvency proceedings were granted foreign "main" status. Each of these cases implicated United States-based creditors and debtor entities. After considering a variety of factors, many of which focused on the day-to-day operations of the foreign and United States-based locations of the debtors' businesses, the bankruptcy courts in each of these cases found that the debtors' "center of main interests" was in Canada. These cases are at the opposite end of the spectrum from the "mail drop" nature of the debtors' connection to the Cayman Islands in *Bear Stearns*, and they demonstrate how Chapter 15 can be used to successfully assist in foreign insolvency proceedings.

Endnotes

1. 11 U.S.C. §§ 101 *et seq*.
2. *See, e.g.*, 11 U.S.C. § 304 (repealed by Pub. L. No. 109-8, tit. VIII, sec. 802, 119 Stat. 23, 146 (2005)). Although § 304 was repealed upon the enactment of Chapter 15, once recognition is granted in a Chapter 15 proceeding, many of the considerations that were relevant in a § 304 analysis remain valid considerations in Chapter 15 pursuant to § 1507. See 11 U.S.C. § 1507. See also 8 COLLIER ON BANKRUPTCY § 1507.01 (15th ed. rev. 2009) (discussing § 304(c)). *But see In re Ran*, 390 B.R. 257, 290-91 (Bankr. S.D. Tx. 2008) (noting that, under § 1507, considerations such as comity are only relevant after a determination is made to recognize a foreign proceeding).
3. *See generally* 11 U.S.C. §§ 1501 *et seq.*
4. "Foreign proceeding," "foreign representative" and "recognition" are defined in 11 U.S.C. §§ 101(23), 101(24), and 1502(7), respectively.
5. 11 U.S.C. § 1520.
6. 11 U.S.C. § 1502(4).
7. 11 U.S.C. § 1508.
8. *In re Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 633-34 (Bankr. E.D. Cal. 2006).
9. *Id.*
10. *Id.*
11. *Id.* at 634 (citations omitted). Chapter 15 provides that, in the absence of evidence to the contrary, the location of a debtor's "registered office" is presumptively its center of main interests. 11 U.S.C. § 1516(c).
12. *Id.* at 634.
13. *In re Betacorp*, 400 B.R. 266, 291-92 (Bankr. D. Nev. 2009).
14. *In re Ran*, 390 B.R. 257, 263 (Bankr. S.D. Tex. 2008).
15. 11 U.S.C. §§ 1502(2), (5).
16. 11 U.S.C. § 1521.
17. *See In re Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) ("*Bear Stearns*").
18. 374 B.R. at 124.
19. *Id.*
20. *Id.* at 125.
21. *Id.* at 126.
22. *Id.*

23. *Id.* (emphasis supplied) (citations omitted). The court in *Bear Stearns* departed from its earlier approach in *In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007) ("*SPhinX*"), in that, despite the lack of opposition, the *Bear Stearns* court denied recognition. Curiously, both Bankruptcy Court decisions (written by two different judges in unrelated cases) were affirmed on appeal by the same judge—District Judge Sweet. In *SPhinX*, the court recognized the foreign proceedings as "nonmain" without analyzing whether the debtor had an "establishment" in the foreign jurisdiction. The decision in *SPhinX* has also been criticized because of the court's reliance, in part, on motive and other subjective criteria in its determination whether a Cayman liquidation proceeding was a foreign main proceeding. Daniel M. Glosband, in his article entitled *Sphinx Chapter 15 Opinion Misses the Mark*, 25 AM. BANKR. INST. J. 44 (December / January 2007), argued that the *SPhinX* court erred in dodging the threshold COMI determination: "[T]here may be great harm to the future of chapter 15 if other courts follow the *SPhinX Funds* opinion. Recognition is not severable from the determination of the nature and eligibility of the foreign proceeding; the petition for recognition and the determination of the nature of the foreign proceeding—main or nonmain—should be based on objective considerations. No flexible, subjective considerations should apply to the decision to enter or decline an order of recognition." *Id.* at 85. *See also* Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1024-28 (2007) (discussing *SPhinX* decision).
24. *Id.* at 130.
25. S*ee* 11 U.S.C. § 1516(c).
26. *Id.* at 129-30.
27. *Id.* at 130.
28. *Id.* Judge Lifland made clear that recognition of a foreign insolvency proceeding was not to be "rubber stamped" in a Chapter 15 case and that the facts should be reviewed independently, even in the absence of an objection.
29. *Id.* at 131.
30. 11 U.S.C. § 1502(5) (emphasis supplied).
31. 374 B.R. at 131 (emphasis in original).
32. *Id.*
33. *Id.* Judge Lifland's conclusions with respect to both the "center of main interests" and "establishment" of the Debtors being outside the Cayman Islands were unsuccessfully challenged by the Joint Provisional Liquidators in their appeal to the District Court. *See Bear Stearns*, note 17 *supra*, 389 B.R. 325 (S.D.N.Y. 2008) (affirming Bankruptcy Court decision). On appeal, District Judge Sweet gave a ringing endorsement of Bankruptcy Judge Lifland's decision. Judge Sweet also noted that *recognition* "is distinct from the *relief* that may be granted *post*-recognition" and that although "[r]ecognition turns on the strict application of objective criteria" the determination whether to grant relief *after recognition* "is largely discretionary and turns on subjective factors that embody principles of comity." *Id.* at 333-34 (emphasis supplied). This marks a significant departure from practice under former Bankruptcy Code § 304. Under Chapter 15, bankruptcy courts will no longer consider factors such as comity unless and until the foreign representative demonstrates that the debtor has a sufficient nexus to the foreign jurisdiction to warrant recognition. *But see* 11 U.S.C. § 1519 (interim relief is available in Chapter 15 *prior* to recognition determination if "urgently needed to protect the assets of the debtor or the interests of the creditors" and where the stringent requirements for injunctive relief have been met. Even then, any such interim relief is effective only until the recognition determination has been made).
34. *Id.* at 132.
35. *Id.* at 132 n.15.
36. Judge Lifland's point appears to be supported by the legislative history of Chapter 15. *See* H.R. Rep. 109-31, pt. 1 at 105-06 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 169, 174 ("In any case, an order granting recognition is required as a prerequisite to the use of sections 301 and 303 by a foreign representative."). Collier agrees. 8 COLLIER ON BANKRUPTCY ¶ 1511.01 (15th ed. rev. 2009).
37. *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009).
38. 384 B.R. 34 (Bankr. D. Mass. 2008) ("*Tradex*").
39. *Id.* at 37-38.
40. *Id.* at 40. The Examiners did not seek dismissal of the Chapter 7 case.
41. *Id.* at 42.
42. *Id.* at 43.
43. 383 B.R. 773 (Bankr. D. Col. 2008).
44. Case No. 08-31022 (Bankr. S.D. Ohio 7 March 2008).
45. *In re Ernst & Young*, 383 B.R. 773, 776 (Bankr. D. Colo 2008).
46. *In re ROL Manufacturing (Canada) Ltd., et al.*, Case No. 08-31022 (Bankr. S.D. Ohio 7 March 2008).
47. R.S.C. 1985, c. C-36, as amended.
48. *Id., Motion of Foreign Rep. Seeking Entry of an Order Recognizing Foreign Main Proceeding* at 12 [Docket No. 2].
49. Other recent cases involving U.S.-based entities whose foreign parents and affiliated debtors commenced insolvency proceedings in Canada, which foreign proceedings were found to be foreign "main" proceedings, include *In re Evergreen Gaming Corp*, Case No 09-13567 (Bankr. W.D. Wash. 6 July 2009) (the court characterized Evergreen's business structure as being "an integrated international enterprise" and emphasized that, although some of Evergreen's subsidiaries operated casinos in two Washington counties, each of the U.S.-based debtor's center of main interest was in Canada, where the group's headquarters were located and where all significant business decisions were made); and *In re Gandi*, Case No. 09-51782, 2009 WL 2916908 (Bankr. W.D. Tex 2009) (bankruptcy court found Canadian proceedings qualified for "main" status, even though some debtors were incorporated in the U.S. because principal assets and managers were located in Canada, there were significant intercompany accounts between the U.S.-based and Canadian entities, and the U.S.-based entity acted as guarantor of loans which served to meet working capital needs of all related companies, whose "nerve center" was in Canada).

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Commentary: Arbitration in Asia? Yes—but Where?

By Christopher Lau and Christin Horlach

I. Introduction

In 2007, Asia was the seat of seventy percent of global reported arbitration cases.[1] While it is true that "arbitration has gained a firm foothold in many jurisdictions in Asia,"[2] and despite the global trend of legal harmonization, differences continue to exist in national arbitration legislation, in the national courts' support or otherwise of arbitration, and in how disputes are administered by a growing number of Asian arbitration institutions. In the hope that it will assist parties, this short commentary provides a brief regional overview with a focus on recent developments in arbitration in Asia.

II. Country-by-Country Overview

A. Hong Kong

To provide a unitary[3] and more user-friendly arbitration system, Hong Kong is currently reforming[4] its arbitration legislation on the basis of the UNCITRAL Model Law as amended in 2006, including new provisions for interim measures.[5] The Hong Kong International Arbitration Centre (HKIAC), one of Asia's most eminent arbitration institutions, has also launched a new set of rules for arbitration under the UNCITRAL Arbitration Rules administered by the HKIAC,[6] which allow for more party autonomy and are designed specifically with Chinese-foreign disputes in mind. Hong Kong courts continue to take a supportive approach to arbitration.[7]

B. People's Republic of China

Mainland China's Arbitration Law 1994 is not based on the UNCITRAL Model Law. However draft rules for arbitration reform are under consideration, although no time frame for their adoption has been set so far. Among the wide range of arbitration institutions, the most popular choice for disputes between Chinese and foreign parties is the China International Economic and Trade Arbitration Commission (CIETAC), due to its increasing openness to adopting international standards,[8] its allowing participation by foreign lawyers and the nomination of foreign arbitrators, its acceptance of foreign or international law as governing law, and the convenience of a growing number of CIETAC arbitration centers throughout mainland China.[9] On 1 May 2009, the CIETAC Online Arbitration Rules came into force. The influence of court control appears considerable,[10] since any decision of a lower court to set aside a foreign-related award must be reported and approved by the Supreme People's Court first, in order to address local protectionism and other factors that may further hinder or prevent enforcement of awards.[11]

C. Japan

Japan's foray into arbitration is rather recent,[12] and the number of arbitrations conducted in Japan is still relatively low.[13] Japanese arbitration law, which was substantially modelled on the UNCITRAL Model Law in 2003, empowers tribunals with the consent of the parties to attempt mediation and an amicable settlement of the dispute, a method that has often proven successful. Following this trend, the Japan Commercial Arbitration Association (JCAA), Japan's key arbitration institution, adopted on 1 January 2009 its International Commercial Mediation Rules and it further amended its Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules with effect from 1 July 2009. A new independent ADR system has recently been introduced for financial institutions[14] under the revised Financial Products Transaction Law. As in South Korea, Japanese courts tend to dismiss actions brought in a dispute which may be the subject of an arbitration agreement rather than stay the litigation.[15]

D. South Korea

Despite the fact that South Korea follows the civil law tradition, South Korean arbitral practice appears to be strongly influenced by American arbitration practices, providing, for example, for production of documents and cross-examination. The premier arbitration institution, the Korean Commercial Arbitration Board (KCAB), proactively seeks to keep up with international arbitration standards.[16] It has seen a rise in terms of numbers and size of disputes in the past year.[17] Local courts are generally supportive of arbitration.

E. India

A great number of local arbitration institutions[18] offer their services to parties in India, and in March of 2009 the London Court of International Arbitration launched LCIA (India). Although Indian courts appeared to be better known for their interventionist approach to arbitration,[19] recent decisions have been more supportive of the arbitral process and it is hoped that this continues.[20]

F. Sri Lanka

The Arbitration Act No. 11 of 1995, which is based in the UNCITRAL Model Law, governs arbitration proceedings in Sri Lanka. Established in 1996, the Institute for the Development of Commercial Law and Practice (ICLP) Arbitration Centre[21] facilitates both ad hoc and institutional arbitrations under its own rules as well as under UNCITRAL Arbitration Rules, and the Institute acts as an appointing authority. It appears, however, that Sri Lankan

courts,[22] as well as courts in Bangladesh,[23] take a rather opposing stance to arbitration.

G. Bangladesh

Arbitration in Bangladesh is governed by the Arbitration Act 2001,[24] the provisions of which apply to all disputes except those which may not be submitted to arbitration by virtue of another law. In mid-2004, the Federation of Bangladesh Chambers of Commerce and Industry established the Bangladesh Council of Arbitration (BCA) as an arbitral body.

H. Singapore

Singapore is a major international arbitration seat and venue, with Singapore courts continuing to support arbitration.[25] International arbitration in Singapore is governed by the International Arbitration Act (IAA), which adopts, with slight modifications, the UNCITRAL Model Law. The principal arbitration institution administering commercial disputes is the Singapore International Arbitration Centre (SIAC). The Singapore Chamber of Maritime Arbitration was recently re-established, with new rules emphasizing party autonomy in respect of maritime disputes. In addition, an integrated dispute resolution complex, with state-of-the-art hearing facilities and offices for local and international arbitration institutions and arbitrators, has just been opened.[26]

I. Malaysia

The Regional Centre for Arbitration in Kuala Lumpur (RCAKL) is the principal organization handling commercial arbitrations in Malaysia. With the entry into force on 15 March 2006 of the latest reform to the Malaysian Arbitration Act, Malaysian courts are not allowed to intervene in arbitration proceedings in any matters governed by the Act, unless otherwise provided.[27] However, the Court of Appeal in *TNB Engineering Consultancy v. Boccard Oil &Gas*,[28] notwithstanding an existing arbitration agreement between the main contractor and a sub-contractor, ordered consolidation, which resulted in all claims being litigated in the courts.[29] It also appears that problems regarding enforcement of foreign awards which arose under the old arbitration law have not been completely addressed,[30] as the decision of the Putrajaya Court of Appeals in *Alami Vegetable Oil Products v. Lombard*[31] illustrates.

