

2011

International Arbitration

Steven Smith

David Foster

Marcus Quintanilla

Ivan Cingel

Robin Devaux

See next page for additional authors

Recommended Citation

Steven Smith et al., *International Arbitration*, 45 INT'L L. 95 (2011)
<https://scholar.smu.edu/til/vol45/iss1/8>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Arbitration

Authors

Steven Smith, David Foster, Marcus Quintanilla, Ivan Cingel, Robin Devaux, Spencer Jones, Kevin Rubino, Justin Mates, Benjamin Jones, Amal Bouchenaki, Michael Radine, and Solomon Ebere

International Arbitration

STEVEN SMITH, DAVID FOSTER, MARCUS QUINTANILLA, IVANA CINGEL, ROBIN DEVAUX, SPENCER JONES, KEVIN RUBINO, JUSTIN MATES, BENJAMIN JONES, AMAL BOUCHENAKI, MICHAEL RADINE, AND SOLOMON EBERE*

I. Introduction

The first section of this survey examines significant decisions from U.S. courts in 2010 that will be of interest to practitioners in the field of international commercial arbitration. In particular, the U.S. Supreme Court issued three noteworthy decisions construing the Federal Arbitration Act (FAA) and addressing whether issues concerning arbitrability were for the courts or the arbitrators to decide. There were also several noteworthy decisions addressing the application of arbitration clauses to non-parties, the status of “manifest disregard of the law” as a ground for vacatur of arbitral awards, and the availability of injunctive relief and discovery in aid of arbitration. A number of courts vacated arbitration awards. In another noteworthy development with potentially far-reaching implications, the English Court of Appeal held that an arbitration clause requiring the parties to appoint only members from an identified community is discriminatory, and thus void. The French Cour de Cassation, on the other hand, overturned a decision setting aside an International Chamber of Commerce partial award on the grounds that the arbitral tribunal had been irregularly constituted.

The second section of this survey looks at major developments from 2010 in the field of investment treaty arbitration. Important jurisdictional decisions included the provisional application of the Energy Charter Treaty in the Yukos shareholder cases, as well as the adoption by many tribunals of an objective definition of “investment” under the ICSID Convention. In awards on the merits, several tribunals addressed issues relating to fair and equitable treatment claims, including the issue of legitimate expectations, and one tribunal considered an argument raising protection of human rights under the defense of necessity. There were also several controversial annulment decisions, including one decision finding manifest excess of powers for disregard of the applicable law and another

* Steven Smith and David Foster are partners at O'Melveny & Myers LLP. Marcus Quintanilla, Ivana Cingel, Robin Devaux, Spencer Jones, Kevin Rubino, Justin Mates, and Benjamin Jones are all attorneys with O'Melveny & Myers LLP. Amal Bouchnaki and Michael Radine are attorneys at Gibson, Dunn, & Crutcher LLP and contributed to the section on Arbitration Developments in European Courts. Solomon Ebere is a Georgetown Global Law Scholar and contributed to the section on Investor-State Disputes.

finding insufficient disclosure of conflicts of interest, as well as several decisions on challenges to appointment of counsel and requests for provisional measures.

In other developments, the United Nations Commission on International Trade Law adopted the revised United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, while the International Bar Association adopted the revised IBA Rules on the Taking of Evidence in International Arbitration. Hong Kong, Singapore, and Ireland adopted new arbitration laws.

II. Arbitration Developments in U.S. Courts

A. INTERPRETATION AND ENFORCEMENT OF ARBITRATION CLAUSES

1. *Challenges to Validity of the Arbitration Agreement*

In *Rent-A-Center West, Inc. v. Antonio*,¹ the U.S. Supreme Court once again refined the law on issues of arbitrability and whether such issues are for the arbitrators or the courts to decide. The parties entered into a stand-alone agreement to arbitrate that contained a “delegation clause” providing that the arbitrator “shall have exclusive authority to resolve any dispute relating to the . . . enforceability. . . of [the] Agreement including. . . any claim that all or any part of [the] Agreement is void or voidable.”² In light of this clause, the Supreme Court held that the question of whether the arbitration agreement was unconscionable (and thus unenforceable) was a question for the arbitrator to decide.³

Noting that parties can agree to arbitrate “gateway” questions of arbitrability, the Court considered whether the delegation clause was valid under FAA section two.⁴ The Court distinguished two types of validity challenges—those that challenge the contract as a whole, and those that challenge the agreement to arbitrate itself.⁵ Only the latter are reserved to the courts; if a party challenges the contract as a whole, a court must refer the issue of validity to arbitration.⁶ Because the defendant sought to enforce the provision of the parties’ arbitration agreement that gave the arbitrators the exclusive authority to resolve any dispute relating to enforceability, while the plaintiff’s unconscionability challenge was directed to the validity of the arbitration agreement as a whole, the delegation provision had to be enforced and the validity question was for the arbitrators to decide.⁷ That the parties’ agreement was a stand-alone agreement to arbitrate was of no consequence: “Application of the severability rule does not depend on the substance of the remainder of the contract.”⁸

1. 130 S. Ct. 2772 (2010).

2. *Id.* at 2777.

3. *Id.* at 2775.

4. *Id.* at 2777-78.

5. *Id.* at 2778.

6. *Id.*

7. *Id.* at 2779.

