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International Arbitration

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I. Introduction

This article surveys developments in international arbitration during 2013 and is organized into four topical sections.

The first section surveys significant U.S. court actions in 2013 relevant to international commercial arbitration. The U.S. Supreme Court issued two notable decisions in 2013 addressing the availability of class arbitration, and it heard oral arguments in a significant case on the roles of courts and arbitrators in determining whether pre-conditions to arbitration under multi-stage dispute resolution agreements have been met. There were also a number of noteworthy federal district and appellate court decisions on preemption of state law under the Federal Arbitration Act (FAA), the domestic enforcement of foreign arbitral awards, grounds for vacatur under the FAA, and the availability of discovery in the United States in aid of foreign arbitration proceedings.

The second section of this survey examines significant arbitration decisions from foreign courts. In one significant development, the Singapore Court of Appeal reversed a lower appellate decision to permit a party to challenge the enforcement of awards rendered in Singapore even after the expiration of the period set aside for proceedings. In another noteworthy decision, a Chinese court refused to enforce an arbitration award rendered by the Shanghai International Arbitration Centre (SHIAC) following its recent separation from the China International Economic and Trade Arbitration Commission (CIETAC). Finally, the Indian Supreme Court overruled its prior decisions and narrowly construed the public policy grounds on which recognition and enforcement of foreign arbitral awards may be denied.

The third section of this survey looks at major developments from 2013 in the field of investment treaty arbitration. Important jurisdictional decisions addressed the definition of “investment” under various investment treaties, the pre-arbitration steps necessary to satisfy “local courts” requirements, the dismissal of a treaty claim on the basis of corruption in the making of the investment, and the perennial question of whether a Most Fa-

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vored Nation (MFN) clause may extend such treatment to the dispute resolution clause of a bilateral investment treaty (BIT). In awards on the merits, key decisions addressed the contours of the “fair and equitable treatment” standard and the rules regarding expropriation.

Finally, the fourth section of this survey briefly addresses recent revisions to arbitration rules and the development of soft-law sources. Noteworthy developments include the release of new arbitration rules by the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC), the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, and the release by the International Bar Association (IBA) of its Guidelines on Party Representation in International Arbitration.

II. Arbitration Developments in U.S. Courts

A. CLASS ARBITRATION WAIVERS

Following its landmark ruling in *AT&T Mobility LLC v. Concepcion*,¹ the U.S. Supreme Court, again, considered the viability of class action waiver provisions in mandatory arbitration clauses in *American Express Co. v. Italian Colors Restaurant*.² In this case, the U.S. Court of Appeals for the Second Circuit found that a class action waiver was unconscionable on the basis of expert evidence demonstrating that individual arbitration would have been cost prohibitive.³ The Supreme Court then considered the case to determine whether courts may, consistent with the FAA, invalidate arbitration agreements based on their failure to provide for class arbitration of federal-law claims.⁴

The Supreme Court explained that neither the antitrust laws underlying American Express’s arbitration claims nor congressional approval of the procedural rule creating the class action constituted a “contrary congressional command” overriding the FAA’s instruction to “rigorously enforce arbitration agreements according to their terms.”⁵ The Court then held inapplicable the “effective vindication” exception to FAA enforcement, which applies when an arbitration agreement eliminates a party’s right to pursue a statutory remedy.⁶ The doctrine could not invalidate the class waiver because “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”⁷ The Court also expressed concern that, under the Second Circuit’s holding, no class action waiver could be enforced without expert evidence showing the economic feasibility of individual actions.⁸

But the Court left open the potential application of the effective vindication doctrine in circumstances where “filing and administrative fees attached to arbitration . . . make access

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

2. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013).

3. *Id.* at 2308.

4. *Id.* at 2307.

5. *Id.* at 2309.

6. *Id.* at 2310.

7. *Am. Express Co.*, 133 S. Ct. at 2311.

8. *Id.* at 2312.

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to the forum impracticable.”⁹ The U.S. Court of Appeals for the Ninth Circuit seized on this language in *Chavarria v. Ralphs Grocery Co.*, holding that Ralph’s mandatory arbitration policy, which exposed employees to the risk of significant arbitration fees, was unconscionable under California law.¹⁰ The Ninth Circuit explained that FAA preemption of state laws with a disproportionate impact on arbitration “cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration.”¹¹ Rather, arbitration agreements are unenforceable when they are the products of “abuses of bargaining power.”¹²

B. DECISIONS ON THE ARBITRATOR’S ROLE IN DETERMINING ARBITRABILITY

1. Interpretation of Whether an Arbitration Clause Permits Class Arbitrations

In *Oxford Health Plans v. Sutter*,¹³ the U.S. Supreme Court considered the validity of an arbitrator’s decision to permit class arbitration following its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, which held that class arbitration is permitted only if the parties had authorized it.¹⁴ The parties in *Oxford Health* had stipulated that the arbitrator should decide whether the arbitration clause permitted class arbitration, and the arbitrator concluded that the broad language of the agreement expressed the parties’ intent to allow it.¹⁵ The Supreme Court affirmed the arbitrator’s decision, noting the parties’ express agreement in *Oxford Health* to have the arbitrator determine whether the contract provided for class arbitration.¹⁶ Thus, the only question for the Court was “whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.”¹⁷ The Court found that the arbitrator’s decision was based upon contractual language and therefore must be sustained.¹⁸

Following *Oxford Health*, the U.S. Court of Appeals for the Sixth Circuit held that whether an arbitration agreement permits class arbitration is presumptively for the courts to determine, absent a clear and unmistakable agreement between the parties to vest that decision in the arbitrator.¹⁹ In *Reed Elsevier, Inc. v. Crockett*, Crockett had filed an arbitration demand on behalf of himself and two classes.²⁰ In response, Reed Elsevier sought a declaratory judgment that the arbitration agreement did not permit class arbitration and obtained summary judgment in its favor.²¹ On appeal, the Sixth Circuit noted that *Oxford Health* had left open the question of whether the availability of class arbitration is a gateway issue of arbitrability to be decided by the courts in the first instance or a subsidiary

9. *Id.* at 2310–11.

10. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926–27 (9th Cir. 2013).

11. *Id.* at 927.

12. *Id.*

13. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

14. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010).

15. *Oxford Health Plans*, 133 S. Ct. at 2067–68.

16. *Id.* at 2067–71.

17. *Id.* at 2068.

18. *Id.* at 2071.

19. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 597, 600 (6th Cir. 2013).

20. *Id.* at 596.

21. *Id.* at 596–97.

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issue presumptively committed to the arbitrator.²² The Sixth Circuit determined that the availability of class arbitration was a gateway issue “which is reserved for judicial determination unless the parties clearly and unmistakably provide otherwise.”²³

2. *Decisions on Gateway Questions of Arbitrability*

On December 2, 2013, the Supreme Court heard oral arguments in the case of *BG Group PLC v. Republic of Argentina* on whether, in disputes involving a multi-stage dispute resolution process, the determination as to whether a precondition to arbitration has been met is a question for the courts or for the arbitrator.²⁴ BG Group had initiated arbitration under the terms of the Argentina-United Kingdom BIT without first satisfying a provision requiring eighteen months of litigation in the Argentine courts as a precondition to arbitration.²⁵ The BIT tribunal found that BG’s claim was admissible and that it had jurisdiction notwithstanding the eighteen-month litigation precondition, and it ultimately issued an award in BG Group’s favor.²⁶ The district court for the District of Columbia (D.C.) denied Argentina’s attempt to overturn the award.²⁷ On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed.²⁸ While acknowledging that the incorporation of the UNCITRAL Arbitration Rules (UNCITRAL Rules) delegated questions of arbitrability to the arbitrator, the Circuit Court held that the satisfaction of the local courts requirement was a necessary precondition to the triggering of the BIT’s arbitration clause, including the rules delegating arbitrability issues to the arbitrators.²⁹ BG Group petitioned the Supreme Court for certiorari, which the Court granted in June of 2013.³⁰

In *Oracle America, Inc. v. Myriad Group A.G.*, the Ninth Circuit also had the opportunity to consider whether, under the UNCITRAL Rules, it is the courts or the arbitrators who decide questions of arbitrability.³¹ Unlike the provisions of the BIT in *BG Group*, the arbitration clause at issue in *Oracle* contained no procedural preconditions to arbitration.³² Rather, the clause simply specified that any dispute arising out of or related to the license agreement would be resolved by arbitration administered by the American Arbitration Association in accordance with the UNCITRAL Rules.³³ On appeal, the Ninth Circuit held that the UNCITRAL Rules delegate resolution of gateway questions of arbitrability to the arbitrator.³⁴ Thus, when commercially sophisticated parties incorporate the UNCITRAL Rules into their arbitration agreement, there is a clear and unmistakable agree-

22. *Id.* at 597–99.

23. *Id.* at 599.

24. Petition for Writ of Certiorari at 3, *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363 (2012) (No. 12–138), 2012 WL 3091067, at *3.

25. *Id.* at 4–9.

26. *Id.* at 10–12.

27. *Id.* at 11–12.

28. *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1366 (D.C. Cir. 2012).

29. *Id.* at 1370–72.

30. Petition for Writ of Certiorari, *BG Grp.*, 665 F.3d (No. 12–138); Order Granting Certiorari, *BG Grp. PLC v. Republic of Argentina*, 133 S. Ct. 2795 (2013) (No. 12–138).

31. *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069 (9th Cir. 2013).

32. *See id.* at 1071; *see also BG Grp.* 665 F.3d at 1370–72.

33. *Oracle Am.*, 724 F.3d at 1071.

34. *Id.* at 1072–75.

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ment to vest the arbitrator with authority to determine issues of arbitrability.³⁵ In so holding, the Ninth Circuit joins the Second and D.C. Circuits, which have issued similar holdings in prior cases.³⁶

C. DECISIONS ON FAA PREEMPTION POST-*Concepcion*

This year, again, saw federal courts consider questions of FAA preemption in light of the Supreme Court's landmark holding in *AT&T Mobility LLC v. Concepcion*. In two such cases, the Ninth Circuit followed *Concepcion*'s pro-arbitration lead and held that the FAA preempted state public policies.