J. Indonesia

Arbitration is increasing in popularity in Indonesia. Law No. 30/1999 on Arbitration and Alternative Dispute Resolution does not follow the UNCITRAL Model Law. Arbitration is conducted mainly by three arbitral institutions: the Indonesian National Board of Arbitration (BANI); the Indonesia Capital Market Board of Arbitration (BAPMI); and the Shariah National Arbitration Body (BASYARNAS). However, difficulties concerning enforcement of foreign awards in Indonesia and Thailand have been reported.[32]

K. Thailand

Arbitration in Thailand is governed by the Arbitration Act BE 2545, which was introduced in 2002 and follows to a great extent the UNCITRAL Model Law. The Act confers broad powers on the tribunal, resulting in limited scope for court intervention in the arbitration process. The Thai Arbitration Institute (TAI) is the principal local arbitral institute. A word of caution: non-Thai arbitrators sitting in Thailand and foreign counsel conducting hearings are well advised to obtain the necessary work permit before the commencement of hearings.

Endnotes

1. *See* Mitchard, *Is CIETAC Leading Arbitration in Asia into a New Era of Transparency?*, THE ASIA PACIFIC ARBITRATION REVIEW 2009 available at http://www.globalarbitrationreview.com/reviews/12/sections/48/chapters/491/china/.
2. Moser, *International Arbitration in Asia*, THE ASIA PACIFIC ARBITRATION REVIEW 2009, available at http://www.globalarbitrationreview.com/reviews/12/sections/47/chapters/487/international-arbitration-asia/.
3. The new act will govern both domestic and international arbitrations.
4. The Arbitration Bill, which has been introduced to the Hong Kong Legislative Council and had a first reading on 8 July 2009, is expected to be enacted in the 2009/2010 legislative session at the earliest.
5. *See* Soo, *Arbitration Landscape in Hong Kong*, THE ASIA PACIFIC ARBITRATION REVIEW 2009, available at http://www.globalarbitrationreview.com/reviews/12/sections/46/chapters/486/the-arbitration-landscape-hong-kong/ Eliasson, *A Brief Introduction to Arbitration in Hong Kong*, 23 INT'L L. PRACTICUM (2010).
6. The Hong Kong International Arbitration Centre Administered Arbitration Rules came into effect on 1 September 2008.
7. The Hong Kong Court of First Instance in *A v R HCCT 54*/2008 (30 April 2009) rejected the argument that enforcement of the award would be contrary to public policy. The court emphasized that the public policy objection should not be abused in order to provide the losing party with a second chance of arguing its case: this would undermine the efficacy of the parties' agreement to pursue arbitration. In order to discourage parties from bringing challenges to the enforcement of an award without merit, the court decided to award costs against the losing party on an indemnity basis—until then only awarded in cases of abuse of the court's process or where proceedings were conducted in an oppressive manner—allowing the winning party full cost recovery.
8. This may apply where specific provisions of the Chinese law are unavailable or unclear.
9. Alternatively, parties may choose the Beijing Arbitration Commission.
10. Before, the ICC standard arbitration clause providing for arbitration to take place in mainland China—without designating the arbitration institution—had been held to be invalid by the Supreme People's Court in *Züblin International GmbH (Germany) v Wuxi Woke General Engeneering Rubber Co., Ltd.* (8 July 2004). However, it appears that recently a Chinese court agreed to enforce an award from an ICC arbitration heard on the mainland

as reported at http://www.globalarbitrationreview.com/news/article/19055/chinese-court-enforces-mainland-icc-award-/.

11. However, awards obtained in China have been successfully enforced in the U.K., the U.S., Canada, France, Germany, New Zealand, Japan, Italy and Singapore, according to CIETAC. Arbitral awards in China and Hong Kong have been mutually enforceable since February 2000 and in China and Macau since 1 January 2008.

12. *See* Wagoner, *Japan Becomes a Friendly Place for Arbitration*, DISPUTE RESOLUTION JOURNAL, Feb.-April 2006.

13. This may change, as a survey conducted by the JCAA in 2007 indicates. According to the survey, in 66% of international business agreements entered into by Japanese corporations include arbitration clauses, 39% of which designate Japan as the seat of arbitration. The survey is mentioned in Boehning, Thacker and Uchida, *Finding the courts, slowly*, available at: http://www.asialaw.com/Article/2121805/Channel/16960/Finding-the-courts-slowly.html.

14. This applies to banks, securities firms and insurance companies.

15. The courts of both countries generally take a broad approach when determining the validity of a arbitration agreements. *See* Yoshimasa Furuta and Naoki Iguchi, *Chapter 7: Japan*, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO INTERNATIONAL ARBITRATION 2009, at 46; Jongkwan Peck and Jin Soo Han, *Chapter 8: Korea*, *id.* 54, available at http://www.iclg.co.uk/index.php?area=4&kh_publications_id=111.

16. KCAB arbitration tends to be a speedy process: most proceedings are completed within one year of initial application. To help expedite arbitration further, the KCAB introduced new arbitration rules with effect from 1 February 2007.

17. Jongkwan Peck and Jin Soo Han, note 15 *supra,* p. 54.

18. The main arbitration bodies in India are the Indian Council of Arbitration, the International Centre for Alternative Dispute Resolution, the Bombay Chamber of Commerce and the Indian Merchants' Chamber, with each organization having its own set of arbitration rules.

19. In *Venture Global Engineering v Satyam Computer Services Ltd & Anor*, (Civil) No. 309/2008, the Supreme Court of India took the view that a challenge to a foreign award could be brought not only before the courts at the seat of the arbitration but also before Indian courts under the Indian Arbitration Act. The Supreme Court in *Delhi Development Authority v R. S. Sharma*, (2008) 13 SCC 80, confirmed the wide discretion of Indian courts to interfere, if review of the specific terms of the contract shows that it is contrary to public policy.

20. In *Nandan Biomatrix Ltd. v D-1 Oils Ltd (Arb.)*, No. 6/2007, the Supreme Court of India confirmed the validity of an arbitration clause which provided that "Any dispute that arises between the parties shall be resolved by submitting the same to the institutional arbitration in India under the provisions of Arbitration & Conciliation Act 1996." Further, in *Max India Limited v General Binding Corporation*, OMP 136/2009, the Delhi High Court rejected the appellant's invitation to intervene and ruled that it should not grant interim relief prior to the commencement of arbitral proceedings as there was an alternate forum available to the parties in the Singapore courts.

21. The Institute for the Development of Commercial Law and Practice (ICLP) Arbitration Centre is the only arbitral institution in Sri Lanka with its own set of arbitration rules. The Sri Lanka National Arbitration Centre, established in 1985, was the first institution in Sri Lanka to administer arbitrations. However, it does not have its own set of arbitration rules, nor does it act as an appointing authority.

22. In *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*, [2002] 3 SLR 603, notwithstanding a prior anti-suit injunction from a Singapore court ordered so that arbitration in Singapore could go forward, the Sri Lankan party was able to obtain a judgment before a Sri Lankan court, the recognition and enforcement of which was subsequently refused by the Singapore High Court.

23. In *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, 30 June 2009, the tribunal awarded damages to compensate Saipem, an Italian oil and gas construction company, based on a finding that the Bangladeshi courts illegally expropriated Saipem's right to have an ICC arbitral tribunal determine the residual value of its contract (available at http://ita.law.uvic.ca/documents/SaipemBangladeshAwardJune3009_002.pdf). Enforcing arbitration agreements in particular for a foreign party seeking enforcement against a local party has also proven difficult in Bangladesh.

24. This act is also based on the UNCITRAL Model Law.

25. In a recent decision, the Singapore Court of Appeal in *Insigma Technology Co Ltd v Alstom Technology Ltd*, [2009] SGCA 24, confirmed the applicability of the ICC Rules of Arbitration to the dispute but with the institute administering the dispute an institute other than the ICC.

26. www.maxwell-chambers.com.

27. See Art. 5 of the UNCITRAL Model Law.

28. [2008] 2 MLJ 43.

29. In *Harris Adacom Corp. v Perkom SDN. BHD*, [1994] 4 CLJ, 683, the High Court of Malaysia found that, if the Bangladesh party resisting enforcement of an award had succeeded in showing that the foreign party seeking enforcement was Israeli—Israel being a state with which Malaysia has no diplomatic relations—the enforcement of the award would have been denied as being contrary to public policy.

30. Sections 38 and 39 of the Arbitration Act 2005, dealing with recognition and enforcement apply, *expressis verbis* to domestic arbitration awards and foreign awards. However, it is left open whether it also applies to awards from international arbitration with seat of arbitration in Malaysia. Moreover, in *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* (14 February 2008), the High Court of Malaysia held that in cases where the arbitration agreement was entered into before the Arbitration Act 2005 came into force on 15 March 2006, the old Arbitration Act 1952 applies.

31. In *Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Limited*, [2009] MLJU 0214, the court refused to register a UK award on the ground that the UK had not been officially declared by His Majesty the *Yang di-Pertuan Agong* a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 by way of an order in the *Official Gazette*.

32. Moser, *International Arbitration in Asia*, THE ASIA PACIFIC ARBITRATION REVIEW 2009, available at http://www.globalarbitrationreview.com/reviews/12/sections/47/chapters/487/.

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A Brief Introduction to Arbitration in Hong Kong

By Dr. Nils Eliasson

I. Introduction

The purpose of this paper is to give a brief introduction to international arbitration in Hong Kong and a brief presentation of the Hong Kong International Arbitration Centre (HKIAC).

In its current form, the HKIAC was established 1985, and in 1990 Hong Kong adopted its current international arbitration regime based on the UNCITRAL Model Law. Although Hong Kong does not enjoy as long a history as a preferred seat for international arbitration as, for example, Paris, Stockholm or Geneva, Hong Kong has nevertheless evolved in recent years into one of the most significant seats of arbitration, not only in the Asia-Pacific Region, but worldwide. In 2008, the HKIAC registered more than two hundred new international arbitrations and more than four hundred new domestic arbitrations. Moreover, the establishment in 2008 of an office in Hong Kong by the International Court of Arbitration (ICC), its first ever outside Paris, with the responsibility to manage the ICC's Asian arbitration cases, is a further mark of confidence in Hong Kong's international arbitration regime.

There are several reasons for this development, including (i) an arbitration-friendly legal system based on the UNCITRAL Model Law, (ii) reliable courts upholding the rule of law, (iii) the proximity to the Chinese market, (iv) the presence of a large number of professionals and specialists, and (v) the fact that arbitral awards rendered in Hong Kong are recognized and enforced in most important jurisdictions.

The high standard of the legal system in Hong Kong together with Hong Kong's geographical and cultural proximity to Mainland China has also made Hong Kong the ideal compromise for a neutral seat of arbitration that can be accepted both by "Western" companies and Mainland Chinese companies.

II. The Arbitration Ordinance

As mentioned above, the current legal basis of Hong Kong arbitration, the Arbitration Ordinance, was introduced in 1990. The ordinance governs both international and domestic arbitration, and provides for both institutional and *ad hoc* arbitration. However, international and domestic arbitration follow different rules.

An arbitration seated in Hong Kong is *international* if: (i) one or more parties have their business outside Hong Kong; (ii) a substantial part of the obligations of the commercial relationship between the parties is to be performed outside Hong Kong; or (iii) the subject matter of the dispute is mostly connected with a place outside Hong Kong. Also, where the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country, the arbitration is international. Any arbitration which is not international is deemed *domestic*.

As noted, international and domestic arbitrations follow different sets of rules. One of the most significant differences is the degree of court intervention. In domestic arbitration, a party, among other things, may appeal an arbitral award to the courts of Hong Kong for review on any question of law, and may request that the court determine a preliminary point of law during the arbitral proceedings. By contrast, in international arbitration no such possibilities exist: International arbitration in Hong Kong is strictly based on the UNCITRAL Model Law. Thus, with respect to international arbitration in Hong Kong the Arbitration Ordinance does not allow any appeal on the merits, awards can be set aside only on narrowly defined procedural grounds, and awards are immediately enforceable under the New York Convention.[1]

III. The Hong Kong International Arbitration Centre

The HKIAC is the principal arbitration institute in Hong Kong. HKIAC is a non-profit enterprise operating under a council composed of business and professional people with a wide diversity of skills and experience. Several nations, jurisdictions and legal systems are represented in the HKIAC Council and on the HKIAC panel of arbitrators. The day-to-day operations of HKIAC are carried out by the HKIAC Secretariat, which is headed by the Secretary General.

In 2008, HKIAC hosted more than two hundred new international arbitration cases, to be compared with the approximately five hundred fifty cases of CIETAC's (China International Economic and Trade Arbitration Commission) and the seventy cases of SIAC's (Singapore International Arbitration Centre) for the same year. In addition thereto, the ICC registered fifty-one new cases in 2008 having the seat of arbitration in Hong Kong or Singapore.

Parties choosing to arbitrate under the auspices of HKIAC may opt for varying degrees of assistance from its secretariat. In addition to its principal set of rules, the HKIAC Administered Arbitration Rules, the HKIAC has also adopted several other sets of arbitration rules, including particular rules for small claims, for documents-only proceedings, for electronic transaction arbitration, and for domain name disputes. The parties may also arbitrate at HKIAC even if it is administered by another arbitration institute or if it is not administered by any institute at all.[2] Typically, however, for international arbitrations conducted at HKIAC, the HKIAC Administered Arbitration Rules or the UNCITRAL Arbitration Rules will be applied.

IV. The HKIAC Administered Arbitration Rules

In September 2008, HKIAC adopted the HKIAC Administered Arbitration Rules (the "Rules"), superseding the former HKIAC Procedures for the Administration of International Arbitration in accordance with the UNCITRAL Arbitration Rules. The case administration

under the Rules has been described as "light touch," since the role of the HKIAC Secretariat is rather unobtrusive—something which facilitates a time- and cost-efficient arbitral procedure. The Rules are based on the UNCITRAL Arbitration Rules, but are modernized to reflect current best practice and adapted to fit an institutional setting.