8. *Id.*

2. Disputes Covered by the Arbitration Agreement

In *Granite Rock Co. v. International Brotherhood of Teamsters*,⁹ the Supreme Court addressed whether courts or arbitrators should determine the date on which an agreement to arbitrate was formed in the context of a dispute regarding when a union ratified a collective bargaining agreement (CBA) containing the arbitration clause.¹⁰ In reversing the court of appeals, the Court explained that the question of when the CBA was ratified (and thus formed) required judicial resolution because the date of ratification—either July 2004 or August 2004—determined whether the parties had consented to arbitrate claims concerning a strike in July.¹¹ The federal policy in favor of arbitration did not compel a different result: Supreme Court precedent has “never held that this policy overrides the principle that a court may submit to arbitration ‘only those disputes. . . that the parties have agreed to submit.’”¹² Moreover, the Court explained, the ratification date dispute did not “arise under” the CBA, because the date determined whether the CBA had even been formed when the acts giving rise to the claims took place.¹³

3. Parties Covered by the Arbitration Agreement

Two U.S. courts of appeal evaluated the applicability of arbitration clauses to non-signatories. In *Todd v. S.S. Mutual Underwriting Association (Bermuda)*,¹⁴ the Fifth Circuit held that non-signatories to arbitration agreements may sometimes be compelled to arbitrate. Citing the Supreme Court’s decision in *Arthur Anderson LLP v. Carlisle*,¹⁵ the Fifth Circuit concluded that “*Carlisle* has called into question [the Circuit’s prior holding] . . . that direct action plaintiffs cannot be required to arbitrate as third party beneficiaries of insurance contracts.”¹⁶ Accordingly, the Fifth Circuit remanded the case to the district court for further consideration.¹⁷

In *Baker & Taylor, Inc. v. AlphaCraze.Com Corp.*,¹⁸ the Second Circuit rejected an unusual motion filed by non-signatory defendants who sought to compel arbitration between the signatories but not participate in the arbitration themselves. In reversing the district court’s decision and reinstating the claims against the non-signatory defendants, the Second Circuit held that, because the defendants had disclaimed any right to arbitration under the governing agreement, they could not rely on the arbitration clause to compel the signatories to arbitrate.¹⁹

9. 130 S. Ct. 2847 (2010).

10. Although the case arose under federal labor law, the Supreme Court relied upon FAA precedents “because they employ the same rules of arbitrability that govern labor cases.” *Id.* at 2857 n.6.

11. *Id.* at 2860–61.

12. *Id.* at 2859.

13. *Id.* at 2861.

14. 601 F.3d 329 (5th Cir. 2010).

15. 129 S. Ct. 1896 (2009).

16. *Todd*, 601 F.3d at 335.

17. *Id.* at 336.

18. 602 F.3d 486 (2d Cir. 2010).

19. *Id.* at 491–92.

B. ENFORCEMENT OF AWARDS

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

In *Stolt-Nielsen v. AnimalFeeds International Corp.*,²⁰ the Supreme Court addressed the comparatively novel issue of whether class arbitration was contemplated by a standard arbitration clause. After the plaintiff filed a demand for class arbitration, the parties stipulated that their arbitration clause was “silent” on whether class arbitration was permissible and that they had not reached any agreement on the issue of class arbitration.²¹ The parties submitted the question of whether such arbitration was permissible to a panel of three arbitrators who were to follow the AAA’s Supplemental Rules for Class Arbitration.²² The panel considered several published arbitration awards permitting class arbitration where the arbitration clause was silent, as well as the plaintiff’s argument that public policy favored the construction of arbitration clauses to permit class arbitration, and issued a partial award construing the parties’ arbitration clause to permit class arbitration.²³

The Supreme Court held that the award should be vacated because the arbitrators had “exceeded [their] powers” under FAA section 10(a)(4),²⁴ which applies where an arbitrator “strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice.’”²⁵ “Because the parties [had] agreed [that] their [contract] was ‘silent’” on the subject of class arbitration, the Court found that “the arbitrators’ proper task was to identify the rule of law that governs in that situation”²⁶ and look to the “default rule” that would apply under either the FAA or one of the two bodies of law that the parties had argued applied to their contract.²⁷ The Court found that the arbitration panel had instead “proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied” and “simply imposed its own [view] of sound policy” regarding class arbitration.²⁸

The Court emphasized that the purpose of the FAA is to give effect to the parties’ intent and to enforce “private agreements to arbitrate. . . according to their terms.”²⁹ Relying on these principles, the Court concluded that “[a] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”³⁰ The Court further held that arbitrators may not infer an implicit agreement to authorize class arbitration “solely from the fact of the parties’ agreement to arbitrate. . . because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”³¹

20. 130 S. Ct. 1758 (2010).

21. *Id.* at 1765-66.

22. *Id.*

23. *Id.* at 1768-69.

24. *Id.* at 1767-68.

25. *Id.* at 1767.

26. *Id.* at 1768.

27. *Id.*

28. *Id.* at 1768-70.

29. *Id.* at 1773-76.

30. *Id.* at 1782.

31. *Id.* at 1775-76.