In *Mortensen v. Bresnan Communications, LLC*, a Montana district court refused to compel arbitration based on a Montana policy invalidating contracts of adhesion that contain involuntary waivers of fundamental constitutional rights.³⁷ On reconsideration, the Montana district court refused to extend *Concepcion* to preempt the Montana policy, observing that *Concepcion* limited the FAA's savings clause only with respect to unconscionability and class-waiver provisions.³⁸ The Ninth Circuit reversed, holding that under *Concepcion* "[a]ny general state-law contract defense, based on unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA."³⁹

In *Ferguson v. Corinthian Colleges, Inc.*, a California district court similarly declined to enforce an arbitration agreement on state public policy grounds—specifically, California's *Broughton-Cruz* rule exempting claims for public injunctive relief from arbitration,⁴⁰ which the Ninth Circuit previously enforced in *Davis v. O'Melveny & Myers*.⁴¹ Revisiting the rule post-*Concepcion*, the Ninth Circuit overturned its own decision in *Davis* and held that the FAA preempted the rule where it "prohibit[ed] outright arbitration of a particular type of claim."⁴²

D. DECISIONS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In a recent New York district court decision, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, the court declined to defer to a Mexican appellate judgment annulling an arbitration award on the ground that the Mexican judgment "violated basic notions of justice."⁴³ Following a lengthy ICC arbitration, the plaintiff, COMMISA, had obtained a sizeable award against a subsidiary of Mexico's national oil company, Pemex.⁴⁴ COMMISA immediately sought and obtained confirmation of the award in a U.S. district court, while the Pemex subsidiary sought an annulment

35. *Id.* at 1074–75.

36. *Id.* at 1073–74.

37. *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1156 (9th Cir. 2013).

38. *Id.*

39. *Id.* at 1159.

40. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 933–34 (9th Cir. 2013).

41. *See Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

42. *Ferguson*, 733 F.3d at 934.

43. *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 CIV. 206 AKH, 2013 WL 4517225, at *1 (S.D.N.Y. Aug. 27, 2013).

44. *Id.* at *5–6.

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in Mexico.⁴⁵ After several attempts, the Mexican court annulled the award, relying heavily on a statute enacted only after the arbitration award was made.⁴⁶ The Second Circuit remanded the confirmation of the award to the district court to address the effect that the Mexican annulment should have on the U.S. confirmation.

Finding that public policy provided a basis to ignore a foreign judgment nullifying an arbitration award, the New York district court refused to defer to the Mexican appellate decision because it violated “basic notions of justice in that it applied a law that was not in existence at the time the parties contract was formed and left COMMISA without an apparent ability to litigate its claims.”⁴⁷ Accordingly, the district court granted COMMISA’s renewed motion to confirm the arbitration award.⁴⁸

In *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, the U.S. Court of Appeals for the Fifth Circuit refused to enforce a foreign arbitration award against two Chinese entities and the People’s Republic of China under an alter ego theory.⁴⁹ The purported award debtors argued that the award could not be enforced against them due to the court’s lack of personal jurisdiction.⁵⁰ Joining the Second, Third, Fourth, and Eleventh Circuits, the Fifth Circuit held that, although personal jurisdiction is not specifically identified as a ground for non-recognition under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), refusal of recognition for lack of personal jurisdiction is “appropriate as a matter of constitutional due process.”⁵¹

In *Sanofi-Aventis Deutschland GmbH v. Genentech, Inc.*, the Federal Circuit considered whether a domestic judgment should enjoin a foreign arbitration.⁵² The case arose out of a dispute between patent-holder Sanofi and licensee Genentech relating to sales of Genentech’s medications, with Sanofi claiming patent infringement and violation of the parties’ licensing agreement.⁵³ Sanofi initiated an ICC arbitration against Genentech under their licensing agreement and, shortly afterward, both parties initiated a patent litigation in U.S. federal court.⁵⁴ The patent actions were consolidated, and Genentech eventually won a judgment according to which no drug infringed Sanofi’s patents.⁵⁵ Genentech then sought to enjoin Sanofi from continuing with the foreign arbitration.⁵⁶

Applying a three-factor test from the Ninth Circuit, the federal circuit declined to issue the injunction. The court first explained that the anti-infringement action was not dispositive of Sanofi’s claims in arbitration because “the meaning of infringement under the Agreement,” as determined according to German law—the substantive law applicable in the arbitration—“and the meaning of infringement under U.S. law are not functionally

45. *Id.* at *6.

46. *Id.* at *7.

47. *Id.* at *1.

48. *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.*, 2013 WL 4517225, at *1.

49. *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding*, 703 F.3d 742, 745 (5th Cir. 2012).

50. *Id.* at 746.

51. *Id.* at 748–50.

52. *Sanofi-Aventis Deutschland GmbH v. Genentech*, 716 F.3d 586, 588 (Fed. Cir. 2013).

53. *Id.* at 588–89.

54. *Id.* at 589.

55. *Id.*

56. *Id.* at 590.

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the same.”⁵⁷ The court then considered whether the foreign arbitration would impair a policy of the enjoining forum and whether the injunction would unduly threaten comity. The federal circuit concluded that the injunction would “frustrate the [United States’] interest in enforcing forum selection clauses,” in turn hindering international trade relations.⁵⁸

The FAA does not expressly authorize an award of attorneys’ fees in a proceeding to confirm a foreign arbitration award, but this year two more district courts awarded attorneys’ fees to parties enforcing such awards. In *Ministry of Defense & Support v. Cubic Defense Systems*, a California district court followed the Ninth Circuit’s instruction that “federal law permits an award of attorney’s fees in an action under the [New York] Convention, as it does in other cases,”⁵⁹ and it awarded fees to a party where the arbitration debtor “simply ignored the validity of the [a]rbitration [a]ward and sought to avoid payment.”⁶⁰ Citing *Cubic Defense Systems* with favor, a D.C. district court similarly ordered the Dominican Republic to pay the award creditor’s attorneys’ fees where the state had unjustifiably and “obstinately refused to participate in [the confirmation] action, resulting in a default and default judgment being enforced against it.”⁶¹