A. Commencement of the Arbitration

Recourse to arbitration under the Rules is initiated by the claimant submitting a Notice of Arbitration to the HKIAC Secretariat, including, among other things, a general description of the nature of the claim, an indication of the amount involved, the relief sought, and a proposal as to the number of arbitrators (if not previously agreed). The Notice must also be accompanied by payment of the HKIAC Registration Fee of U.S. $1,000.

A copy of the Notice is provided to the respondent, who within thirty days must submit an Answer to the Notice of Arbitration, including, among other things, any plea that the arbitral tribunal lacks jurisdiction, comments on the particulars set forth in the Notice, an answer to the relief or remedy sought, a proposal as to the number of arbitrators (if not previously agreed), and, if possible, any counterclaim or set-off defense. The Notice and the Answer thereto may also include proposals for the appointment of arbitrators.

If the parties have not agreed upon the number of arbitrators, the HKIAC Council decides whether the arbitration shall be heard by one or by three arbitrators. In the case of a three-member arbitral tribunal, each party designates one arbitrator, and the so designated arbitrators are to designate a third arbitrator, who is to act as the presiding arbitrator of the arbitral tribunal. The HKIAC Council will appoint the arbitrators in the event the parties (or the two party-appointed arbitrators) fail to do so. In that case, the arbitrators are chosen from the HKIAC panel of arbitrators. All appointments of arbitrators are made subject to the HKIAC Council's confirmation.

Upon the establishment of the arbitral tribunal, the HKIAC Secretariat will request the parties to deposit an advance for the costs, i.e., the tribunal's fees and expenses, costs of expert advice, and the HKIAC administrative fee. The amount is determined in accordance with the particular fee arrangements as agreed between the parties and the arbitrators, or, where there are no such agreements, on the basis of the sum in dispute.

B. Arbitral Proceedings

Once the HKIAC Council has confirmed all arbitrators, the HKIAC Secretariat transmits the file to the arbitral tribunal. The Rules grant the arbitral tribunal a broad discretion as to how to conduct the proceedings. However, the Rules anticipate the following steps.

When the tribunal is constituted, the claimant must file its statement of claim, including a statement of the facts supporting its claim, the points at issue, and the relief sought.

Thereafter, the respondent submits its statement of defense in reply to the statement of claim, also including the factual and legal basis of objections relating to jurisdiction or the proper constitution of the arbitral tribunal (if any). Where there is a counterclaim or set-off claim, the statement of defense must also contain a statement of facts supporting the claim, the points at issue and the relief sought.

Both parties must attach to their respective statements the documents on which they rely. As under most arbitration rules, the parties have no automatic right to far-reaching discovery under the Rules. However, the Rules do allow the parties to request the production of specific documents or classes of documents.

As is standard practice in international arbitration, further written statements and additional evidence are commonly exchanged following the statement of claim and the statement of defense.

The written proceedings are usually followed by an oral hearing, where witnesses and expert witnesses are examined, and where the parties are given the opportunity to present their arguments. The arbitral tribunal is free to determine the manner in which the witnesses are to be examined. It may also determine the admissibility, relevance, materiality and weight of any matter presented by the parties, including as to whether strict rules of evidence shall be applied. Written witness statements are allowed.

All hearings are held in private. Moreover, unless the parties have agreed to the contrary, all matters and documents relating to the arbitral proceedings are confidential. This principle of confidentiality covers the parties, the arbitrators, the experts appointed by the tribunal, the secretary of the arbitral tribunal (if any), and the HKIAC Secretariat and Council.

It should be noted that, in Hong Kong arbitration, the arbitral tribunal may, on its own motion, adduce evidence of relevance for the establishment of facts. The tribunal should not, however, base its award solely on such evidence without giving the parties the chance to address the evidence thus introduced in the case. A conduct to the contrary would not be considered in keeping with due process, which could hinder the enforceability of the award, and leave it open to challenge.

C. The Deliberations of the Arbitral Tribunal and the Arbitral Award

The arbitral award is to be made by a majority of the arbitrators. If there is no majority, the award is made by the chairman of the tribunal alone. The final award shall include an award on the costs. As a starting point, the unsuccessful party shall pay the costs.

The arbitral tribunal is to decide the case in accordance with the rules of law agreed upon by the parties (or, in the absence of any such agreement, by applying the rules of law with which the dispute has the closest connection). The arbitral tribunal may only decide the case according to equity and good conscience if the parties have authorized it to do so.

V. Challenge and Setting Aside Proceedings

The rules on challenge of arbitral awards rendered in Hong Kong in international arbitration mirror the corresponding rules on enforcement (described in Part VI below). Hence, arbitral awards rendered in international arbitrations in Hong Kong may be challenged and set aside only on grounds corresponding to those set out in Article 34 of the UNCITRAL Model Law. Thus, the grounds for setting aside applicable to international arbitration in Hong Kong do not allow any review of the merits of the arbitral award. The correctness of the arbitral tribunal's determination of legal and factual issues is not for the court that hears the challenge to review. Instead, the review is limited to four main categories: (i) the jurisdiction of the arbitral tribunal; (ii) irregularities with regard to the independence or impartiality of arbitrators; (iii) procedural irregularities and violations of due process; and (iv) public policy and arbitrability.

By contrast, for arbitral awards rendered in domestic arbitrations in Hong Kong, leave to appeal may be granted also on a question of law, if such question substantially affects the rights of one or more of the parties.

VI. Enforcement of Arbitral Awards

A. Enforcement in Hong Kong of Hong Kong Awards

An arbitral award made in Hong Kong may be enforced in Hong Kong to the same extent as a court judgment, i.e., an award ordering performance is enforceable. It is moreover enforceable in the same manner as a court judgment, i.e., pursuant to a leave to enforce the arbitral award, which leave in an *international* arbitration may only be refused due to serious procedural errors.

With regard to *domestic* arbitrations, leave to enforce the award may also be refused if the circumstances justify leave to appeal the award, that is, that the determination of a question of law (but not fact) could substantially affect the rights of one or more of the parties to the arbitration.

B. Enforcement in Hong Kong of Foreign Awards

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York 1958 (the "New York Convention") applies to Hong Kong. Therefore, arbitral awards rendered in New York Convention states are enforceable in the same manner as international awards rendered in Hong Kong, i.e., pursuant to leave to enforce such an award.

Pursuant to an amendment in the Arbitration Ordinance that came into effect in June 2000, awards made in states which have not ratified the New York Convention are also enforceable.

C. Enforcement Overseas of Hong Kong Awards

Since Hong Kong is covered by the New York Convention, arbitral awards issued in Hong Kong are enforceable in all other states which have ratified the New York Convention, of which there are currently 144.

D. Enforcement in Relation to Mainland China

Hong Kong awards are recognized and enforced in Mainland China under a special *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong SAR* (the "Arrangement") on conditions similar to those that follow from the New York Convention.

Despite the fact that the "Arrangement" leaves no doubt that Hong Kong awards are to be recognized and enforced in Mainland China, the Supreme People's Court has from time to time received questions from lower Mainland courts regarding the enforceability of Hong Kong awards in China. On 30 December 2009, the Supreme People's Court therefore issued a so-called Notice confirming the enforceability of both *ad hoc* and institutional Hong Kong awards in the Mainland.

VII. The Role of Hong Kong Courts in Arbitration

Hong Kong courts are considered to be both efficient and reliable from the perspective of legal certainty. With respect to international arbitration, Hong Kong courts follow the internationally widespread practice of accepting the principle of party autonomy. Thus, undue court interference, contrary to the parties' arbitration agreement, during the course of arbitral proceedings would be highly unlikely in an international arbitration seated in Hong Kong.

Instead, court interaction will be limited to measures securing the efficiency of the arbitral proceedings, such as production of documents, different forms of interim measures and injunctions, and ordering persons to give evidence before the arbitral tribunal. The court may not, however, order security for costs pertaining to the arbitration. The powers of the court and the arbitral tribunal concurs in relation to several of the interim measures, i.e., the parties are at liberty to seek recourse either with the court or with the tribunal.

Hong Kong courts also have jurisdiction to grant interim measures of protection in relation to foreign arbitral proceedings. As a main rule, however, this would require the approval of the arbitral tribunal in those proceedings.

VIII. Comparison with CIETAC and SIAC

As noted, Mainland China does not recognize *ad hoc* arbitration. Moreover, it is uncertain whether arbitral awards of foreign institutes, such as the ICC, rendered in Mainland China would be recognized there. Singapore has no similar restrictive approach, although *ad hoc* arbitration reportedly is uncommon. As a matter of further comparison between CIETAC, HKIAC and SIAC, the following features are also noteworthy.

A. Selection and Appointment of Arbitrators

According to CIETAC, party-appointed arbitrators must be confirmed if they are not represented on the CIETAC panel of arbitrators. At SIAC and HKIAC, all arbitrators will be confirmed by the Institute's chairman and council, respectively.

In the common event of a tribunal consisting of three arbitrators, and where the parties are of different nation-

alities, the starting point under the HKIAC rules is that the chairman should not have the same nationality as any party. In CIETAC arbitrations, Chinese chairmen have frequently been appointed, regardless of the parties' nationalities.

B. Decision on the Arbitral Tribunal's Jurisdiction

According to both SIAC and HKIAC, the arbitral tribunal is competent to rule on its own jurisdiction. At CIETAC, the Institute rules on this matter. CIETAC may, however, delegate this competence to the arbitral tribunal.

C. Party Representatives

Neither Hong Kong law nor Singapore law lay down any restrictions as to the right of a party to be represented by whomever it may prefer in international arbitrations. In Mainland China, the situation is uncertain. This is owing to the fact that, according to the professional rules for foreign law firms with a registered office in China, foreign lawyers must not interfere with what is referred to as Chinese legal affairs. This has been held by some commentators to mean that foreign lawyers might not be permitted to represent parties in CIETAC arbitration, or at least not without being accompanied by a Chinese attorney. The situation, however, is uncertain. It is also uncertain whether the same would apply if the governing law is not Chinese law, but rather foreign law or international conventions.

It should be noted, however, that no similar restrictions apply to foreign arbitrators, which appears to be somewhat contradictory.

D. Adversarial Proceedings

Both the HKIAC and SIAC place the obligation upon the parties to present their case and to provide evidence to support alleged facts. Neither HKIAC nor SIAC prohibits the arbitral tribunal's examination of facts on its own motion, but the rules are in substantial aspects adversarial in their nature. However, at CIETAC, the arbitral tribunal may choose between making use of an adversarial or an inquisitorial approach in establishing the facts and determining the evidence. Moreover, the CIETAC version of the inquisitorial approach does not presuppose the presence of the parties in all parts of the proceedings, e.g., at the hearing of witnesses.

SIAC is the only institute of the three allowing explicitly for the hearing of witnesses in writing only (that is without cross-examination by the counter party). Under those rules, the arbitral tribunal has discretion to allow, refuse or limit the appearance of witnesses. Any party may indeed request that such a witness who has submitted a written witness statement should be made available for oral examination, but if the witness fails to attend, the arbitral tribunal may still place such weight on the written testimony as it thinks fit (including disregarding it or excluding it altogether).

E. Language

In the absence of an agreement between the parties, CIETAC arbitration is always conducted in Chinese. HKIAC and SIAC simply states that the arbitral tribunal decides which language(s) will be used during the proceedings.

F. Memorandum of Issues

At SIAC, the arbitral tribunal will, at an early stage of the proceedings, agree with the parties, or else decide by itself, on a list of issues deemed to be of importance for the arbitration. There is no corresponding feature at HKIAC or CIETAC.

G. Interim Measures

Under the rules of HKIAC and SIAC, the arbitral tribunal is authorized to order interim measures, whereas CIETAC exclusively refers to courts for such measures.

H. Review of the Award

Both SIAC and CIETAC, but not HKIAC, reserve the right to draw the arbitral tribunal's attention to relevant issues in the award and to give recommendations. This is made possible by an obligation of the arbitral tribunal to submit a draft of the award to the respective institute. The SIAC Registrar may suggest modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. In the same manner, CIETAC may remind the arbitral tribunal of issues in the award, on the condition that the arbitral tribunal's independence in rendering the award is not affected.

IX. Investment Arbitration In Hong Kong

For many years, *investment arbitration* has been one of the "hot topics" of international arbitration. Today, however, investment arbitration no longer qualifies as the "new thing," but the number of investment disputes is still growing.

To date, Hong Kong has not been the seat of any investment arbitration. If Hong Kong would be chosen as the seat of arbitration in an investment arbitration, the rules of the Arbitration Ordinance applicable to international arbitration would apply.[3]

Endnotes

1. For further details regarding the UNCITRAL Model Law, *see, e.g.*, Sekolec and Eliasson, *The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: A Comparison*, in Heuman / Jarvin, THE SWEDISH ARBITRATION ACT OF 1999, FIVE YEARS ON: A CRITICAL REVIEW OF STRENGTHS AND WEAKNESSES (2006).
2. For instance, the HKIAC and the Arbitration Institute of the Stockholm Chamber of Commerce have concluded a cooperation agreement to the effect that parties to an SCC arbitration may agree to arbitrate their dispute in Hong Kong at the HKIAC.
3. For investment arbitration involving Mainland Chinese and or Hong Kong parties, *see, e.g.*, Hobér and Eliasson, *Investor-State Arbitration and China*, in M. Moser (ed.), BUSINESS DISPUTES IN CHINA (2d ed. 2009); Eliasson, *Investor-State Arbitration and Chinese Investors, Recent Developments in Light of the Decision on Jurisdiction in the Case* Mr. Tza Yap Shum v. The Republic of Peru, in 2 CONTEMP. ASIA ARBITR. J., No. 2, p. 347.