2. Other Enforcement Decisions

In *Polimaster Ltd. v. RAE Systems, Inc.*,³² the Ninth Circuit vacated a district court's confirmation of an arbitral award after concluding that it was the result of procedures inconsistent with the parties' agreement. The arbitration clause had provided for arbitration at "the defendant's [site]."³³ Polimaster, a Belarusian company, filed suit against RAE Systems, which is based in California, and agreed to arbitrate the dispute in California as provided in the arbitration clause.³⁴ But when RAE submitted counterclaims, Polimaster argued that they could only be heard in Belarus, the "defendant's [site]" as to those claims.³⁵ The arbitrator concluded that "defendant," as used in the arbitration clause, is the defendant on the initial complaint.³⁶ But the Ninth Circuit disagreed, finding that a defendant is simply one who defends another party's claim for relief.³⁷ It therefore concluded that the contract was unambiguous in providing that the counterclaims against Polimaster must be arbitrated in Belarus.³⁸

In *PMA Capital Insurance Co. v. Platinum Underwriters Bermuda, Ltd.*,³⁹ the Third Circuit affirmed a district court's vacatur of an arbitral award because the arbitrators had exceeded their powers in issuing an award that was completely irrational. In that case, the party that filed for arbitration had merely sought a declaration about the proper treatment of certain payments under the parties' agreement.⁴⁰ Instead, in a one-page award, the arbitrators awarded \$6 million in damages and ordered that the relevant provision be removed from the parties' agreement.⁴¹ The district court and Third Circuit concluded that this relief was "completely irrational."⁴²

Two of the three arbitrators who presided over the *PMA Capital* arbitration also presided over a related arbitration in which they failed to disclose their involvement in *PMA Capital*.⁴³ The arbitral award in that related case was also vacated by a district court based upon a finding of "evident partiality" on the part of the two *PMA Capital* arbitrators.⁴⁴ By serving on both arbitral panels, the arbitrators "could receive *ex parte* information," "be influenced by recent credibility determinations," and "influence each other's thinking" on relevant issues.⁴⁵ Thus, their failure to disclose their material relationship to the related arbitration justified vacatur.⁴⁶

32. 623 F.3d 832 (9th Cir. 2010).

33. *Id.* at 834.

34. *Id.*

35. *Id.* at 835.

36. *Id.*

37. *Id.* at 838.

38. *Id.*

39. 2010 WL 4409655 (3d Cir. Nov. 8, 2010).

40. *PMA Capital Ins. Co. v. Platinum Underwriters Berm., Ltd.*, 659 F. Supp. 2d 631, 637-38 (E.D. Pa. 2009).

41. *PMA Capital*, 2010 WL 4409655, at *1.

42. *Id.* at *2.

43. *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins.*, 2010 WL 653481 (S.D.N.Y. 2010).

44. *Id.* at *9.

45. *Id.* at *8.

46. *Id.* at *9.

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

It remains unsettled whether judicially created grounds not expressly set forth in the FAA—including manifest disregard of the law and complete irrationality—continue to be valid grounds for vacatur of arbitral awards following the Supreme Court’s 2008 decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*⁴⁷ The answer will likely depend on whether “manifest disregard” and “complete irrationality” are deemed extra-statutory grounds for vacatur—which would call their viability into doubt—or whether they instead refer collectively to the grounds set forth in section 10 of the FAA, or are merely shorthand for, or a gloss on, FAA sections 10(a)(3)-(4), which authorize vacatur when the arbitrators are “guilty of misconduct” or “exceed[] their powers.” The Supreme Court has declined to resolve this issue,⁴⁸ and circuit courts remain divided.

The Second Circuit previously affirmed the continued viability of “manifest disregard” on the statutory “shorthand” theory, indicating that this standard is a “judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA.”⁴⁹ But, that decision was reversed and remanded on separate grounds by the Supreme Court.⁵⁰ A subsequent Second Circuit case merely acknowledged *Stolt-Nielsen’s* findings, stated that *Hall Street* had placed “manifest disregard . . . into some doubt,” and concluded that “manifest disregard” was inapplicable on the facts of that case, without settling the issue.⁵¹ The Ninth⁵² and Sixth⁵³ circuits have held that “manifest disregard” remains a viable ground for vacatur, while the Fourth⁵⁴ and Tenth⁵⁵ circuits have applied the standard without squarely addressing its continued viability. In contrast, the Fifth,⁵⁶ Eighth,⁵⁷ and Eleventh⁵⁸ circuits have held that it is no longer a viable ground. The First Circuit stated in dicta in one opinion that *Hall Street* abolished “manifest disregard,” but in a subsequent opinion vacated an award based on the manifest disregard standard without discussing *Hall Street*.⁵⁹

C. AVAILABILITY OF INJUNCTIVE RELIEF IN AID OF ARBITRATION

Several federal courts have held that courts may not grant interim relief in connection with an arbitration falling under the New York Convention.⁶⁰ But the Ninth Circuit held in *Toyo Tire Holdings of Americas, Inc. v. Continental Tire North America, Inc.* that a district court may provide “interim injunctive relief on arbitrable claims [i]f necessary to preserve

47. 552 U.S. 576 (2008).

48. *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3.

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

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

51. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010).

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

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

54. *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183 (4th Cir. 2010).

55. *DMA Int’l, Inc. v. Qwest Comm’n Int’l, Inc.*, 585 F.3d 1341 (10th Cir. 2009).

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

57. *Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010).

58. *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010).

59. *Compare Ramos-Santiago v. UPS*, 524 F.3d 120 (1st Cir. 2008), *with Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008).