E. CONTINUING VIABILITY OF MANIFEST DISREGARD

After recognizing the continuing viability of “manifest disregard” as a ground for vacatur last year, the Fourth Circuit vacated an award on “manifest disregard” grounds in *Dewan v. Walia*.⁶² Specifically, an arbitrator construed a release agreement, in which an employee released its employer from any and all claims, as only extending to court actions, and awarded the employee a substantial sum in arbitration.⁶³ In vacating the award, the Fourth Circuit found that the release language clearly barred all causes of action, including in arbitration, such “that the [a]rbitrator manifestly disregarded the law by holding the [r]elease valid and enforceable but nevertheless arbitrating Walia’s counterclaims arising out of his employment with the [c]ompany.”⁶⁴

F. AVAILABILITY OF DISCOVERY IN AID OF ARBITRATION

Weighing in on the question of whether a private commercial arbitration qualifies as a “tribunal” under 28 U.S.C. § 1782, a California district court, in *In re Dubey*, followed the Second and Fifth Circuits in holding that § 1782 does not permit discovery for use in a private commercial arbitration.⁶⁵ After thoroughly examining conflicting decisions reached by other courts, the *Dubey* court explained that a “reasoned distinction” could be

57. *Sanofi-Aventis Deutschland GmbH*, 716 F.3d at 593.

58. *Id.* at 594.

59. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1104 (9th Cir. 2011).

60. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, No. 98–CV–1165–B, 2013 WL 55828, at *6 (S.D. Cal. Jan. 3, 2013).

61. *Concesionaria Dominicana de Autopistas y Carreteras, SA v. Dominican State*, 926 F. Supp. 2d 1, 3 (D.D.C. 2013).

62. *Dewan v. Walia*, No. 12–2175, 2013 WL 5781207, at *1 (4th Cir. Oct. 28, 2013).

63. *Id.* at *1–3.

64. *Id.* at *7.

65. *In re Dubey*, No. SACV 13–677 JVS SHX, 2013 WL 2896799, at *3–4 (C.D. Cal. June 7, 2013).

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drawn between state-sponsored arbitral bodies and private commercial arbitrations that would justify the imposition of § 1782 with respect to the former but not the latter.⁶⁶ The court also expressed concern that construing § 1782 to apply to private commercial arbitrations would “defeat the timeliness and cost-effectiveness of arbitration” and place heavy burdens on the federal court system.⁶⁷ Because the court held that there was no “tribunal” within the meaning of the statute in private commercial arbitration, it did not reach whether an arbitration seated in the United States and held between domestic parties but conducted pursuant to the international arbitration rules of the American Arbitration Association is “international” for purposes of § 1782.⁶⁸

III. Arbitration Developments in Foreign Courts

In *PT First Media TBK v. Astro Nusantara International BV*,⁶⁹ the Singapore Court of Appeal overturned the decision of the High Court⁷⁰ to hold that, where the awards in question were rendered in Singapore, the Singapore International Arbitration Act governed and barred an award debtor’s challenge made only after award creditors had secured court judgments and enforcement orders, and the period for setting aside the awards had expired.⁷¹

The Court of Appeal found that Singapore law provides a “choice of remedies” to a party seeking to challenge an arbitral award on jurisdictional grounds.⁷² The “passive” choice entails the party raising its objections to an award as a defense in enforcement proceedings, where Singapore legislation provides a residual/inherent jurisdiction to refuse enforcement of an international arbitration award issued in Singapore. The “active” route is exercised by a party initiating set aside proceedings in the court with supervisory jurisdiction under article 16(3) of the UNCITRAL Model Law.⁷³

Having established that the passive route, which the award debtors had taken, was still available during enforcement proceedings, the Court of Appeal found that it could review the tribunal’s findings on jurisdiction.⁷⁴ It then held that the tribunal’s joinder of non-parties had been based on an incorrect interpretation of the SIAC rules of arbitration, as then in force.⁷⁵ Accordingly, the Court ruled that the parts of the awards relating to the joined parties were unenforceable,⁷⁶ thus dramatically reducing the value of the arbitral awards from approximately U.S. \$250 million to U.S. \$700 thousand.⁷⁷

After a schism within CIETAC last year, the Shanghai and South China CIETAC Sub-Commissions rebranded themselves respectively as the Shanghai International Arbitration

66. *Id.* at *3.

67. *Id.* at *4.

68. *Id.*

69. *PT First Media TBK v. Astro Nusantara International BV*, [2013] SGCA 57 (Sing.).

70. *Astro Nusantara International BV v. PT Ayunda Prima Mitra*, [2012] SGHC 212 (Sing.).

71. *Id.* at [7]–[9]. For further information on the High Court decision, see Steven Smith et al., *International Arbitration*, 47 INT’L LAW. 115 (2013).

72. *PT First Media*, [213] SGCA 57 at ¶ 65.

73. *Id.* ¶ 22.

74. See *id.* ¶¶ 132, 143, 164.

75. *Id.* ¶ 198.

76. *Id.* ¶ 224.

77. *PT First Media*, [213] SGCA 57 at ¶ 227.