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International Child Custody and Abduction Under the Hague Convention

By Rita Wasserstein Warner

I. Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention")[1] is a multilateral treaty adopted "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[2]

The United States ratified the Hague Convention on 25 October 1980, and the U.S. Congress enacted the International Child Abduction Remedies Act (sometimes referred to as "ICARA")[3] on 29 April 1988 to implement the Hague Convention. As of now, eighty-one countries have become parties to the Hague Convention.

II. Cases in Which the Hague Convention Applies

The Convention applies in the following situation:

(a) The child is under 16;[4]

(b) Both countries involved—that is, the country of the child's habitual residence[5] and the country to which the child has been taken[6]—are signatories to the Hague Convention; and

(c) The child has been "wrongfully removed or retained" in breach of custody rights under the law of the country or state of the child's "habitual residence."[7]

III. Two High-Profile Cases

A. The Case of Christopher Savoie in Japan

Most recently, the custody dispute of an American father and Japanese mother received worldwide headlines when the father was jailed in Japan for trying to enforce his court-ordered parental rights. Japan is not a signatory to the Hague Convention. The parties in this case had lived in Japan from 2001 to 2008 and moved to Tennessee in 2008. In January of 2009, they entered into a court-ordered joint custody agreement (under which the mother had primary residential custody, with liberal access time provided to the father). However, in August of that year, the mother flew to Japan with the children without consent of the father, immediately enrolled them in school, and retained them in that country in violation of the joint custody agreement. That September, the father, Christopher Savoie, flew to Japan in an attempt to get his children back, but when he grabbed them on the street, the mother notified the police and the father was arrested for kidnapping, just before reaching the offices of the U.S. Consulate. He was finally released in October of 2009 after spending about twenty days in jail.[8] Since Japan is not a signatory to the Hague Convention, the father's remedies are quite limited, notwithstanding the mother's having violated court orders.

The worldwide publicity surrounding the case of Christopher Savoie has created new diplomatic pressure on Japan to become a signatory to the Hague Convention. Ambassadors from the U.S. and seven other countries (namely, Australia, Britain, Canada, France, Italy, New Zealand and Spain) have since met with the Japanese Justice Minister in an effort to get Japan to address a growing number of international child custody disputes.

B. The Case of Sean Goldman in Brazil

The case of Sean Goldman is a testament to the fact that the mere fact that a country is a signatory to the Hague Convention does not assure compliance. Sean, now eight, was removed from New Jersey by his Brazilian mother and her parents in June of 2004, when he was four years old, for what the father believed was to be a two-week vacation. The couple had been living in New Jersey since their marriage in 1999, and the child had lived his entire life in that state. Upon arriving in Brazil, the mother called to say that she wanted a divorce and sole custody and was not returning. The father immediately brought proceedings in both countries and in August of 2004, a New Jersey Superior Court judge ruled that the mother was wrongfully keeping Sean in Brazil and ordered her to return him, but she refused. Also, approximately fifty days after the abduction, the father filed a petition in Brazil pursuant to the Hague Convention to have his son returned.

In cases subject to the Hague Convention the judicial authorities are to "act expeditiously in proceedings" for the return of the children involved,[9] but in the case of Sean Goldman, determination of the father's petition before the Brazilian courts dragged on for years. During that time, the mother had a relationship with (and eventually married) a very prominent lawyer who came from an influential Brazilian family of lawyers and judges.

Among the defenses raised by the mother was that Sean was now "settled" in his new environment in Brazil and would presumably be psychologically harmed if he were returned to the United States.[10] It was on this basis that the Brazilian courts initially refused to return the child to his father, even though the court found that Sean's retention in Brazil had occurred illegally.[11]

In 2008, the mother died during childbirth and a state judge in Rio de Janeiro granted temporary custody of Sean to the mother's new husband. Meanwhile, the father traveled to Brazil nine times over the years in an attempt to get his son back. He was sued in Brazil and found guilty of talking publicly about the case. His first court-ordered visit with his son occurred in February of 2009. On 10 June of that year, a Brazilian state court judge ruled that the biological father should have temporary custody of his son six days a week while the father was in Brazil. However, this was overturned on 19 October by the federal court, which ruled that custody would remain with the stepfather pending further proceedings. A prior ruling by the state court judge ordering Sean's return to the U.S. was stayed after a petition was filed by a political party, arguing that removing Sean from his current family environment would cause him harm.

In March 2009, the U.S. House of Representatives passed a resolution calling for Sean's return to his biological father.

Moreover, the Goldman custody battle was the first topic raised by Secretary of State Hillary Clinton during a meeting with the Brazilian Foreign Minister in March, and the issue grew into a political problem between the two countries. The U.S. State Department has characterized Brazil as having a pattern of "noncompliance" on the treaty. Brazil has at least fifty pending cases involving American parents seeking to have children returned from Brazil, the fifth most of any country after Mexico, India, Japan and Canada.

Finally, in December of 2009, the chief judge of Brazil's high court ordered that the boy be returned to his father in the U.S., and this occurred that same month.[12]

IV. Abduction of the Child from the State of His or Her Habitual Residence

The parent left behind cannot invoke the protection of the Hague Convention unless the child was habitually resident in a state that is a signatory to the Hague Convention and was removed to or retained in a different state that is also a signatory to the Hague Convention. Neither the Hague Convention nor its implementing legislation defines "habitual residence." In nearly all of the cases that arise under the Hague Convention, the parents have come to disagree as to the place of the child's habitual residence. It then becomes the court's task to determine the mutual intentions of the parents.

In determining a child's "habitual residence," the following should be noted:

(a) The court should inquire into the *shared intent* of the parents, looking at both actions and declarations, at the latest time that their intent was shared;

(b) Notwithstanding any conflict with the latest shared intent of the parents, the court should examine whether the child acquired a *new* habitual residence by acclimatizing to the new location.

The object of the Hague Convention is to dissuade parents and guardians from engaging in gamesmanship with a child's upbringing in order to secure an advantage in an anticipated custody battle. Thus, caution should be exercised in permitting evidence of acclimatization to trump evidence of an earlier parental agreement, since this could "open children to harmful manipulation when one parent seeks to foster residential attachments during what was intended to be a temporary visit."[13]

V. Remedies; Hearing

The Hague Convention provides two remedies.

One of these is the administrative assistance: The Central Authority of each country is to attempt to communicate with each other and with the parties, both to exchange information relating to the social background of the child, and, where possible, to achieve the voluntary return of the child.[14] A parent in a Contracting State who discovers that his or her child has been wrongfully abducted to the United States or is being wrongfully retained in the United States usually contacts the Central Authority in the United States or in the state of the children's habitual residence to make a request for return of the child.[15]

Alternatively, a judicial proceeding may be commenced in the country to which the child has been removed.[16] In the U.S., both federal and state courts have concurrent jurisdiction.[17] A Hague Convention hearing is invariably expedited since the treaty requires prompt action. There is extremely limited discovery. It is a civil remedy, not criminal, and the Hague Convention cannot be used as an extradition treaty. The purpose of the hearing is to facilitate the return of the child to his or her country of habitual residence, so that custody can be determined there, rather than determining custody between the parents at the Hague Convention hearing.[18]

An abduction claim is limited, initially, to a determination of whether the defendant has "wrongfully removed or retained" the child, with the petitioner bearing the burden of proof.[19]

The removal of a child will be deemed "wrongful" so as to require the return of the child under the Hague Convention in the following situation:

(a) The removal was in breach of rights of custody attributed to a person under the law of the state in which the child was habitually resident immediately before the removal or retention; and

(b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or

would have been so exercised but for the removal or retention.[20]

The Court has authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim.[21] Instead, an abduction claim proceeding is intended to determine where the underlying custody dispute will be adjudicated. To deter family members from removing children to gain an advantage in their custody claims, the Hague Convention attempts to deprive their actions of any practical or juridical consequences. The main objective under the Hague Convention is to restore the status quo by means of the prompt return of children wrongfully removed to or retained in any Contracting State.[22]

VI. Custody and Access Rights

An order of return is available as a remedy only if there has been a breach of custody rights. Whether the parent left behind does in fact have custody rights is determined by the law of the country in which the child is habitually resident.[23] For example, if custody has already been awarded to one parent, then that parent has a right of custody. The Hague Convention distinguishes between two types of parental rights: rights of custody and rights of access, granting different protections to parents with regard to each type of rights.[24] If the other parent has been granted visitation rights, then that parent has a right of access. This right of access, however, is not sufficient in and of itself to qualify as a right of custody for purposes of ordering a return under the Hague Convention. Rights of access only are not sufficient to qualify as custody.

The Second Circuit has recognized that rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."[25] Ordinarily, where there has been no adjudication on custody at the time of the abduction, both parents are *de facto* custodial parents and either one may bring a petition under U.S. law, pursuant to the Hague Convention. However, this may not be true in other countries. In the situation of a nonmarital child, many countries will give a superior right of custody to the mother.[26]

A parent does not have to have actual physical custody to be exercising rights of custody. Decisions regarding the child's well-being, including the right to determine the place of residence of the child, may be considered rights of custody.[27]

In *Croll v. Croll*,[28] a very controversial case, the Second Circuit, in a 2-1 decision, ruled that a *ne exeat* order (which bars the removal of the child from the country without the consent of the other parent or court) did not give a "right of custody" under the Hague Convention and, on that basis, dismissed the father's petition under the Hague Convention, notwithstanding the mother's violation of a court order prohibiting her from removing the child from his habitual residence in Hong Kong. The court ruled that the father had access rights only and that, therefore, the court lacked jurisdiction to order the child's return, since enforcement under the Hague Convention was available *only* if the child's removal was in breach of the petitioning parent's custodial rights. The court explained that "custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things."[29] The Hague Convention assumes that "the remedy of return will deliver the child to a custodial parent who (by definition) will receive *and care* for the child. It does not contemplate return of a child to a parent whose sole right—to visit or veto—imposes no duty to give care."[30]

Significantly, Justice Sotomayor issued a sharp dissent criticizing the majority, and other circuits have split with *Croll*. The 11th Circuit, for example, has reached a different result in ordering the return of a child even though the petitioning parent had only visitation rights under the controlling custody order.[31]

In *Duran v. Beaumont*,[32] the Second Circuit followed its holding in *Croll* and dismissed the father's petition pursuant to the Hague Convention on the ground that violating a *ne exeat* right was insufficient to qualify as a violation of custodial rights. In *Duran*, which involved parents who came from Chile and were unwed, the mother had violated a lawful order of a Chilean court by removing the child to New York and retaining him there without the father's permission and in violation of his visitation rights. In affirming the decision of the district court dismissing the father's petition, the court of appeals held that the father's rights amounted to merely a right of access. An affidavit was submitted by the Chilean Central Authority asserting that separated unmarried parents share joint custody by operation of Chilean law, but the district court's disregard of this affidavit was upheld on appeal. Judge Wesley issued a strong dissent, noting that deference to a foreign sovereign's views of its own laws is particularly favored in the context of determining custody rights under the Hague Convention.[33]

In contrast to decisions of the Second Circuit, England, Australia and Israel have upheld the rights of noncustodial parents who have the right to consent to the removal of the child from the jurisdiction, on the theory that Article 5(a) of the Hague Convention defines "rights of custody" to include the right to determine the child's place of residence.

VII. Exceptions to Requirement That Child Be Returned

Once the parent who has been left behind establishes that removal was wrongful, the child must be returned unless one of the following applies:

(1) The person, institution or other body opposing the child's return establishes that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;[34] or

(2) If fundamental principles relating to the protection of human rights and fundamental freedoms of the requested state would not permit the return of the child;[35] or

(3) Judicial proceedings were not commenced within one year after the child's abduction and the child has settled in his or her new environment;[36] or

(4) The "left behind" parent was not actually exercising custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;[37] or

(5) If the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take accounts of the child's views.[38]

In *Blondin v. DuBois*,[39] the mother had abducted the children, aged six and two, from France to New York by forging the father's signature on a passport application. She claimed that she had been the victim of domestic abuse. The father's petition for return of his children to France was denied after a hearing by the district court on the ground that repatriation would subject the children to posttraumatic stress disorder and therefore would create a "grave risk of psychological harm" under Article 13(b) of the Hague Convention. This determination was based on expert testimony and was ultimately upheld by the court of appeals.

Notably, the court in *Blondin* was presented with assurances by the French government that the mother would not be prosecuted for the abduction or forgery and that she would be provided social services and free legal assistance in the pending custody proceedings. Also, the father offered to pay support and agreed not to make contact prior to determination of his parental rights. Nevertheless, the court found that even these arrangements would fail to mitigate the grave risk of harm to the children, since France was the scene of their trauma.

In contrast, the court in *Lachman v. Lachman*[40] ordered the return of the parties' child to London since the father's prior arrest for alleged domestic violence had not been proven and there was no evidence that the father had ever harmed the child.

VIII. Variable Enforcement Among Signatory States

Signatory countries vary dramatically in their enforcement of the Hague Convention. England, Australia and New Zealand have been reasonably vigilant in returning children who were wrongfully taken. Some European countries have been less so, particularly Greece. Honduras has been labeled "non-compliant" by the State Department, and Brazil, Chile, Mexico and Venezuela have been labeled "countries demonstrating patterns of noncompliance."[41]

IX. "Hague Protections" as a Condition for Foreign Visitation

The fashioning of so-called Hague protections is routinely sought when one of the parties is foreign, particularly if the non-American parent has strong ties to his or her country of origin and limited ties to the U.S. This is particularly so where the foreign country is either not a signatory to the Hague Convention or a weak enforcer of Hague Convention rules. Islamic countries are generally not parties to the Hague Convention, with Turkey being an exception. Nor are a number of Asian countries—such as China, Japan, Korea and Taiwan—signatories.

Special precautions as a pre-condition to visitation have also been sought in situations involving signatories to the Hague Convention having a history of noncompliance.