60. *See, e.g., Simula, Inc. v. Autliv Inc.*, 175 F.3d 716, 726 (9th Cir. 1999); *I.T.A.D. Assocs. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981); *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032, 1038 (3d Cir. 1974).

the status quo and the meaningfulness of the arbitration.”⁶¹ The Ninth Circuit distinguished an earlier case (*Simula, Inc. v. Autoliv Inc.*) where it had found that injunctive relief can be issued only by the arbitrator when parties have agreed to arbitration.⁶² But unlike *Simula*, the *Toyo Tire* case did not involve changing the status quo through injunctive relief. The Ninth Circuit also noted that Article 23(2) of the ICC Rules explicitly permits interim judicial relief if proper conditions are met.⁶³

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

The case law is unsettled on whether evidence can be obtained in aid of an international arbitration pursuant to 28 U.S.C. § 1782, which authorizes district courts to compel discovery “for use in a proceeding in a foreign or international tribunal.”⁶⁴ In a series of decisions granting requests under Section 1782 in connection with an arbitration between Ecuador and Chevron Corporation, several district courts recently held that, in contrast to an arbitral tribunal established by private parties, an arbitral tribunal established pursuant to a bilateral investment treaty does qualify as a “foreign or international tribunal” for purposes of Section 1782.⁶⁵

But, in *In re Caratube International Oil Co.*, although the district court assumed that arbitration under a bilateral investment treaty could fall within Section 1782, it nonetheless exercised its discretion to deny the petition.⁶⁶ The court reasoned that granting a party’s petition for discovery from a non-party would interfere with the parties’ bargained-for expectations concerning the arbitration process, including the adoption of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.⁶⁷

III. Arbitration Developments in European Courts

A. ENGLISH COURT OF APPEAL

In *Jivraj v Hashwani*,⁶⁸ the Court of Appeal held that an arbitration clause requiring the parties to appoint as arbitrators only members from the Ismaili community is discriminatory and thus void. The party appointing a non-Ismaili arbitrator argued that the arbitration clause violated the Employment Equality (Religion and Belief) Regulations 2003 (the “Regulations”) and the Human Rights Act 1998. The court agreed, observing that the

61. 609 F.3d 975, 981 (9th Cir. 2010).

62. See *Simula, Inc.*, 175 F.3d at 726.

63. *Toyo Tire Holdings*, 609 F.3d at 980-81.

64. 28 U.S.C. § 1782(a)(2010).

65. See *In re Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010); *Chevron Corp. v. Shefftz*, No. 10-mc-10352-JLT, 2010 WL 4985663, at *3 (D. Mass. Dec. 7, 2010); *In re Chevron Corp.*, No. 10-CV-2989-AW, 10-CV-2990-AW, 2010 WL 4880378, at *3 (D. Md. Nov. 24, 2010); *In re Veiga*, F. Supp. 2d, No. 10-370, 10-371, 2010 WL 4225564, at *8 & n.12 (D.D.C. Oct. 20, 2010), *appeal dismissed*, No. 10-7145, 2010 WL 5140467, at *1 (D.C. Cir. Dec. 17, 2010). Cf. *In re Winning (HK) Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at *9 (S.D. Fla. Apr. 30, 2010) (holding that an arbitral panel established by private parties in fact satisfied § 1782 because the award was subject to court review under English arbitration law, which the court found applied to the arbitration).

66. No. 10-0285, 2010 WL 3155822, at *3 (D.D.C. Aug. 11, 2010).

67. *Id.* at *4.

68. *Jivraj v. Hashwani*, [2010] EWCA (Civ) 712 (Eng.).

Regulations intended to define employment “in the broadest sense,” and would apply to all contracts to perform “services of any kind.”⁶⁹ The arbitrator takes on a quasi-judicial role in doing work that is irrelevant.⁷⁰ While the court recognized that the self-employed may be exempt, it found that arbitrators are only self-employed in the sense that their employer changes with each contract; they are still, in some sense, controlled by an employer.⁷¹

Although Regulation 7 exempts from the prohibition situations where the religious identity of the employee is necessary to the employment, the Court found the exemption inapplicable because the arbitration clause called for English law, which does not vary with the parties’ or arbitrators’ religion.⁷² Finally, the Court determined that the entire clause was void because the discriminatory element could not be severed.⁷³

B. FRENCH COUR DE CASSATION

In *Tecnimont v. Avax*,⁷⁴ the French Cour de Cassation overturned a decision of the Paris Court of Appeal⁷⁵ setting aside an ICC partial award on the grounds that the arbitral tribunal had been irregularly constituted. Avax contested the independence of the tribunal’s chair on grounds that his law firm represented affiliates of Tecnimont before and during the course of the arbitration. The Paris Court of Appeal rejected Tecnimont’s time-bar defense, found the challenge admissible, and held that the chair’s disclosure was not exhaustive and should have continued during the arbitration.

Without addressing the merits, the Cour de Cassation overturned that decision on a procedural ground, striking down the court of appeal’s decision on admissibility of the challenge, and remanded Avax’s challenge for reconsideration by the court of appeal in Reims. On remand, the court of appeal in Reims will therefore have to decide anew (i) whether it is bound by the ICC Court’s decision to reject the challenge against the chair, and (ii) whether it should enforce Article 11(2) of the ICC Rules providing that challenges to arbitrators’ independence are only admissible if submitted within thirty days from the date the challenging party was informed of the facts on which the challenge is based.

IV. Investor-State Disputes

A. JURISDICTION AND ADMISSIBILITY

1. *Provisional Application of Energy Charter Treaty*

In a long-awaited award on jurisdiction concerning claims against Russia under the Energy Charter Treaty (ECT), a tribunal constituted under Article 26 of the ECT held that it possessed jurisdiction to determine the claims made by three shareholders of Yukos Oil

69. *Id.* ¶ 13.

70. *Id.* ¶¶ 12, 14.