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Center (SHIAC) and the Shenzhen Court of International Arbitration (SCIA), while continuing to accept cases where the relevant arbitration agreement specifies “CIETAC Shanghai Sub-Commission” or “CIETAC South China Sub-Commission.”⁷⁸ Parties are now challenging the jurisdiction of these institutions and the validity of their awards. In one case, the Intermediate People’s Court of Shenzhen upheld the SCIA’s jurisdiction based on an arbitration agreement referring to the CIETAC South China Sub-Commission, holding that the agreement’s reference to the CIETAC South China Sub-Commission should be treated as a reference to the SCIA.⁷⁹ In contrast, the Intermediate People’s Court of Suzhou declined to enforce an award where the arbitration was initiated in the Shanghai Sub-Commission but the award was issued by the SHIAC, on the ground that the parties had agreed to arbitration in the CIETAC with the seat of arbitration in Shanghai.⁸⁰ The SHIAC, the court reasoned, lost jurisdiction once it became an independent institution and, absent express consent to jurisdiction in the new institution by the parties, had no authority to issue an award. The court, however, subsequently revoked its own decision, as requested by the Superior People’s Court of Suzhou.

India’s Supreme Court overruled itself in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, narrowly interpreting the public policy exception applicable to foreign arbitration awards in that country’s Arbitration and Conciliation Act.⁸¹ Explaining that a court asked to confirm a foreign arbitration award “does not exercise appellate jurisdiction over the foreign award [or] enquire as to whether . . . some error has been committed,” the Supreme Court held that “the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality.”⁸² This more limited exception stands in contrast to the Court’s broader interpretation of the Arbitration and Conciliation Act’s public policy exception to the enforcement of domestic awards.⁸³ Notably, however, the Indian Supreme Court’s distinction leaves unanswered the scope of the public policy exception applicable to awards rendered in international arbitrations seated in India.

78. Paula Hodges, Laurence Shore & Peter Godwin, *CIETAC Split Update: Chinese Courts’ Approach to Enforcing Awards Rendered by SCIA and SHIAC*, LEXOLOGY (July 12, 2013), <http://www.lexology.com/library/detail.aspx?g=e70240f5-bbc3-4f54-8d79-71ddef351fa>.

79. Jia Xin Da Fazhan Gongsi Yu Shenzhen Shi Yong Ke Yiyao Youxian Gongsi (佳馨大发展大道瀚公司深圳市宇石勇柯一瑶攸县贡丝) [Jia Xin Da Dev. Co., Ltd. v. Shenzhen Yongke Pharm. Co., Ltd.], 2012 Shen Zhong Fa She Wai Zhong Zi Di 226 Hao [Int. People’s Ct. Shenzhen] (China).

80. Jiangxi Sai Wei LDK Taiyangneng Gaokeji Youxian Gongsi Yu Suzhou A Te Si Yangguang Dianli Keji Youxian Gongsi (江西西伟江西赛维 Taiyangneng Gaokeji 攸县瀚公司奥苏州一特硅阳光电力大学冀攸县贡丝) [Jiangxi LDK Solar Hi-Tech Co., Ltd. v. Suzhou CSI Solar Power Tech. Co., Ltd.], 2013 Su Zhong Shang Zhong Zi Di 0004 Hao [Int. People’s Ct. Suzhou] (China).

81. See *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2013), Civil Appeal No. 5085 of 2013, available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=40512>.

82. *Id.* ¶ 45.

83. *Id.* ¶ 25.

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IV. Decisions on Investor-State Disputes

A. DEFINITION OF “INVESTMENT” GENERALLY NARROWLY CONSTRUED UNDER NAFTA AND BITs

In a recent NAFTA claim brought against the United States by Apotex Inc., the tribunal upheld the United States’ preliminary objection to jurisdiction on the ground that the company’s efforts to win approval for generic drugs in the United States market did not make it an “investor” under Article 1139 of NAFTA Chapter Eleven.⁸⁴ The tribunal held that significant expenses incurred in (1) seeking U.S regulatory approval, (2) purchasing materials and ingredients in the United States intended for foreign manufacture, and (3) legal expenses incurred in corresponding with and making submissions to the regulator, were all insufficient to qualify as an “investment” under the treaty.⁸⁵

Similarly, in *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, Uruguay argued that Philip Morris had not made an “investment” in Uruguay within the definition of Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), on the ground that its activities did not contribute to the economic development of the state under the *Salini* test.⁸⁶ The tribunal rejected Uruguay’s jurisdictional objection, characterizing the *Salini* elements as “typical features” of investments rather than “jurisdictional requirements.”⁸⁷

B. COMPLIANCE WITH THE “EXHAUSTION OF LOCAL LEGAL REMEDY REQUIREMENTS” IS MANDATORY

In *Apotex*, the NAFTA tribunal found that Apotex had failed to exhaust local legal remedies in the United States and that this failure would also have been fatal to its claim.⁸⁸ The tribunal rejected Apotex’s argument that seeking certiorari before the Supreme Court would be “obviously futile,”⁸⁹ holding that establishing futility based on the low likelihood of certiorari being granted “would be, in effect, to write the U.S. Supreme Court out of the exhaustion of remedies rule in almost all cases. This cannot be correct.”⁹⁰ Other International Centre for Settlement of Investment Disputes (ICSID) tribunals similarly confirmed the importance of strict compliance with local courts requirements, including

84. *Apotex Inc. v. Gov’t of the United States of Am.*, UNCITRAL, Award on Jurisdiction and Admissibility, ¶ 336 (June 14, 2013).

85. *Id.* ¶ 227.