There are a number of possible conditions that might be imposed as a way to offer protection in permitting foreign visitation:

(a) having the non-U.S. person post a financial bond sufficient to ensure compliance with the court's orders;

(b) having the non-U.S. person consent to the court's continuing jurisdiction over the child;

(c) having the non-U.S. person agree to a prohibition against attempting to modify the judgment except upon application to the court, subject to forfeiture of the bond and other appropriate sanctions; and

(d) registering the judgment with the proper foreign authorities.[42]

X. International Relocation Cases

Safeguards are sought and sometimes imposed as a condition to granting a custodial parent's request to relocate to a foreign country, particularly one that is not a signatory to the Hague Convention. The move is then permitted subject to protection of the "left behind" parent's rights of access. In addition to the restrictions noted in Section VIII above, these may include the following:

(a) requiring the relocating parent to register the custody order annually under the Hague Convention;

(b) providing that support payments will be forfeited in the event of noncompliance; and

(c) requiring the relocating parent to deposit support payments in a trust fund to finance travel for visitation.[43]

XI. Concluding Observation

The Hague Convention is an important tool in reducing child abductions throughout the world. Every judge must understand that, just because a party has abducted a child and brought that child to his or her courtroom does not give that judge a right to hear the merits of the case, allowing that party to pick the forum.

Endnotes

1. Done at the Hague, 25 Oct. 1980, 1343 U.N.T.S. 89 (hereinafter the "Hague Convention"), available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24 (last visited on 21 Jan. 2010).
2. *Id.* Preamble.
3. 42 U.S.C.S. §§ 11601 *et seq.*
4. Hague Convention, note 1 *supra*, art. 4.
5. *Id.* art. 4.
6. *Id.* arts. 1, 8.
7. *Id.* art. 3(a).
8. *See* Christian Sci. Monitor, 15 Oct. 2009, available at http://www.csmonitor.com/World/Asia-Pacific/2009/1015/p06s11-woap.html (last visited on 21 Jan. 2009).
9. Hague Convention, note 1 *supra*, art. 11.
10. Article 12 of the Hague Convention provides that "where a child has been wrongfully removed or retained…and where less than a year has passed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." If more than a year has passed since the unlawful removal or retention, the administrative authority should still order the return of the child, "unless it is demonstrated that the child is now settled in its new environment."
11. *Court Battle Over a Child Strains Ties in Two Nations*, N.Y. TIMES, 25 Feb. 2009.
12. N.Y. TIMES, 24 Dec. 2009, available at http://www.nytimes.com/2009/12/25/world/americas/25brazil.html?scp=2&sq=sean%20goldman&st=cse (last visited on 21 Jan. 2009).
13. *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005) (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001)).
14. Hague Convention, note 1 *supra*, art. 7.
15. *Id.* art. 8.
16. 42 U.S.C. § 11603(b).
17. *Id.* § 11603(a).
18. See Article I of the Hague Convention: "The objects of the present Convention are (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State." *See, e.g.*, *Baran v. Beaty*, 526 F.3d. 1340, 1344 (11th Cir. 2008) ("The Convention and [the implementing legislation] empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims. When a child has been wrongfully removed from his country of habitual residence, the Convention provides the non-abducting parent with a remedy of return, intended to restore the parties to the pre-abduction status quo and deter parents from crossing borders in search of a more sympathetic forum for child custody proceedings." (Citation omitted.))
19. 42 U.S.C. § 11603(e).
20. Hague Convention, note 1 *supra*, art. 3.
21. *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993).
22. *Id.*
23. Hague Convention, note 1 *supra*, art. 3(a).
24. *Id.* arts. 4, 5. *See also* arts. 8, 21.
25. *Gitter v. Gitter*, 396 F.3d 124, 130(2d Cir. 2005).
26. For example, countries using Islamic law deem an illegitimate child to be related to his or her mother but not to his or her father, and the mother retains all custody rights and support obligations with respect to the child. For a comprehensive treatment of various countries' and religions' treatment of children born out of wedlock, see Hari Dev Kohli, LAW AND ILLEGITIMATE CHILD: FROM SASTRIK LAW TO STATUTORY LAW (Anmol Pubs. 2003).
27. *Antunez-Fernandez v. Connors-Fernandez*, 259 F. Supp. 2d. 800, 811 (N.D. Iowa 2003) ("Rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." These rights may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." The Hague Convention, therefore, broadly defines "rights of custody"; its accompanying report states that "the law of the child's habitual residence is invoked in the widest possible sense, and the sources from which custody rights derive are all those upon which a claim can be based within the context of the legal system concerned.").
28. 229 F.3d 133 (2d Cir. 2000).
29. *Id.* at 139.
30. *Id.* at 140.
31. *Furness v. Reeves*, 362 F.3d 702 (11th Cir. 2004) (involving Norway).
32. 534 F.3d 142 (2d Cir. 2008).
33. *Id.* (citing *Navani v. Shahani*, 496 F3d 1121 (10th Cir. 2007)).
34. Hague Convention, note 1 *supra*, art. 13(b).
35. *Id.* art. 20.
36. *Id.* art. 12.
37. *Id.* art. 13 (a).
38. *Id.* art. 13.
39. 238 F.3d 153 (2d Cir. 2001).
40. 08 CV 04363 (E.D.N.Y. 20 Nov. 2008), 2008 U.S. Dist. Lexis 95185, 2008 WL 5054198.
41. The U.S. Department of State issues a Compliance Report annually on Hague Convention abduction issues and lists countries which are not compliant or which are only partially compliant. In 2007 and in 2008, Honduras was found to be noncompliant and the following countries were found to demonstrate patterns of noncompliance in both years: Brazil, Chile, Greece, Mexico, and Venezuela.
42. *See* Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies* (ABA Center on Children and the Law, 2000), available at http://www.abanet.org/child/pkprevrem.pdf (last visited on 25 Mar. 2010).
43. For more detailed discussion of these suggestions and other means of preventing international parental kidnapping when a parent relocates internationally, see J. Robert Flores, *A Family Resource Guide on International Parental Kidnapping* (U.S. Dept. Justice, Office of Juvenile Justice, Jan. 2007), accessible at http://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf (last visited on 25 Mar. 2010).

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International Adoption: Improving on the 1993 Hague Convention

By Jennifer Ratcliff

I. Introduction

In 1993, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the "Convention") was called to address the need to protect internationally adopted children and promote global recognition of international adoptions.[1] The Convention acts as a guide to states for building a legal structure to govern such adoptions[2] with the ultimate goal of promoting the creation of legal systems that end practices such as child selling and child sex-trafficking.[3] While emphasizing the importance of safety in regard to international adoption, the Convention makes clear that the first priority of states should be keeping children within their own families or at least placing them with families in their country of origin; international adoption should be used only as a last resort.[4]

These goals are a step toward protecting the rights of internationally adopted children, but the Convention itself does little to ensure that they can be successfully implemented in the real world.[5] Since the drafting of the Convention, serious problems have become apparent. Many individual countries lack the resources and strong governmental support needed to create and maintain a "Central Authority" on adoption.[6] Also, the language of the Convention is vague, subject to broad interpretation[7] and devoid of sanctions for countries that violate its mandates.[8] These problems leave room for individual states to enact policies that do not support an adoption program that prioritizes the Convention's main goal: placing children with families within their own countries before looking to international adoption.[9] Nowhere is this clearer than in China where parents are restricted to one child and often have no choice but to give up any additional children.[10] The only chance these abandoned babies have for growing up outside an orphanage is to be adopted by a foreign family,[11] an endeavor made more difficult with the passage of a new law severely restricting who is allowed to adopt Chinese children.[12] By examining these Chinese policies in further detail, we can see more plainly that governments can, and do, pass laws in direct opposition to the Convention's goal of minimizing the institutionalization of children.[13]

II. Overview of International Adoption

International adoption began in the middle of the twentieth century, following the end of World War II, when soldiers arrived back home and shed light on the problem of children displaced by the war.[14] In the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption,[15] the United Nations (UN) drew attention to the need that arises for adoptive homes following calamities. The UN General Assembly expressed concern with "the large number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems."[16] During the 1950s, proxy adoptions, which allowed U.S. citizens to adopt by designating a proxy agent to take their place in foreign courts, were the most widely publicized means of international adoption.[17] Since that time, international adoptions have become increasingly popular, particularly among Americans.[18] There were about fifteen thousand foreign children adopted by U.S. families between 1953 and 1962,[19] compared with 17,433 in 2008 alone.[20]

While international adoption was once generally motivated by the aftermath of wars, it is now much more a product of the gap between the world's poor and privileged populations.[21] Receiving countries have low birthrates and few children in need of homes; conversely, sending countries have high birthrates and many homeless children.[22] In industrialized receiving countries the demand for foreign children has risen as the availability of children to adopt domestically has dropped.[23] This decrease is due to various factors that have emerged in recent decades, such as the use of contraception, the legalization of abortion, and the increased acceptance of single parents.[24] On the other hand, the practice of giving up children to international parents is common where both the families and the governments themselves cannot care for the abandoned or orphaned children.[25] For families, the reasons could be as basic as the economic inability to afford a child; however, there may be more complex social and political factors at play. Poignant examples include Confucian beliefs in Korea that promote continuing the family through an unbroken bloodline (this stopped many Koreans from adopting displaced children following the Korean War);[26] the Ceausescu regime in Romania, which forced women to have at least five children for the state;[27] and the one-child policy in China, which leads many families to give up, or even abort, "extra" children.[28] For some governments, the incapacity to care for their children could be the temporary result of a war or an economic downturn.[29] For others, the problem might be more permanent,[30] as is the case in economically underdeveloped countries that experience a combination of population explosion and depression.[31] For the families and countries faced with these harsh realities, international adoption might be the only solution.[32]

III. The 1993 Hague Convention

The Hague Convention on Protection of Children and Co-Operation of Respect of Intercountry Adoption (the "Convention") was adopted on 29 May 1993[33] and applies to all international adoptions between Member States.[34] As of February 2010, eighty-one countries have ratified the Convention and an additional three, Ireland, Nepal, and the Russian Federation, are signatories, but are not party to the treaty.[35]

The Convention's main success was its ability to bring together so many interested parties, both to acknowledge the need for, and to commit to working toward, international adoption regulations.[36] Previous UN declarations and conventions have touched on international adoption, such as the Declaration of the Rights of the Child;[37] the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption;[38] and the Convention on the Rights of the Child;[39] but the 1993 Convention is noticeably different.[40] First, it focuses solely on international adoption.[41] Second, nearly all countries that engage in international adoption played a role in drafting and approving it.[42] Finally, it shows a different attitude toward the idea of a child's being adopted outside of his or her native country. The Convention represents a "far more enthusiastic endorsement of international adoption as a good solution for children without parents than any previous international agreement."[43] It shifts the focus from keeping children within their country of origin at all cost, to finding abandoned or orphaned children a permanent family, wherever that family may reside.[44] The Preamble states that international adoption may be the best option for a child "for whom a suitable family cannot be found in his or her [s]tate of origin."[45] This change in tone establishes international adoption as a preferable alternative to several worst case scenarios, such as institutionalization and homelessness, while still urging countries to take "appropriate measures to enable the child to remain in the care of his or her family"[46] or, if this is not possible, to make efforts to find the child a family within his or her own country of origin.[47] Despite a hierarchy that placed international adoption near the bottom, the Convention sought to create, at a minimum, a foundation for cooperative international adoption law.[48]

The Convention has three main objectives: to ensure international adoptions take place in the best interests of the child, to establish cooperation among countries so as to ensure safeguards are put in place to prevent the exploitation of children, and to promote recognition of adoptions that conform to the Convention's standards.[49] The Convention first sets out the requirements for international adoptions.[50] The state of origin must establish that the child is adoptable, that international adoption is in the child's best interest, and that the child's parents (or the institution where the child resides) have consented to the adoption.[51] Additionally, the Convention places a duty on the receiving state to determine that the prospective parents are eligible and suitable, that they be counseled if necessary and that the child is or will be allowed to enter and permanently reside there.[52]

Chapter III of the Convention requires Contracting States[53] to "designate a Central Authority[54] to discharge the duties which are imposed by the Convention upon such authorities."[55] Among other things, Central Authorities are required to work cooperatively with one another, to prevent any gain, financial or otherwise, in connection with adoption and to fulfill the requirements listed above as either a state of origin or a receiving state.[56] Chapter IV lists more specific procedures that the Central Authority must follow with respect to individual adoptions.[57] The Central Authority of the receiving state must conduct an investigation and compile a report on the potential adoptive parents.[58] If they conclude that this person (or couple) is suitable, it will transmit the report to the Central Authority in the desired country of origin which then evaluates the report and makes a determination on the prospective parent or parents.[59] If the Central Authority is satisfied, it will transmit information about the prospective adopted child to the new family.[60] Finally, both Authorities must ensure that the child will be able to leave his or her country of origin and enter the receiving country.[61] Thus, the Convention not only consolidates authority and streamlines adoption practices in Member States, but it also creates a process of cooperation between the two concerned countries.[62]

Chapter V of the Convention concerns the recognition and effects of the adoption.[63] Among other things, it mandates that an adoption may only be refused if it "is manifestly contrary to [the State's] public policy."[64] Chapter V also asserts the Convention's recognition of the legal parent-child relationship between a child and his or her adoptive parents and the termination of this relationship, upon the finalization of the adoption, between the child and his or her birth parents.[65] Chapter VI lists general provisions.[66] Perhaps most notably, it states that "[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption" and limits any fees to "costs and expenses."[67]

IV. Problems Arising from the Hague Convention

A. Introduction

The Hague Convention was the first declaration of its kind to acknowledge the reality that international adoption is sometimes a positive solution for abandoned and orphaned children.[68] In bringing so many nations together to address this singular issue the Convention also brought international attention to both the virtues of the system and the problems it still faces. Despite these achievements, however, the Convention is deficient in several areas, and it leaves holes in the international adoption system that have permitted further abuses.