71. *Id.* ¶ 21.

72. *Id.* ¶¶ 27, 29.

73. *Id.* ¶ 34.

74. Cour de cassation [Cass.][supreme court for judicial matters] 1e civ., Nov. 4, 2010, Bull. civ. II, No. 09-12716 (Fr.).

75. Cour d’appel [CA][regional court of appeal] Paris, 1ere ch., Feb. 12, 2009, Section C. (Fr.).

Corporation, even though the ECT had not been ratified by the Russian Parliament after signature.⁷⁶ The tribunal analyzed Article 45 of the ECT, concerning the scope of the treaty's provisional application, and concluded that the ECT applied provisionally in its entirety in the Russian Federation until October 19, 2009, and consequently that Russia was bound by the investor-State arbitration provisions invoked by the claimants.⁷⁷ The decision on provisional application is likely to have significant implications for other potential claimants under the ECT as well as for the Russian Federation.

2. *Investor Standing*

In *Mobil Corp. v. Bolivarian Republic of Venezuela*,⁷⁸ the respondent challenged claimants' standing to bring a claim on the ground that one of the claimants was a "corporation of convenience" created for the sole purpose of gaining access to ICSID jurisdiction under the Netherlands-Venezuela BIT. The tribunal rejected that argument, finding that all of the claimants were nationals of the Netherlands as defined in the BIT.⁷⁹ The tribunal also rejected an argument that the corporate restructuring that led to the incorporation of the Dutch entity was an abusive manipulation of the ICSID system, although it held that it had no jurisdiction with respect to any dispute arising before the restructuring.⁸⁰

3. *Qualifying Investments*

The test for establishing what is, and is not, a qualifying "investment" under the relevant BIT and under the ICSID Convention continued to be a prominent subject of debate.

In *Alpha Projektholding GmbH v. Ukraine*, an award was rendered on November, 8 2010, in favor of the claimant (US \$5.25 million).⁸¹ One of the issues was whether the loan agreements and contracts between claimant and a Ukrainian state-owned entity constituted qualifying investments. The tribunal concluded that the claimant had made an "investment" as defined in the BIT, because, at a minimum, the claimant had a claim to money that had been given in order to create an economic value, and this was sufficient to meet the BIT's jurisdictional requirement.⁸²

The tribunal then considered the test for an "investment" as that term is used in the ICSID Convention.⁸³ Observing that the Convention did not define "investment," the tribunal criticized the test applied in *Salini Costruttori S.p.A. v. Kingdom of Morocco*⁸⁴ for

76. See *Hulley Enter. Ltd. (Cyprus) v. Russian Fed'n, Interim Award on Jurisdiction and Admissibility*, ¶¶ 244-398 (Perm. Ct. Arb. 2010); see also *Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, Interim Award on Jurisdiction and Admissibility* (Perm. Ct. Arb. 2010); *Veteran Petroleum Ltd. (Cyprus) v. Russian Fed'n, Interim Award on Jurisdiction and Admissibility* (Perm. Ct. Arb. 2010).

77. See, e.g., *Hulley*, ¶¶ 393-98.

78. ICSID Rep. Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010).

79. *Id.* ¶¶ 144, 160.

80. *Id.* ¶¶ 204-06.

81. ICSID Case No. ARB/07/16, Award (Nov. 8, 2010).

82. *Id.* ¶ 303.

83. *Id.* ¶ 310.

84. ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

imposing requirements not found in Article 25(1) of the Convention, specifically that the purported investments have contributed to the host country's economic development.⁸⁵

But, in *Global Trading Resources Corp. and Globex International, Inc. v. Ukraine*, a tribunal held that the concept of an investment could not be defined solely by reference to party intent; it had to adhere to an objective definition within the ICSID Convention framework.⁸⁶ The tribunal held that the claimants' case failed because purchase and sale contracts were not qualifying investments within the meaning of the relevant BIT,⁸⁷ and also because they could not qualify as an investment under Article 25(1) of the ICSID Convention.⁸⁸

In reaching this decision, the *Global Trading Resources* tribunal relied on the recent award in *Saba Fakes v. Republic of Turkey*,⁸⁹ where the tribunal concluded that the ICSID Convention provided an autonomous definition of an "investment" that could not be altered by contract or treaty for the purposes of establishing ICSID jurisdiction.⁹⁰ Significantly, while accepting that the ICSID Convention required an investment to satisfy certain objective criteria, the *Saba Fakes* tribunal specifically rejected the criterion of contribution to the host state's development.⁹¹ The tribunal also held that the claimant did not hold legal title over the temporary share certificates in the Turkish investment and consequently did not have an investment within the terms of the BIT or the ICSID Convention.⁹²

In the jurisdictional challenge to the Yukos shareholders referred to above, Russia argued that the claimants were only nominee shareholders in Yukos Oil Corporation and that their shares did not constitute a qualifying investment.⁹³ Russia also argued that there was no investment because no injection of foreign capital into the state had occurred.⁹⁴ The tribunal found that simple legal ownership was sufficient for the purposes of the treaty, and that there was no basis in the ECT for limiting "investments" to injections of foreign capital.⁹⁵

4. Admissibility/Premature Commencement of Arbitration

The problem of whether a claim is inadmissible or fails for lack of jurisdiction if the claimant fails to comply with the correct dispute resolution procedure arose in *Burlington Resources v. Republic of Ecuador*.⁹⁶ The claimant initiated ICSID arbitration under the U.S.–Ecuador BIT, but the respondent objected to jurisdiction over certain claims for

85. *Id.* ¶ 311-12.