86. See *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 178 (July 2, 2013). The “Salini” test takes its name from an award on jurisdiction from the case of *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), and includes the following elements: “contributions, a certain duration of performance of the contract and a participation in the risks of the transaction In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”

87. *Philip Morris Brands Sàrl*, ICSID Case No. ARB/10/7 at ¶ 206.

88. *Apotex Inc.*, UNCITRAL at ¶ 337.

89. *Id.* ¶ 255.

90. *Id.* ¶ 289.

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*Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*⁹¹ and *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*.⁹²

In the *Philip Morris* case, the tobacco company and its local subsidiary had initiated proceedings against Uruguay under the Switzerland-Uruguay BIT.⁹³ Uruguay challenged the tribunal's jurisdiction on the ground, *inter alia*, that the subsidiary had not satisfied the BIT's eighteen-month "local courts" precondition to arbitration.⁹⁴ The key provision of the BIT, Article 10(1), stated that "[d]isputes with respect to investments within the meaning of this Agreement between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably"⁹⁵ Uruguay argued that the subsidiary's application to the country's domestic courts on administrative and constitutional law grounds was not made "with respect to" the investment. Philip Morris contended that the dispute requiring submission to local courts is "the subject matter at issue, not . . . particular legal claims."⁹⁶ The tribunal sided with Philip Morris, holding that "the ordinary meaning of the phrase 'disputes with respect to investments' is broad and includes any kind of disputes where the subject matter is an 'investment.'"⁹⁷

In the *Kiliç İnşaat* case, the tribunal rejected jurisdiction where the claimant had failed to satisfy the Turkey-Turkmenistan BIT requirement that, prior to submission of the dispute to ICSID, the claimant must first (1) submit the dispute to Turkmenistan's local courts and (2) wait a further year from submission of the case to the local courts for a final award to be issued.⁹⁸ The claimant argued that submitting its claim to local courts would have been "ineffective and otiose,"⁹⁹ and that recourse to local courts went to the claim's admissibility rather than to the tribunal's jurisdiction.¹⁰⁰ The tribunal held that claimant had failed to prove futility¹⁰¹ and that the local courts requirement was jurisdictional—leaving the tribunal with no jurisdiction and "no alternative but to decline to address the claim."¹⁰²

C. ICSID DISMISSES INVESTMENT TREATY CLAIMS DUE TO CORRUPTION

In 2013, an ICSID tribunal, for the first time, dismissed BIT claims for lack of jurisdiction due to corruption.¹⁰³ In *Metal-Tech v. Republic of Uzbekistan*, an Israeli company

91. *Philip Morris Brands Sàrl*, ICSID Case No. ARB/10/7 at ¶ 107.

92. *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, ¶ 10.1.1(a) (July 2, 2013).

93. *Philip Morris Brands Sàrl*, ICSID Case No. ARB/10/7 at ¶ 1.

94. *Id.* ¶ 32.

95. *Id.* ¶ 25.

96. *Id.* ¶ 103.

97. *Id.* ¶ 107.

98. *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi*, ICSID Case No. ARB/10/1 at Annex A, ¶ 11.1(c).

99. *Id.* ¶ 4.3.

100. *Id.* ¶ 6.4.1.

101. *Id.* ¶ 8.1.5.

102. *Id.* ¶ 6.4.1. *Contra* Ömer Dede and Serdar Elhüseyni v. Romania, ICSID Case No. ARB/10/22, Award, ¶ 275 (Sept. 5, 2013) (holding that claimant's failure to pursue required domestic remedies was without prejudice to its right to file its claims upon satisfaction of such requirements).

103. An ICSID tribunal had previously dismissed a case brought under a contract on corruption grounds. *See* World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

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claimed that Uzbekistan expropriated its investment in a joint venture, Uzmetal.¹⁰⁴ Metal-Tech alleged that Uzmetal was rendered insolvent after the Uzbek government suspended its purchase rights and initiated criminal proceedings.¹⁰⁵ During the hearing, it was revealed that Metal-Tech had made payments totaling U.S. \$4 million for “lobbyist activity.”¹⁰⁶ The tribunal determined that some of these payments were bribes made in violation of the BIT’s requirement that covered investments comply with Uzbek law.¹⁰⁷ Consequently, the tribunal found that Metal-Tech’s investment was not protected under the BIT and dismissed its claims for lack of jurisdiction.¹⁰⁸

D. THE DEBATE CONTINUES OVER WHETHER MFN CLAUSES EXTEND TO BITs’
DISPUTE RESOLUTION CLAUSES

In *Kılıç İnşaat* the tribunal dismissed the claimant’s argument that the BIT’s MFN clause extended to the dispute resolution provisions of the treaty,¹⁰⁹ stating that the text of the BIT recognized a distinction between substantive rights in relation to investments and remedial procedures in relation to those rights.¹¹⁰ The tribunal also held that the international law principle of effectiveness invalidated the claimant’s interpretation of the scope of the BIT’s MFN clause¹¹¹ because at the time of the conclusion of the BIT, Turkey already had twenty-two other BITs in force, many of which contained no local courts requirement.¹¹² Consequently, if the claimant’s MFN interpretation was accepted, the BIT’s local courts requirement would have been ineffective *ab initio*.¹¹³

E. DECISIONS ON THE MERITS IN INVESTOR-STATE DISPUTES

1. *Fair and Equitable Treatment (FET)*

The most notable case illustrating the contours of FET in 2013 arose under the France-Moldova BIT. In *Arif v. Republic of Moldova*, a French investor had won a tender to open several duty-free stores in Moldova, entered into a government-approved lease agreement, and invested heavily in developing the stores for sixteen months.¹¹⁴ The tender result and lease agreement were then suspended by the Moldovan courts, and the investor was denied access to his shops for a prolonged period.¹¹⁵ The investor asserted claims for denial of justice, a violation of the FET standard of the BIT, and expropriation.¹¹⁶

Despite procedural irregularities in the Moldovan court proceedings, the tribunal rejected the denial of justice claims, finding no “egregious misapplication of procedural law

104. Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶ 107 (Oct. 4, 2013).