B. Many Countries Lack Resources or Governmental Support for Creating and Maintaining a Central Authority

The Convention's requirement for a "Central Authority" in each Contracting State was designed to ensure that each country that participated in international adoption had a medium through which the UN's adoption standards could be promoted and enforced.[69] This idea is sound in theory, but in practice it has proven unrealistic.[70] Such an endeavor requires funding and a revamping of the adoption systems of most countries, a goal which may be impossible for underdeveloped nations to achieve.

In Romania, one of the first countries to ratify the Convention, the failure to fix the severely crippled adoption system has effectively led to the end of all international adoptions of Romanian children.[71] In 1997, prospective adoptive parents began to complain that the system had become too slow and overly bureaucratic;[72] unfortunately, when Romania attempted to simplify and improve it, the results were disastrous. The newly implemented laws opened the door to corruption that the government was not equipped to address.[73] When Romania applied for membership to the European Union (EU), the EU demanded that it overhaul its entire adoption system as a prerequisite for joining.[74] In an attempt to reevaluate and reform the system, Romania issued a "temporary" moratorium on all international adoptions in June 2001.[75] The U.S. agreed with this decision at the time and acknowledged that Romania's legal framework had not always protected the best interest of the child.[76] The U.S. made recommendations on how Romania's adoption procedures could be improved and reiterated that the child's interest is paramount.[77] Within a month after the moratorium, Romania passed a law that banned international adoption of Romanian children by anyone other than grandparents.[78] Political changes, political opposition, uncertainty regarding international adoptions and a lack of finances kept Romania from reforming the system to bring it in line with the Convention;[79] and, as a result, both laws remain in force to this day. This policy has left more than eighty thousand Romanian children to live in orphanages or foster care without a permanent family.[80]

The situation is perhaps even worse in Cambodia, where the government's inability to effectively regulate has led to the adoption of countless kidnapped or purchased children for profit.[81] Despite being aware of rampant fraud within the system, the Cambodian government was not able to create a way to successfully evaluate visa applications on behalf of orphans.[82] The child trafficking problem in Cambodia, which was most prevalent between 1997 and 2001,[83] is "the most documented instance of large-scale child laundering within the intercountry adoption system."[84] In fact, it is likely that most of the 1,609 Cambodian children that were adopted in the U.S. during that time were laundered. As a result, on 21 December 2001,[85] the U.S. government suspended all adoptions from Cambodia.[86]

The Convention's Central Authority requirement is instrumental to setting and maintaining standards for international adoption in each Contracting State.[87] While the theory behind this mandate makes sense, in practice it is clear that the Convention's demand for adoption system reform does not automatically make such reform happen. Both the Romanian and Cambodian governments have proven unable or unwilling to carry out reforms they agreed to when they signed on to the treaty, leaving thousands of children institutionalized following the passage of laws that ended their chances of adoption. These laws prove that the systems at issue are deeply flawed, and major improvements must be made to bring them in line with the Convention. The Convention, however, provides no support to help these countries achieve those improvements.[88]

C. The Convention Is Vague and Subject to Broad Interpretation

Although the Convention clearly describes the duties of the Central Authority,[89] many other aspects of the Convention are not so straightforward. Much of the ambiguity has to do with the definition of certain words.[90] For instance, while the Convention explicitly states that it is up to the Central Authority in the country of origin to determine if the child in question is "adoptable,"[91] it gives no indication as to what that means.[92] It does not even list minimum requirements for finding a child adoptable.[93] In many countries the system is burdened by practices such as forcing a parent or guardian to surrender his or her legal rights to the child so others can sell the child to be adopted.[94] The primary means by which launderers in Cambodia persuaded parents to give up their children were false statements such as: "a rich family will raise your baby in the United States," and falsely telling them that when the child becomes an adult, he or she could petition for the birth parents to immigrate to the United States.[95] Alternatively, and perhaps more cruelly, some parents were told that their child would be given a better life within Cambodia and that they could visit and/or take the child back at any time.[96] The Convention does not mandate that countries look into the background of how a child came to be an orphan and, left unchecked, many governments might find such a laundered child to be "adoptable" simply by virtue of the fact that he or she no longer has a legal guardian. By allowing such crucial terms to remain undefined and open to interpretation, the Convention runs the risk that some Central Authorities might be uncertain as to which children are appropriate candidates for adoption.

D. The Convention Is Difficult to Enforce and Does Not Impose Sanctions

While the Convention is the international community's first attempt to set a standard that emphasizes the

child's interest within the international adoption system, it does little to ensure that the Contracting States adhere to that standard or other mandates.[97] One reason for this problem is the Central Authority system itself. According to Article 6 of the Convention, the Central Authority is responsible for enforcing the Convention in each individual country, and the government is in charge of supervising the Central Authority.[98] This practice allows each country to police its own international adoption system however it chooses, despite the Convention's intention that every government should look first to its children's best interests.[99]

Not only are Central Authorities inadequately scrutinized, but there are no sanctions contained in the Convention that can be used to punish a country that violates its requirements.[100] Issuing moratoriums on adoptions from countries with systems that do not meet the Convention's requirements is the only recourse that has been used.[101] This "solution" is ill-advised for three reasons. First, there is no broad authority that can end all adoptions from a particular country. Instead, either the country itself must decide that its system is so in need of reform that it cannot continue with international adoptions, or other individual countries must refuse to adopt from the deficient country. Second, often the decision to end all adoptions is not reached until the problem is out of hand, such as the baby-laundering epidemic in Cambodia.[102] This is likely a direct result of allowing only for self-regulation. Finally, ending international adoptions is not an ideal solution; although it may temporarily stop a corrupt system, it will lead many children to end up in institutions because sending countries generally have more children in need than they do domestic families willing to adopt.[103] The focus must be on helping countries to reform rather than forcing them to shut down. The situation as it is will continue so long as there is no overarching authority to oversee the practices and procedures of individual Central Authorities.[104]

V. State Policies Inconsistent with the Convention: Focus on China

A. Introduction

It is clear that the Convention is far from flawless.[105] While the discussion thus far has focused on problems that arise because countries either will not or cannot reform their adoption systems to meet the standards of the Convention,[106] there is an additional problem. Many complex issues arise as a result of state policies that directly contradict the Convention's goals. Nowhere is this problem more evident than in China where the "one-child policy" and new adoption requirements actually increase the number of children in need of a home while simultaneously preventing more children from being adopted.[107] In doing so, China goes against the Convention's prioritizing of adoption over institutionalization.[108]

B. China's One-Child Policy in Direct Tension with the Convention

China enacted its well-known one-child policy in 1980 to address the problem of overpopulation.[109] The policy restricts families to having only one child unless their regional government permits them to have more.[110] Even if such permission is granted, the couple will still be penalized.[111] Penalties include "loss of state benefits, housing or employment," [112] which most poor families cannot afford.[113] As a result, China has a notorious problem with abandoned and orphaned children. As of 2008, there were at least twenty million orphaned children living there.[114] Since 1992, when China first began to allow international adoption,[115] it has become one of the world's leading sources for internationally adopted children.[116]

The one-child policy puts a strain on China's adoption system by increasing the number of institutionalized children in three ways. The first is the most obvious: families are only allowed one child so that, unless they are among the few that can afford to pay for more, they are forced to give up any subsequent children.[117] Second, the policy makes any domestic adoption system effectively impossible. Because all Chinese couples are limited to one child, the overwhelming majority of couples, aside from those who are unable to have children, will choose to have their own baby rather than adopt.[118] Finally, cultural ideas about gender have led to a surplus of abandoned baby girls.[119] A higher value has traditionally been placed on sons than on daughters.[120] While this archaic belief has begun to change, it still prevails, particularly in rural China where the majority of the population lives.[121] As a result, many families give up daughters (even firstborns) so that they can try for a son.[122] This leads to a disproportionate number of girls in orphanages and to a general increase in the number of children in need of adoption. It is bad enough that families are forced to give up any children following their first, but the problem severely worsens if couples keep abandoning their babies in order to get the one that they want. What if a couple has two, three, five, or more girls before they have a boy? They will ultimately relinquish many more children in this pursuit than if they had kept their first child and only had to give up more in the event of a subsequent unplanned pregnancy.

This policy and its effects go directly against the principles of the Convention. While the strong cultural attachment of the Chinese to bloodlines falls within the Convention's first choice scenario—that is, that a child be raised within his or her birth family—the laws enacted by the government that place a limit on children make this goal next to impossible to achieve. The Convention's second-best option, domestic adoption, is difficult for the reasons already mentioned. Additionally, it may be unacceptable to some, as a result of their affinity for blood relations in families.[123] Short of institutionalization, international adoption becomes the only choice. The Convention

obviously recognizes such adoption as a viable option,[124] but reliance on it to such an extent is contrary to the Convention's goal of keeping children at least within their country of origin.

C. China's New, More Restrictive Laws May Reduce Foreign Adoptions Without Encouraging Domestic Adoptions

On 1 May 2007, the China Center for Adoption Affairs enacted a law that set strict guidelines for prospective adoptive parents.[125] The law includes age and income restrictions, as well as a requirement that each child be adopted by a heterosexual married couple.[126] It also restricts people with certain "health" conditions, including AIDS, mental disability, blindness in either eye, severe facial deformation or a body mass index of forty or more.[127] As a result, the number of Chinese adoptions in the U.S. dropped from 6,492 in 2006 to 5,453 in 2007 to 3,909 in 2008.[128] The law is still very new, but it is already having an effect on Chinese adoption. Every abandoned child that is not adopted is institutionalized. While it is true that China has the autonomy under the Convention to determine if particular prospective parents are "suitable,"[129] one could make the argument that this new law restricts many couples that would be deemed suitable under the Convention's interpretation of who is "suitable." By preventing these people from adopting, the Chinese government is allowing some children to be put in an institution rather than be placed with a family, which is against the priorities established by the Convention.[130]

VI. International Oversight to Ameliorate Deficiencies of the Hague Convention

Although it is impossible to address all of the problems within the international adoption system, especially all at once, an overarching UN international central authority to supervise each of the individual Central Authorities could go a long way in alleviating some of these issues. The Convention was the first of its kind and was intended to create at least a foundation for cooperative international adoption law.[131] It is hard to imagine how any new set of laws will apply in real world situations, but now that so many countries have implemented or attempted to implement the Convention's principles, the gaps and problems within these laws are more apparent.

Romania and Cambodia are just two examples of an unfortunate trend: countries ending their adoption programs because they cannot reform them to meet the Convention's standards.[132] These moratoria are not an acceptable solution; they hurt the children in these countries more than anyone else,[133] which is in direct opposition to the Convention's principle that one act "in the best interest of the child."[134] If there were a UN-appointed body to oversee this, it could look at the individual problems within each of these countries and work with those countries to devise a plan that would be feasible within their individual frameworks. Similarly, this body could address the ambiguity of the Convention.[135] Rather than waiting for a new Convention to convene on this issue, which may not happen in the near future, the UN body would be in charge of interpreting and construing the language of the Convention. This would provide all countries with one clear, uniform standard on which to base the respective systems.[136] Lastly, rather than leave the enforcement of the Convention to each individual country, this solution would allow for a more impartial implementation of the law.[137] Not only would the UN body make sure that the Convention is being applied correctly, it would also exact an appropriate penalty on countries whose international adoption systems do not meet the UN's requirements.

In attempting to put the Convention's central principles into practice most effectively, one must be optimistic, but also realistic as to what can be done. Although a UN appointed authoritative body would be a step in the right direction, there is only so much it can do to eradicate the problems in international adoption. Powerful countries like China, whose policies create more abandoned children and fewer adoptive parents, are extremely unlikely to reform their laws to bring them in line with the Convention's standards. This is especially true of the one-child policy, which has been ingrained in the Chinese legal system for almost thirty years.[138] In countries where the government genuinely wants to reform international adoption, however, the addition of a new authoritative body could make a significant difference. The same could be said for countries that did not actively enact laws contrary to the Convention's principles, but which nonetheless violate its mandates. An international body put in place to oversee the individual Central Authorities would go a long way in making the Convention's abstract policies more of a reality.

VII. Conclusion

The greatest achievement of the 1993 Hague Convention was that it indentified and focused attention on the problems within the international adoption system. Unfortunately, it brought along problems of its own.[139] The Convention fails to provide support for countries that lack the infrastructure to reform their adoption systems and to create a Central Authority.[140] The Convention lacks clear, specific guidelines[141] and it contains no effective enforcement strategies or sanctions to ensure compliance.[142] Perhaps most troublesome is the fact that certain countries, such as China, enact measures that are in direct opposition to the Convention's goals.[143] One way to address these issues would be to create a central authoritative body to oversee each adoption system, to help countries struggling to reform, and to penalize countries that refuse to comply with the Convention's standards.[144] The 1993 Hague Convention is the first treaty of its kind to not only

address international adoption specifically, but also to endorse it as a preferred alternative to institutionalization.[145] The international community must do all it can to ensure that those countries that engage in international adoption maintain it as an institution worthy of such an endorsement.