86. *Global Trading Res. Corp. v. Ukraine*, ICSID Case No. ARB/09/11, Award, ¶ 43 (Dec. 1, 2010) (citing numerous authorities including *Salini*, ICSID Case No. ARB/00/4).

87. *Id.* ¶ 51.

88. *Id.* ¶ 56.

89. ICSID Case No. ARB/07/20, Award (July 14, 2010).

90. *Id.* ¶ 109 (citing *Joy Mining v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶¶ 49-50 (Aug. 6, 2004)).

91. *Saba Fakes*, ¶¶ 110-11. See also *LESI-Dipenta v. Algeria*, ICSID Case No. AB/03/08, Award, ¶ II.13(iv) (Jan. 10, 2005); *Salini*, ICSID Case No. ARB/00/4 ¶¶ 50-58.

92. *Saba Fakes*, ¶ 135.

93. *Hulley*, ¶¶ 420-21.

94. *Id.* ¶ 422.

95. *Id.* ¶¶ 429-31.

96. *Burlington Res. Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (June 2, 2010).

which claimant did not give notice or attempt negotiations for a period of six months prior to initiating arbitration, as required under the BIT.⁹⁷ The tribunal found that, due to the claimant's non-compliance, the tribunal lacked jurisdiction over the claims.⁹⁸

Substantially the same issue arose in *Murphy Exploration & Production Co. International v. Republic of Ecuador*.⁹⁹ The claimant filed a request for arbitration on March 3, 2008, under the U.S.–Ecuador BIT. Ecuador raised several objections to jurisdiction and admissibility, the most significant of which was that the claimant had not allowed a mandatory six-month period to pass after informing Ecuador of the alleged breach before initiating the arbitration.¹⁰⁰ The claimant argued that the cooling-off period was merely a procedural rather than jurisdictional requirement.¹⁰¹ The tribunal found in favor of Ecuador and held that it had no jurisdiction over the dispute.¹⁰² In doing so, it rejected the approach taken in cases such as *Lauder*¹⁰³ and *SGS v. Pakistan*,¹⁰⁴ which had treated consultation periods as directory and procedural.¹⁰⁵

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

Two ICSID tribunals recently upheld for the first time preliminary objections made under Article 41(5) of the ICSID Arbitration Rules, which were amended in 2006 to enable tribunals to dispose of claims summarily if they are “manifestly without legal merit.” In *Global Trading Resources*, two U.S. poultry exporters sought damages for Ukraine's failure to honor poultry sale and purchase contracts.¹⁰⁶ Ukraine filed a preliminary objection under Article 41(5), and the tribunal decided that the contracts could not qualify as an investment under the ICSID Convention.¹⁰⁷ Because the claims were without legal merit, the tribunal dismissed them pursuant to Article 41(5).¹⁰⁸

B. DECISIONS ON THE MERITS

1. Expropriation

In *Kardassopoulos v. Republic of Georgia*, an ICSID tribunal found that Georgia directly expropriated a Greek investor's exclusive rights in an oil pipeline.¹⁰⁹ The tribunal found that Georgia had failed to provide the investor due process of law.¹¹⁰ In defining due process, the tribunal cited the *ADC* tribunal's reasoning that the legal mechanism employed “must be of a nature to grant an affected investor a reasonable chance within a

97. *Id.* ¶¶ 251-52.

98. *Id.* ¶¶ 316-18.

99. ICSID Case No. ARB/08/4, Award on Jurisdiction (Dec. 15, 2010).

100. *Id.* ¶ 48.

101. *Id.* ¶ 140.

102. *Id.* ¶ 157.

103. *Id.* ¶ 147; see also *Lauder v. Czech Republic* (UNCITRAL), Award ¶ 187 (Sept. 3, 2001).

104. *Murphy*, ¶ 148; see also *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 184 (Aug. 6, 2003).

105. *Murphy*, ¶¶ 147, 154.

106. See *Global Trading Resources*, ICSID Case No. ARB/09/11.

107. *Id.* ¶¶ 28-29, 57.

108. *Id.* ¶ 58.

109. ICSID Case No. ARB/05/18 and ARB/07/15, Award, ¶ 387 (Mar. 3, 2010).

110. See *id.* ¶¶ 391-403.

reasonable time to claim its legitimate rights and have its claims heard.”¹¹¹ The tribunal found that Georgia engaged in “[b]ack-door press reports” and “opaque” dealings that had denied Kardassopoulos due process.¹¹²

2. *Fair and Equitable Treatment*

Several tribunals addressed claims for violation of the host State’s obligation to provide fair and equitable treatment (FET) to the foreign investor. Two important issues were whether the FET standards in the relevant BITs exceeded the international minimum standard under customary international law, and the legitimate expectations of the foreign investors.