105. *Id.* ¶¶ 37–54.

106. *Id.* ¶ 86.

107. *Id.* ¶¶ 86, 352.

108. *Id.* ¶¶ 372–74.

109. *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi*, at ¶ 4.2.7.

110. *Id.* ¶ 7.3.9.

111. *Id.* ¶ 7.4.

112. *Id.* ¶ 7.4.2.

113. *Id.* ¶ 7.4.3.

114. *Arif v. Republic of Mold.*, ICSID Case No. ARB/11/23, Award, ¶¶ 43–51, 87–92 (Apr. 8, 2013).

115. *Id.* ¶¶ 59–86, 93–124.

116. *Id.* ¶¶ 187–224.

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[or] a procedure which is tainted by bad faith,”¹¹⁷ and that the Moldovan courts had not “render[ed] decisions that no competent and honest court would have possibly been able to render.”¹¹⁸ The tribunal held, however, that Moldova violated the FET provision of the BIT by infringing upon the investor’s legitimate expectation of a secure legal environment.¹¹⁹

In its FET analysis, the tribunal considered Moldova’s encouragement and approval of the investment and its awareness of the investor’s capitalization of that investment for sixteen months.¹²⁰ When challenges to the tender and contract were lodged, the Moldovan Airport Authority then “behaved as a powerless bystander.”¹²¹ The tribunal found the Airport Authority’s inaction in the face of the destruction of the investment to be “the most reprehensible element” of its conduct.¹²²

In *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, a Venezuelan Government agency awarded a Canadian company the right to develop gold mines in Venezuela, which it then assigned to Vannessa Ventures.¹²³ The state agency viewed this as a unilateral and unauthorized act under the work contract governing the concession, and it rescinded the contract and took possession of the mine.¹²⁴ Vannessa Ventures initiated an ICC arbitration against the Venezuelan agency under the work contract, but the Venezuelan courts refused to compel arbitration.¹²⁵ Vannessa Ventures then asserted an FET claim under the Canada-Venezuela BIT, alleging that it possessed legitimate expectations that Venezuela (including its courts) would respect the arbitration clause and require arbitration before the agency’s termination of the work contract could become legally effective.¹²⁶ The tribunal held that Venezuela’s conduct—both in terminating the work contract without first resorting to arbitration and in the courts’ refusal to compel arbitration—did not “fall below a minimum standard of fairness and equitableness that all investors have a right to respect.”¹²⁷

*Rompetrol Group N.V. v. Romania*¹²⁸ also merits discussion. There, the claimant investor alleged that Romanian prosecutors were “driven by hostility and bias” toward certain individuals associated with the claimant, and thus engaged in a coordinated “pattern of abusive acts” against the claimant, including the seizure of its banking records and assets and the arrests of associated individuals.¹²⁹ The tribunal accepted “that the cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment” even where the individual actions would not give rise to a treaty breach.¹³⁰ The tribunal found that such actions must “disclose[] some

117. *Id.* ¶ 489.

118. *Id.* ¶ 463.

119. *Arif*, ICSID Case No. ARB/11/23 at ¶¶ 533, 538–39.

120. *Id.* ¶ 542.

121. *Id.* ¶ 547(f).

122. *Id.*

123. *Vannessa Ventures Ltd. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/04/6, Award, ¶¶ 54, 84 (Jan. 16, 2013).

124. *Id.* ¶¶ 98–101.

125. *Id.* ¶ 103.

126. *Id.* ¶ 106.

127. *Id.* ¶ 222; *see also id.* ¶ 225.

128. *Rompetrol Grp. N.V. v. Rom.*, ICSID Case No. ARB/06/3, Award (May 6, 2013).

129. *Id.* ¶ 270.

130. *Id.* ¶ 271.

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link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough.”¹³¹ The tribunal concluded, however, that the state’s actions “[f]ell well short” of meeting that standard.¹³²

2. *Expropriation*

This year saw a favorable decision for the claimants on the merits in the largest ever expropriation claim. The core of the dispute in *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela* concerned the valuation of assets that were expropriated by Venezuela in 2007.¹³³ ConocoPhillips demanded payment based on market prices while Venezuela only offered to pay the much lower measure of book value.¹³⁴ The tribunal held that Venezuela violated its BIT obligation “to negotiate in good faith for compensation for its taking of the ConocoPhillips assets . . . on the basis of market value . . . , and that the date of the valuation is the date of the [a]ward.”¹³⁵ Damages will be determined in a later phase of the proceeding.¹³⁶ While ConocoPhillips has claimed that Venezuela owes it over U.S. \$30 billion, Venezuela asserts that the compensation only reaches U.S. \$570.5 million.¹³⁷