Endnotes

1. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, concluded on 29 May 1993, 32 I.L.M. 1134-46 (1993) **(**hereinafter the "Hague Adoption Convention").
2. *Id.*
3. *Id.* at 1139 ("The States signatory to the present Convention [are] convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.").
4. *Id.* ("The States signatory to the present Convention…[recall] that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin…[and recognize] that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.").
5. *See infra* Part IV.
6. *See* Section IV.B. *infra*.
7. *See* Section IV.C. *infra.*
8. *See* Section IV.D. *infra.*
9. *See* Section V. *infra.*
10. *See* Section V.B. *infra.*
11. *Id.*
12. *See* Section V.C. *infra.*
13. *See* Section Part V. *infra.*
14. Ellen Herman, "International Adoptions," available on the Web site of the Adoption History Project (11 Jul. 2007), http://www.uoregon.edu/~adoption/topics/internationaladoption.htm (last visited on 10 Feb. 2010) (hereinafter "Adoption History Project Web Site").
15. G.A. Res. 41/85, U.N. GAOR, 41st Sess., U.N. Doc. A/RES/41/85 (3 Dec. 1986).
16. *Id.* Annex.
17. Ellen Herman, *Proxy Adoptions*, Adoption History Project Web Site, note 14 *supra*, http://www.uoregon.edu/~adoption/topics/proxy.htm (last visited on 10 Feb. 2010). This practice gained traction after 1955 when Harry and Bertha Holt, an evangelical couple from Oregon, adopted eight Korean War orphans. They went on to arrange many similar adoptions for other American families. *See* "International Adoptions," available at the Adoption History Project Web Site note 14 *supra.*
18. Elizabeth Bartholet, Family Bonds: Adoption, Infertility, and the New World of Child Protection 143 (Beacon Press ed., 1999) (1993).
19. The Adoption History Project: International Adoptions, note 14 *supra.*
20. Intercountry Adoption: Office of Children's Issues, United States Department of State, *Total Adoptions to the United States*, http://adoption.state.gov/news/total_chart.html (last visited Feb. 9, 2009) [hereinafter Chart: Total Adoptions to the United States (by country)] (This number includes 4,123 children from Guatemala, 3,909 from Mainland China, 1,861 from Russia, 1,725 from Ethiopia and 1,065 from South Korea.).
21. Bartholet, note 18 *supra*, at 141-43.
22. *Id.* at 141.
23. *Id.*
24. *Id.*
25. Mary Kathleen Benet, The Politics of Adoption 121 (Free Press 1976).
26. Sam Jameson, *Keeping Them Home, Orphan—A Shame Fades in South Korea*, L.A. Times, 1 Sept. 1989, at A1.
27. Catherine Dunphy, *The Romania Adoptions: New Lives for the Children of Turmoil*, TORONTO STAR, 22 Aug. 1993, at B1. In furtherance of this policy Ceausescu outlawed birth control, including abortion. *Id.* Impoverished Romanian families often could not support so many children and had no choice but to give them up. *Id.* As many as 140,000 children were institutionalized as a result of this policy; all because Ceausescu saw children as a symbol of national pride and power. Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & Fam. Stud. 303, 314 (2004).
28. Alexa Olesen, *China Sticking to One-Child Policy*, Wash. Post, 23 Jan. 2007 (noting that many couples give up or abort female babies so they can have the opportunity to try for a son).
29. Benet, note 25 *supra*, at 121.
30. *Id.*
31. *Id.*
32. *Id.*
33. Hague Adoption Convention, note 1 *supra*, at 1134.
34. Peter H. Pfund, Introductory Note to Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 29 29 1993, 32 I.L.M. 1134, 1134-35 (1993).
35. Hague Conference on Private International Law, *Status Table, 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69 (last visited 1 March 2010); *see generally* UN Treaty Collection, Treaty Reference Guide, http://untreaty.un.org/English/guide.asp (last visited 1 March 2010) (hereinafter "Treaty Reference Guide") (describing the difference between "signatories" to a treaty and "parties" to a treaty that are "States and other entities with treaty-making capacity which have expressed their consent to be bound by a treaty and where the treaty is in force for such States and entities").
36. *See* Bartholet, note 18 *supra*, at 150.
37. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 6, U.N. GAOR, 14th Sess, Supp. No. 16, U.N. Doc. A/4354 (20 Nov. 1959) ("The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.").
38. Declaration on Social and Legal Principles Relating to Adoption and Foster Placement of Children Nationally and Internationally, G.A. Res. 41/85, art. 17, U.N. GAOR 41st sess., 95th pl. mtg., U.N. Doc. A/RES/41/85 (3 Dec. 1986) (acknowledging international adoption as an option for abandoned children, but only as a last

resort: "If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.").

39. *Convention on the Rights of the Child*, G.A. Res. 44/25, art. 20, U.N. GAOR 44th sess., 61st pl. mtg., U.N. Doc. A/RES/44/25 (20 Nov. 1989):

> 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child. 3. Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

Id. See also art. 21, which provides as follows:

> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

40. Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. Am. Acad. Matrimonial Law. 181, 192 (1996).
41. *See generally* Hague Adoption Convention, note 1 *supra*.
42. Bartholet, note 40 *supra*, at 192.
43. *Id.*
44. *Id.*
45. Hague Adoption Convention, note 1 *supra*, at 1134-35.
46. *Id.* at 1139.
47. *Id.*
48. Bartholet, note 18 *supra*, at 150.
49. Hague Adoption Convention, note 1 *supra*, at 1139.
50. *Id.*
51. *Id.* at 1139-40.
52. *Id.* at 1140.
53. The UN defines Contracting States as "[s]tates and other entities with treaty-making capacity which have expressed their consent to be bound by a treaty where the treaty has not yet entered into force or where it has not entered into force for such states and entities." Once the treaty has entered into force for the State or entity it becomes a "Party" to the treaty. Treaty Reference Guide, note 35 *supra*.
54. "The Central Authority is the governmental body that is responsible for implementing the Convention. It may delegate many of its duties to other authorities, as provided for by the convention. For the U.S., the Department of State will provide the Central Authority, to be located in the Office of Children's Issues. The U.S. Central Authority is expected to delegate many of its responsibilities concerning specific adoption cases to accredited bodies or approved persons (for example, preparing home studies, educating parents, and referring specific children for adoption)." Holt International, Hague Convention Definitions, http://www.holtintl.org/hague/HagueConvDef.pdf (last visited 1 March 2010).
55. Hague Adoption Convention, note 1 *supra*, at 1140.
56. *Id.* at 1140-41.
57. *Id.* at 1141-42.
58. *Id.* at 1141.
59. *Id.*
60. *Id.*
61. *Id.* at 1141.
62. *See* Part III *supra*.
63. Hague Adoption Convention, note 1 *supra*, at 1142.
64. *Id.*
65. *Id.*
66. *Id.* at 1143-44.
67. *Id.* at 1143.
68. *See* notes 36-40 *supra* and accompanying text.
69. Hague Adoption Convention, note 1 *supra*, at 1140.
70. *See* Part IV.B. *supra*.
71. Maura Harty, Assistant Sec'y of State for Consular Affairs, Testimony to the Comm'n on Sec. and Cooperation in Eur. (14 Sept. 2005) (discussing how Romania's adoption laws failed to protect their children and how this led to their moratorium on international adoption).
72. Molly S. Marx, *Who Does It Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies*, 21Emory Int'l L. Rev. 373, 383 (2007).
73. *Id.* at 384.
74. *Id.* at 386-87.
75. On the Protection and Promotion of the Rights of the Child, Law No. 272/2004, Rom. O.G. (2004).
76. Harty, note 71 *supra*.
77. *Id.*
78. On Legal Status of Adoption, Law No. 273/2004, Rom O.G. (2004).
79. H.R. Res. 578, 109th Cong. (2005).
80. UNICEF, Romania: Background, http://www.unicef.org/infobycountry/romania_background.html (last visited 1 March 2010).

81. David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113, 145 (2006).

82. *Id.*

83. *Id.* at 144-45.

84. *Id.* at 135; *See* Ethica, Cambodian Adoption Investigation / Prosecution Documents, accessible at http://www.ethicanet.org/item.php?recordid=camdocs&pagestyle=default (last visited 1 March 2010) (Many of the relevant U.S. government documents concerning criminal prosecutions in the Cambodian adoption laundering scandal can be found on the Ethica Web site.).

85. The U.S. government suspended all adoption of Cambodian children on 21 Dec. 2001; however, at that time there were a number of adoptions already under way and at various stages of the process. These "pipeline" cases continued to be evaluated and, if appropriate, were approved. As a result, there are data available on Cambodian adoptions in the U.S. as late as 2003. Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619, 621-25 (2005).

86. Press Release, U.S. Dep't of Justice, Immigration and Naturalization Serv., INS Announces Suspension of Cambodian Adoptions and Offer of Parole in Certain Pending Cases (21 Dec. 2001).

87. *See* Part III *supra.*

88. *See* Smolin, note 81 *supra*, at 145-47 (discussing the Cambodian government's inability to screen out cases of purchased or stolen children); *See generally* Harty, note 71 *supra* (discussing the problems within the Romanian adoption system and how the government could not cope with them).

89. *See* Part III *supra.*

90. *See generally* Hague Adoption Convention, note 1 *supra*.

91. *Id.* at 1139 ("An adoption within the scope of the Convention should take place only if the competent authorities of the State of origin … have established that the child is adoptable . . . .").

92. *See generally* Hague Adoption Convention, note 1 *supra*.

93. *Id.*

94. Smolin, *supra* note 81, at 115-117 (discussing the practice of launderers who buy or steal children from their birth families; thus, blurring the line between "true orphans" and "paper orphans").

95. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, BACKGROUNDER: OPERATION BROKEN HEARTS (2004).

96. *Id.*

97. *See generally* Hague Adoption Convention, note 1 *supra*.

98. *Id.* at 1140. Article 6 provides:

> (1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
>
> (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State. *Id.*

99. *See generally* Hague Adoption Convention, *supra* note 1.

100. *Id.*

101. *See* Part IV.B. *supra.*

102. *Id.*

103. Harty, note 71 *supra* (discussing the need to urge that the government of Romania resume intercountry adoptions for the sake of Romanian children in need); S. Res. 359, 109th Cong. (2006) (urging the government of Romania to reform its adoption system and resume international adoptions to ensure all Romanian children are raised in permanent families).

104. *See* Part VI *infra.*

105. *See* Part IV *supra.*

106. *Id.*

107. *See* Part V.B.and C. *infra.*

108. *Id.*

109. The Marriage Law of the People's Republic of China was adopted by the Third Session of the Fifth National People's Congress on 10 Apr. 1980 and became effective on 1 Jan. 1981. The English text of the law can be found in LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE P.R.C., THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 184-86 (Foreign Languages Press ed.) (1987).

> Article 2 of the Marriage Law states in part as follows:
>
> "…Family planning shall be practiced."
>
> Article 12 of the Marriage Law states:
>
> "Both husband and wife shall have the duty to practice family planning."

110. Christopher Bagley *et al.*, INTERNATIONAL AND TRANSACTIONAL ADOPTIONS: A MENTAL HEALTH PROSPECTIVE 188-89 (Avebury ed.) (1993).

111. *Id.*

112. *Id.*

113. Aside from the problems the "one-child policy" causes the international adoption system, it has serious human rights implications as well. *See* Forced Abortion and Sterilization in China: The View from the Inside: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. On Int'l Rel., 105th Cong. (1998) (discussing the Chinese government's use of forced abortions and sterilizations to enforce its "one-child policy"); *see* Olsen, note 28 *supra* (pointing out the huge disparity between boys and girls in China as a result of couples' aborting or giving up female babies); *see The Earthquake*, N.Y. Times, 18 May 2008 (reporting that most parents who lost children in the devastating earthquake in May 2008 lost their only child because of the "one-child policy"); *see generally* Jim Yardley, *China to Reconsider One-Child Limit*, N.Y. Times, 29 Feb. 2008 (reporting that China is considering alternative ways to control its population in an attempt to soften its human rights image).

114. *NPR Weekend Edition Saturday: Considering China's One-Child Policy* (NPR 24 May 2008).

115. Although China began to formally allow international adoptions in 1992, the practice was suspended later that year, for ten months, as a result of corruption within the system. International adoption in China has continued uninterrupted since this ban was lifted. Chris Yeung, *New Agency to Monitor Child Adoption*, S. CHINA MORNING POST, 14 Feb. 1994.

116. Intercountry Adoption: Office of Children's Issues, U.S. Dept. of State, *China, Country Specific Information*, http://adoption.state.gov/country/china.html (last visited 2 Mar. 2010) (hereinafter "Adoptions from China to the United States") (Almost 62,000 children have been adopted from China by U.S families in the last ten years.). *See* Chart: Total Adoptions to the United States (by country), note 20 *supra* (China has been the nation with the most adoptions to the U.S. four out of the last five years.).

117. Olsen, note 28 *supra.*

118. Nili Luo, *Ray Rushton Distinguished Lecturer Series: Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives* (15 Apr. 2005), in 35 Cumb. L. Rev. 597, 610-11 (2004). In 1999, China revised its adoption law to provide that a family's one-child quota would not be affected by any children they might adopt; only by their biological child. Although this is a step in the right direction, the law has a gaping loophole: it applies only to children who have passed through the social welfare system. Any other children adopted by a Chinese couple count as that couple's "one-child." *Id* at 611-13.

119. Olsen, note 28 *supra.*

120. Bagley, note 112 *supra,* at 188-89 (Many people still subscribe to old beliefs that favor male children in order to ensure that parents receive better support in their old-age and the carrying on of the family name.).

121. *Id.*

122. *Id.*

123. Luo, note 120 *supra,* at 613-14.

124. *See generally* Hague Adoption Convention, note 1 *supra.*

125. Adoptions from China to the United States, note 116 *supra.*

126. *Id.* The law requires that both parents be between thirty and fifty years old (or thirty and fifty-five if they are adopting a disabled child) and that they have a collective net worth of at least $80,000. In addition, it requires couples to be married for two years (five years if either has been previously divorced) and does not allow more than two divorces in the couple's past. *Id.*

127. *Id.*

128. Chart: Total Adoptions to the United States (by country), note 20 *supra.*

129. Hague Adoption Convention, note 1 *supra,* at 1141.

130. *Id.* at 1134-35.

131. Bartholet, note 18 *supra,* at 150.

132. *See* Part IV.B. *supra.*

133. *Id.*

134. Hague Adoption Convention, note 1 *supra,* at 1139-40.

135. *See* Part IV.C. *supra.*

136. *Id.*

137. *See* Part IV.D. *supra.*

138. *See* note 109 *supra.*

139. *See* Part IV. *supra.*

140. *See* Part IV.BA. *supra.*

141. *See* Part IV.C. *supra.*

142. *See* Part IV.D. *supra.*

143. *See* Part V. *supra.*

144. *See* Part VI. *supra.*

145. Hague Adoption Convention, note 1 *supra,* at 1134-35.

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Foreign Investment in Companies Considered "Strategic" to Russian National Security: Are the Rewards Worth the Effort?