In *Kardassopoulos*, the tribunal found that the respondent had failed to satisfy its fair and equitable treatment obligation under the Georgia–Israel BIT.¹¹³ The claimant argued that the BIT’s autonomous FET standard required a higher level of conduct than the international minimum standard.¹¹⁴ The tribunal agreed, interpreting the FET standard in accordance with the object and purpose of the treaty, noting the language in the preamble that encouraged the inflow and retention of foreign investment.¹¹⁵ The tribunal also found that claimant had a legitimate expectation that the host State would conduct itself in a “reasonably justifiable” manner.¹¹⁶

In *Suez v. Argentine Republic*, the tribunal was confronted with claims of FET violations under two BITs, one of which included the language that the obligation must be interpreted in accordance with “principles of international law.”¹¹⁷ The tribunal found that there was no reason to interpret the scope of either BIT provision as limited to the international minimum standard.¹¹⁸ The tribunal found that an important consideration for assessing the investors’ legitimate expectations is whether they “acted in reliance upon [the host state’s] laws and regulations and changed their economic position as a result.”¹¹⁹

In contrast, in *AES Summit Generation Ltd. v. Republic of Hungary*, the tribunal found that the foreign investor had no legitimate expectation that the host State would not reinstate an administrative pricing scheme for power generation.¹²⁰ The *AES* tribunal concluded that “any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times.”¹²¹ The tribunal stated that, under the ECT, a violation of fair and equitable treatment would be found only when a state’s acts or omissions are manifestly unfair and unreasonable.¹²²

111. *Id.* ¶ 396. See also *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006).

112. *Kardassopoulos*, ¶¶ 403–04.

113. *Id.* ¶ 451.

114. *Id.* ¶ 409.

115. *Id.* ¶ 433.

116. *Id.* ¶ 441.

117. ICSID Case No. ARB/03/17, Decision on Liability, ¶ 178 (July 30, 2010).

118. *Id.* ¶ 179.

119. *Id.* ¶ 207.

120. ICSID Case No. ARB/07/22, Award, ¶ 9.3.34 (Sept. 23, 2010).

121. *Id.*

122. *Id.* ¶ 9.3.40.

3. *Effective Means of Asserting Claims and Enforcing Rights*

In *Chevron Corp. v. Republic of Ecuador*, the tribunal accepted Chevron's arguments that the failure of the Ecuadorian courts to timely resolve contractual claims against the host State violated the U.S.–Ecuador BIT obligation to provide an effective means of asserting claims and enforcing rights.¹²³ The tribunal found that the BIT obligation was a potentially less-demanding standard than the denial of justice standard under customary international law.¹²⁴ The tribunal held that undue delay and manifestly unjust decisions would suffice to constitute a breach, with no requirement of government interference in judicial proceedings,¹²⁵ and thus found Ecuador to be in breach of the BIT based on the failure of the Ecuadorian courts to resolve cases that had been pending for more than fifteen years.¹²⁶

4. *Defense of Necessity*

In *Suez v. Argentine Republic*, the tribunal addressed an argument by Argentina that its measures were justified by the defense of necessity under customary international law in order to safeguard the human right to water.¹²⁷ The tribunal found: (1) that Argentina failed to satisfy the requirements of the defense, as it had other means available to safeguard its essential interests, (2) that Argentina had contributed to the situation of necessity, and (3) that the State's human rights obligations did not trump its obligations to foreign investors under the BIT.¹²⁸

C. ANNULMENT AND ENFORCEMENT ACTIONS

1. *Decisions on Stays of Enforcement*

Following the issuance of the *Kardassopoulos* Award earlier this year, Georgia moved for an unconditional stay, and the investors accepted a stay subject to a condition of security.¹²⁹ In making its Decision on the Stay of Enforcement of the Award, the *ad hoc* Committee considered the difficulty of enforcing ICSID awards in Georgia, as well as the protracted character of the underlying dispute, and conditioned the stay on Georgia's providing an unconditional and irrevocable bank guarantee of a reputable international bank.¹³⁰ Additionally, the Committee stated that a stay of enforcement during the annulment proceeding "is by no way automatic."¹³¹ This contrasts with the decision of the *ad hoc* Committee in *Víctor Pey Casado & Fondation President Allende v. Republic of Chile*, which

123. Partial Award on the Merits, ¶ 242 (Perm. Ct. Arb. 2010).

124. *Id.* ¶ 244.

125. *Id.* ¶ 248.

126. *Id.* ¶ 262.

127. *Suez*, ICSID Case No. ARB/03/17, ¶ 232.

128. *Id.* ¶¶ 238–42.

129. *Kardassopoulos*, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award, ICSID Case Nos. ARB/05/18 and ARB/07/15, ¶¶ 27–28 (Nov. 10, 2010).

130. *Id.* ¶¶ 43–45.

131. *Id.* ¶ 26.

stated that “absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic.”¹³²

2. *Decisions on Applications for Annulment*

There were two significant (and controversial) ICSID annulment decisions this year, both involving Argentina. In *Sempra Energy International v. Argentine Republic*, Argentina requested annulment of a 2007 ICSID award holding that Argentina had breached the FET standard and the umbrella clause of the United States-Argentina BIT.¹³³ The *ad hoc* annulment Committee annulled the award on the basis that the tribunal had disregarded the law and that this constituted a manifest excess of its powers.¹³⁴ The Committee reasoned that there was a fundamental distinction to be drawn between an erroneous application of the law, which was not a ground for annulment, and a wholesale disregard for the applicable rules of law, which might constitute a ground for annulment if found to be a manifest excess of the tribunal’s powers.¹³⁵ The Committee concluded that the tribunal, in failing to apply the applicable law, acted in manifest excess of powers, because it was “obvious from a simple reading of the reasons of the tribunal that it did not identify or apply Article XI of the BIT as the applicable law.”¹³⁶

This decision provoked considerable debate and criticism, because it is unclear where the line should be drawn between a simple error of law, which does not permit annulment of the award, and a “manifest” error, which does. It also prompted fresh suggestions that the present annulment system under the ICSID Convention should be revised, to be replaced with a more formal, investment-law appellate system.