Expropriation claims were asserted alongside FET claims in many of the cases discussed above. In the *Arif* case the tribunal held that no expropriation had occurred where only “invalid rights” were at issue,¹³⁸ and there was no allegation of bad faith or collusion in the Moldovan courts, illegitimacy in Moldovan law, or proof that the investor did not have a fair opportunity to defend itself before those courts.¹³⁹ Similarly, in *Vannessa Ventures*, the tribunal dismissed the expropriation claim just as it had dismissed the FET claim.¹⁴⁰ The tribunal held that Venezuela’s termination of Vannessa Ventures’ rights had been “justified and legitimate” because the assignment of interest to claimant had violated the agreement between Venezuela and the assignor.¹⁴¹ As such, “[Vannessa Ventures] ha[d] not shown that [Venezuela’s] actions were more than legitimate contractual responses to what the tribunal considers to be contractual breaches.”¹⁴²

131. *Id.*

132. *Id.* ¶¶ 276, 279, 293 (the tribunal did find a “limited” violation of fair and equitable treatment on the basis of “procedural irregularities” in the criminal investigations, however, claimant had failed to produce “any reliably concrete evidence of actual losses incurred” by this violation, so the tribunal declined to make any award of damages).

133. *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶ 199 (Sept. 3, 2013).

134. *Id.* ¶ 368.

135. *Id.* ¶ 401.

136. *Id.* ¶ 212(b).

137. *Id.* ¶¶ 214, 217.

138. *Arif*, ICSID Case No. ARB/11/23 at ¶¶ 417.

139. *Id.* ¶¶ 415–16. These findings, however, did not denigrate the tribunal’s decision that the State was nevertheless liable for defeating the claimant’s legitimate expectations of a stable legal environment.

140. *Vannessa Ventures Ltd.*, ICSID Case No. ARB(AF)/04/6 at ¶ 214.

141. *Id.* ¶ 190.

142. *Id.* ¶ 210.

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V. Revisions to Arbitration Rules and Development of Soft-Law Sources

On April 1, 2013, the 2013 the SIAC Rules of Arbitration went into force.¹⁴³ The most significant change under the 2013 SIAC Rules of Arbitration is the establishment of the SIAC Court of Arbitration, which will be responsible for issuing decisions on jurisdictional challenges¹⁴⁴ and challenges to arbitrators.¹⁴⁵ The new rules vest the President of the SIAC Court with responsibility for the appointment of arbitrators¹⁴⁶ and emergency arbitrators¹⁴⁷ and for making determinations on applications for expedited procedures.¹⁴⁸

In June 2013, the HKIAC published a revised version of its HKIAC Administered Arbitration Rules, which came into effect on November 1, 2013.¹⁴⁹ The new rules significantly expand HKIAC tribunals' flexibility to handle complex arbitrations involving multiple parties and claims arising under multiple contracts. For example, Article 27 expands the authority of the tribunal to join additional parties,¹⁵⁰ Article 28 provides for consolidation of two or more arbitrations in certain circumstances,¹⁵¹ and Article 29 provides for a single arbitration covering claims under multiple contracts, provided certain criteria are met.¹⁵² In addition, the new rules provide for expedited appointments of emergency arbitrators and decisions on applications for emergency relief,¹⁵³ and they broaden the circumstances under which parties can apply for expedited procedures.¹⁵⁴

UNCITRAL adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in July of 2013, following nearly three years of negotiations.¹⁵⁵ These rules will apply to treaty-based investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to investment treaties concluded on or after April 1, 2014, unless the parties agree otherwise.¹⁵⁶ The rules include provisions requiring disclosure and openness in proceedings,¹⁵⁷ providing exceptions to these requirements,¹⁵⁸ and providing for a repository of published information.¹⁵⁹

143. Arbitration Rules of the Singapore International Arbitration Centre, 5th ed. (Apr. 1, 2013), *available at* http://www.siac.org.sg/images/stories/articles/rules/SIAC_IN_ENG_AUG13_D3.pdf.

144. *Id.* art. 25.1.

145. *Id.* art. 13.2.

146. *Id.* art. 6.4.

147. *Id.* sched. 1.

148. Arbitration Rules of the Singapore International Arbitration Centre, *supra* note 143, art. 5.2.

149. Hong Kong International Arbitration Centre Administered Arbitration Rules (Nov. 1, 2013), *available at* http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf.

150. *See generally id.* art. 27.

151. *Id.* art. 28.1.

152. *Id.* art. 29.1.

153. *Id.* art. 23.1; *see also id.* sched. 4.

154. Hong Kong International Arbitration Centre Administered Arbitration Rules, *supra* note 149, art. 41.

155. Press Release, U.N. Information Service, UNCITRAL Adopts Transparency Rules for Treaty-Based Investor-State Arbitration and Amends the UNCITRAL Arbitration Rules, U.N. Press Release UNIS/L/186 (July 12, 2013), *available at* <http://www.unis.unvienna.org/unis/pressrels/2013/unisl186.html>.

156. Pre-Release Publication, UNCITRAL Working Group, UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (Oct. 2, 2013), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>.

157. *Id.* arts. 2, 3, 6.

158. *Id.* art. 7.

159. *Id.* art. 8.

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Finally, in May of 2013, the IBA adopted its Guidelines on Party Representation in International Arbitration.¹⁶⁰ These ethical guidelines represent optional standards that can be adopted by parties and are intended to assist parties, counsel, and arbitrators in maintaining fairness and integrity in international arbitral proceedings.¹⁶¹

160. International Bar Association, IBA Guidelines on Party Representation in International Arbitration (May 25, 2013), *available at* <http://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>.

161. *Id.* pmbl., pp. 1–2.