By Daniel Ginzburg

I. Background

On November 12, 2009, in his state-of-the-nation address, Russian President Dmitri Medvedev proposed to modernize the Russian financial system and reconsider the role of the state in the national economy. Among his plans was the idea to disband some of Russia's seven state-owned corporations[1] and transform them into "joint-stock companies," i.e., private corporations open to private investors.[2] At a subsequent news conference, a presidential aide stated that Russian Technologies State Corporation ("Russian Technologies"), Rusnano, and Vnesheconombank would likely be transformed into such a corporate form as early as 2010.[3] The next day, President Medvedev ordered Prime Minister Putin to create a plan to reorganize the state-owned corporations.[4] In his state-of-the-nation address, Mr. Medvedev also called for a foreign policy aimed at attracting investments, noting that Russia should not be too proud to be "interested in the flow of [foreign] capital, new technologies and modern ideas."[5] He also stated that he would like to create a research and development center to support the hi-tech sector, "something on the lines of Silicon Valley."[6] Concurrently, Russia elevated its 2010 target for revenue from the state corporations to one hundred billion rubles (roughly equivalent to three and a half billion U.S. dollars). That figure is almost fifteen times the original target of seven billion rubles.[7] In keeping with the theme of economic liberalization, Mr. Medvedev, on his official web portal, supported the Asia-Pacific Economic Cooperation (APEC) summit's views against excessive protectionism.[8]

But the question must be asked: Can Russian laws support this new level of optimism, and should foreign investors take out their checkbooks and start writing? Maybe not so fast.

II. The Current State of Russian Regulation Over Foreign Investment in "Strategic" Companies

A. Overview

On 17 October 2009, just a few weeks before Mr. Medvedev's speech, the government of the Russian Federation issued Decree No. 838, "On the Endorsement of the Rules for Obtaining Preliminary Concordance for Foreign Investments in Strategic Enterprises" ("Decree 838").[9] This decree regulates the procedure for submission of applications in conformity with Federal Law No. 57-FZ of 29 April 2008, "Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defense and State Security" ("Law 57-FZ").[10] The latter law caused concern for international investors because it imposed new restrictions and additional requirements for foreign investment in business sectors that are considered to be strategically important to Russian national defense and security, especially when the investment results in foreign "control" over a strategic company. A Russian company is deemed to come under the "control" of a foreign investor when a transaction results:

- in the acquisition of "blocking rights," i.e., ownership of fifty percent plus one of a strategic company's shares, or twenty-five percent of voting shares where the acquisition is by a foreign state or international organization; or
- in the acquisition of the right to appoint a single executive body or over fifty percent of the board of directors.[11]

In the case of companies engaged in the extraction of oil, gas, or other natural resources, however, "control" has an even lower threshold and includes ownership or the ability to manage ten percent or more of voting shares (which is five percent for a foreign state or international organization) or to appoint over ten percent of the board of directors.[12]

Law 57-FZ lists forty-two strategically important activities, which include, *inter alia*:

- works related to hydrometeorological or geophysical processes;
- activities related to nuclear devices and radioactive substances;
- activities related to manufacturing or sales of coding/cryptographic equipment;
- activities related to manufacturing and trade of weapons and military machinery;
- aviation security and space activity;
- television and radio broadcasting, printing, and mass media publishing;
- media companies with a wide readership or number of viewers;
- exploration and production in subsoil areas of federal significance; and

- "harvesting aquatic biological resources," i.e., fishing.[13]

Although the number of economic sectors deemed strategically important seems limited, their number includes areas that are most attractive to foreign investors seeking to do business in Russia, e.g., oil and gas exploration and development. In addition, in accordance with Article 10(1)(5) of Law 57-FZ, any companies that have accepted orders from the Russian military within the five years preceding the inquiry year are also considered companies of strategic importance. Since Soviet times, however, as in the United States, the military-industrial complex places orders with a multitude of corporations, beginning with massive steel mills and ending with relatively small companies that produce a limited number of high-tech devices. As a result, the law reaches many more companies than is evident at first glance.

For example, entities seeking to invest in the three state corporations Mr. Medvedev seeks to reform—Russian Technologies, Rusnano and Vnesheconombank—will surely have to contend with Law 57-FZ. Russian Technologies alone has four hundred thirty-nine subsidiaries and is responsible for twenty-three percent of the volume of Russia's military-industrial complex.[14] The military also invests a large amount of resources in Rusnano.[15] Lastly, entities wishing to invest in Vnesheconombank may have restrictions placed on them by similar laws and require approval comparable to that required for strategic companies.[16] Thus, although the transformation of the three state corporations may be accomplished, Law 57-FZ will be an obstacle to foreign investment in the resulting joint-stock companies.

B. The Steps Necessary to Comply with Law 57-FZ

Transactions that may result in "control" over a strategic company by foreign investors require prior governmental approval, which is termed "preliminary coordination."[17] The request for preliminary coordination must be directed to what Law 57-FZ calls the "Authorized Body,"[18] which is currently the Russian Federal Antimonopoly Service (FAS). The request must specify the essential terms and conditions of the proposed transaction and include a detailed list of persons who may acquire control rights as a result of the transaction.[19]

Within three days after the filing for preliminary coordination has been completed, the Authorized Body must inquire of the Russian Federal Security Service (FSB) whether the proposed transaction poses a danger to national security.[20] Inquiries could also be sent to other departments, such as the Interagency Commission for the Protection of State Secrets.[21]

Once all relevant information has been gathered, the final decision regarding whether to grant preliminary coordination is made by the Russian Government Commission (the "Commission"), which is currently headed by the Prime Minister of the Russian Federation, Vladimir Putin.[22] The Commission may grant or deny the application, or grant it on condition that the petitioner agree to fulfill certain other obligations, as laid out in Article 12.[23] The Commission's decision may be contested in the Supreme Arbitration Court of the Russian Federation,[24] but it is unlikely to be overturned, given the Russian courts' general unwillingness to challenge the decisions of the other branches of government.[25]

Transactions executed in breach of Law 57-FZ are deemed void.[26] The parties to a void transaction may, in a court action brought by the Authorized Body, be ordered to disgorge everything received under such transaction.[27] If it is impossible to reverse the transaction, a court may order that, at the next general meeting of the strategic company's stockholders, the foreign investor be deprived of all voting rights.[28] Decisions of shareholders or other managing bodies made after an acquisition in violation of Law 57-FZ may also be voided.[29] Therefore, an investor's legal counsel should continually monitor the company's activity and verify its compliance with the relevant articles of the law.

C. The Lack of Clarity Faced by Foreign Investors

Unfortunately, the multitude of complex requirements in Law 57-FZ and Decree 838 is made worse by their attendant lack of clarity. For example, although a rudimentary question, it is not clear if a group of unaffiliated foreign investors who seek to purchase a number of shares sufficient to give them control over a strategic company must meet the requirements of Law 57-FZ, and, if so, whether they must do so as a group or individually. Ms. Svetlana Levchenko, Head of the Administration on the Control of Foreign Investment at the FAS, admits that many foreign investors do not understand the law and that every month the FAS receives dozens of inquires about the law's implementation.[30] In many cases, however, the answer is significantly delayed because the FAS itself needs to consult with other federal agencies.[31] Therefore, even at the earliest stages of a potential transaction involving Law 57-FZ, foreign investors should consult counsel competent in Russian law.

D. Foreign Entities Seeking to Invest in Russia Must Contend with Other Obstacles as Well

In another part of his state-of-the-nation address, President Medvedev pointed to "corruption, excessive bureaucracy and inadequate legal protection" as some of the major problems that keep foreign entities wary of investing in Russia.[32] Indeed, in Transparency International's latest Corruption Perceptions Index, Russia shared with Zimbabwe, Cameroon, and five other developing nations the dubious distinction of placing 146th out of 180 countries.[33] The U.S. Department of State

agrees with this analysis, warning that Russia has "a complex regulatory and legal system that requires professional help to navigate, widespread corruption, [and] a lack of respect for the rule of law…."[34] This regrettable troika also plays an important role in the preliminary coordination mandated by Law 57-FZ.

For example, every application made in accordance with Law 57-FZ is examined by officials in multiple government bodies, e.g., FAS, FSB, and various Ministries and other federal executive organs. As detailed as Law 57-FZ and Decree 838 are, they do not require that the Commission provide specific reasons for the denial of a petition for preliminary coordination. As is to be expected, such lack of uniformity and transparency in the decision-making process gives rise to opportunities for abuse. It is not uncommon for corrupt bureaucrats to seek kickbacks and other payments by endlessly stalling petitions as incomplete or falsely declaring a corporation as vital to national security. Moreover, unclear regulations regarding the fulfillment of continuing obligations in accordance with Article 12 of Law 57-FZ can create additional, continuing problems.

Russia is likewise infamous for its unequal enforcement of the law, especially in instances where the law is inconvenient for business allies of the government. One victim of such behavior was Shell Oil Corporation, which was forced to sell off its operations in Sakhalin Island to Gazprom (a private corporation, albeit with the Russian Government holding a controlling share) in return for $7.4 billion, an amount that experts consider to be half of its actual value.[35] In that case, Shell Oil was pressured into the sale by RosPrirodNadzor (Russia's version of the U.S. Environmental Protection Agency), which threatened to close down Shell's entire operation for purported environmental violations.[36] After Shell Oil agreed to the sale, "the environmental issue magically disappeared."[37] Incidentally, Mr. Medvedev was intermittently either Chairman or Deputy Chairman of Gazprom's Board of Directors from 2000 until 2007.[38] Indeed, the heads of many Russian government agencies concurrently occupy top positions in leading industrial enterprises, many of which are defined by the law as strategic. Thus, it is difficult to expect impartiality, and national security is frequently used as a pretext for protectionism.

III. Russia Must Do More to Attract Foreign Investors

Foreign direct investment in Russia plunged forty-five percent in the first half of 2009, mostly due to the global financial crisis.[39] Therefore, if President Medvedev truly seeks to increase foreign investment in the Russian economy, he should move the Duma to liberalize existing laws and make them more welcoming to foreign investors. Instead, Law 57-FZ substantially tightens regulations, especially in economic sectors outside of the traditional areas of national security, e.g., mass media and fishing. It is no surprise, then, that some experts believe that "the Russian investment framework belongs to the most restrictive regimes worldwide, as reflected in the OECD's [Organization for Economic Cooperation and Development's] measures for market openness in which Russia—already prior to the additional restriction of the new law [i.e., Law 57-FZ]—ranked third last."[40] Indeed, quite recently, the FAS and the Commission have stated that Law 57-FZ would be amended in the near future[41] and that foreign investors would be consulted regarding all proposed changes.[42] Such statements should probably be taken with a grain of salt, but foreign investors can at least look forward to some changes in the current unwieldy framework. Hopefully, the amendments will make Law 57-FZ clearer and uniformly applicable to all investors.

Endnotes

1. At the present time, there are seven state corporations in Russia: Vnesheconombank (the "Bank for Development and Foreign Economic Affairs"); Russian Technologies State Corporation (manufacturing everything from aerospace systems to high tech weapons platforms); Rusnano (which deals with nanotechnologies); the Deposit Insurance Agency (which has functions similar to the U.S. Federal Deposit Insurance Corporation); the Fund for Reforming the Housing and Utilities Sector; the Rosatom nuclear power corporation; and Olimpstroi (which is charged with construction duties for the Sochi 2014 Winter Olympics).
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9. Decree No. 838 of October 17, 2009. *See* http://www.businesspravo.ru/Docum/DocumShow_DocumID_158588.html (last visited on 30 Mar. 2010).

10. Federal Law No. 57-FZ of 29 Apr. 2008. *See* http://www.fas.gov.ru/english/legislation/20300.shtml (last visited on 30 Mar. 2010). The suffix "FZ" is a Russian acronym for "Federal'niy Zakon," i.e., "Federal Statute," and is appended to the end of all Russian federal laws.
11. Law 57-FZ art. 5(1).
12. Law 57-FZ art. 5(3).
13. Law 57-FZ art. 6.
14. *See* information about Russian Technologies State Corporation available at http://www.rostechn.ru/company (last visited on 30 Mar. 2010).
15. *U nanotehnologiye v Rossiye yest' budushiye* [Nanotechnology Has a Future in Russia], Rosnano Press Release, available at http://www.rosnano.ru/Post.aspx/Show/15869 (last visited on 30 Mar. 2010).
16. *Foreigners to Buy into Russian Banks: Central Bank*, REUTERS, 24 Aug. 2007, available at http://www.reuters.com/article/idUSL2427048720070824 (last visited on 30 Mar. 2010).
17. *See* Law 57-FZ art. 4(1); Decree 838 art. 3.
18. Law 57-FZ art. 4(1).
19. Law 57-FZ art. 8.
20. Law 57-FZ art. 10(1).
21. Law 57-FZ art. 10(4).
22. Law 57-FZ art. 11.
23. Law 57-FZ art. 11(1).
24. Law 57-FZ art. 11(7).
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International Section
Seasonal Meeting
October 26-30, 2010
Sydney, Australia

The 2010 Seasonal Meeting of the New York State Bar Association's International Section will be held in Sydney Australia, from Tuesday, October 26 through Saturday, October 30 at the Shangri-La Hotel.

Sydney is a large city, stretching nearly 60 miles from top to bottom. The harbor divides the city into northern and southern halves, with most of the attractions on the south shore. Most visitors spend their time on the harbor's south side, within an area bounded by Chinatown in the south, Harbour Bridge in the north, Darling Harbour to the west, and the beaches and coastline to the east.

Educational programs will be held in cooperation with local bar associations and law societies.

Mark your calendar now and plan to attend!!

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