Criticism of the annulment system was further fueled by the decision of the annulment Committee in *Compania de Aguas del Aconquija S.A. v. Argentine Republic*. Argentina filed an application for annulment of the Award dated August 20, 2007, based on multiple grounds under Article 52(1) of the ICSID Convention.¹³⁷ Most significantly, Argentina sought annulment on the ground that the tribunal was not properly constituted, after discovering, subsequent to the rendering of the award, that one of the arbitrators was a member of the board of directors of UBS, the single largest shareholder in claimant Vivendi Universal.¹³⁸

The *ad hoc* Committee upheld the award but was critical of the steps taken by the arbitrator to determine whether a conflict of interest might arise from her directorship of UBS.¹³⁹ The Committee concluded that the relationship between UBS and the claimants

132. ICSID Case No. ARB/98/2, Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, ¶ 25 (May 5, 2010).

133. See *Sempra Energy Int’l v. Argentine Republic (U.S. v. Arg.)*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, ¶ 1 (2010).

134. *Id.* ¶ 219.

135. *Id.* ¶ 173.

136. *Id.* ¶¶ 209-219.

137. *Compania de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic’s Request for Annulment of the Award rendered on 20 August 2007, ¶ 2 (Aug. 10, 2010).

138. *Id.* ¶ 20.

139. *Id.* ¶ 232.

had no material impact upon the decision of the tribunal—a kind of “harmless error” standard previously unfamiliar in ICSID jurisprudence.¹⁴⁰

D. PROVISIONAL MEASURES

In *Quiborax S.A. v. Bolivia*, the claimants initiated arbitration proceedings against Bolivia in October of 2005 alleging that the respondent had expropriated their property in breach of the Bolivia-Chile BIT. Tensions escalated between the parties, and Bolivia initiated criminal proceedings against several individuals involved in the claimants’ Bolivian operations.¹⁴¹ The claimants filed a request for provisional measures, seeking suspension of the Bolivian criminal proceedings and alleging impairment of their rights.¹⁴²

The tribunal found that there was a clear link between the criminal proceedings and the ongoing arbitration,¹⁴³ and that the Bolivian criminal proceedings posed a threat to the procedural integrity of the arbitration, particularly with respect to the claimants’ right to access evidence through potential witnesses.¹⁴⁴ Thus, if the measures were intended to protect the procedural integrity of the arbitration, then they were by definition urgent. As a result, the tribunal concluded that the requested provisional measures were necessary,¹⁴⁵ despite Respondent’s argument that the measure would violate Bolivia’s sovereignty.¹⁴⁶

V. Other Developments

In May of 2010, the International Bar Association (IBA) adopted the new IBA Rules on the Taking of Evidence in International Arbitration. The new rules apply to all arbitrations in which the parties agree to apply them, whether as part of new arbitration agreements, or in determining the rules of procedure in a pending or future arbitration.¹⁴⁷

In June of 2010, UNCITRAL adopted the revised UNCITRAL arbitration rules, which went into effect on August 15, 2010. The revised arbitration rules will apply to any new arbitration agreements adopting the UNCITRAL Rules that are concluded after August 15, 2010, unless the parties have agreed otherwise.¹⁴⁸

There have also been several noteworthy developments in national arbitration laws. Ireland passed the Arbitration Act of 2010 that incorporates the entire text of the UNCITRAL Model Law.¹⁴⁹ The act applies to all arbitrations commenced in Ireland after the date the act came into operation and does away with the historical distinction between

140. *Id.* ¶ 238.

141. ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶¶ 29-32 (Feb. 26, 2010).

142. *Id.* ¶¶ 46-64.

143. *Id.* ¶ 121.

144. *Id.* ¶ 148.

145. *Id.* ¶¶ 153, 163.

146. *Id.* ¶ 164.

147. See *IBA Announces Approval of Revised Evidence Rules*, INT’L BAR ASS’N, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=AD2E4AFA-F3E5-4009-99BC-6745C8B97648> (last visited Jan. 22, 2011).

148. See Press Release, Revised UNCITRAL Arbitration Rules Adopted, U.N. Press Release UNIS/L/139 (June 29, 2010), available at <http://www.unis.unvienna.org/unis/pressrels/2010/unisl139.html>; UNCITRAL Arbitration Rules, art. 1(2)(2010).

149. See Arbitration Act 2010 (Act No. 1/2010) (Ir.) § 6, available at <http://www.irishstatutebook.ie/2010/en/act/pub/0001/print.html>.

domestic and international arbitration.¹⁵⁰ Similarly, Hong Kong passed a new Arbitration Ordinance that adopts a single regime based on the UNCITRAL Model Law for domestic and international arbitration.¹⁵¹ The new Ordinance, passed in November 2010, significantly reforms arbitration law in Hong Kong but will likely not become effective until sometime in 2011. Singapore's International Arbitration Act was also recently amended in part to provide that a court may grant interim measures in aid of arbitration irrespective of whether the arbitration is seated in Singapore.¹⁵²

150. *See id.* §§ 3, 6.

151. *See* Arbitration Ordinance, No. 17/2010, (2010) (H.K.) §§ 4, 5, *available at* <http://www.legco.gov.hk/yr10-11/english/ord/ord017-10-e.pdf>.

152. *See* International Arbitration (Amendment) Bill, 2009 (Bill No. 20/2009) (Sing.) § 4, *available at* <http://www.parliament.gov.sg/Publications/090020.pdf>.