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Recent Decisions Involving Arbitral Proceedings

During the year 1995, a number of significant decisions relating to international arbitration have been rendered or have come to light. Chosen for review are ten cases: eight decisions by national courts in four different jurisdictions (Australia, England, Germany, and the United States) and two awards of ICC tribunals. Nine of these cases fall three each into three categories: (1) whether a valid arbitration clause has been concluded, and, if so, for what arbitral forum; (2) what are the powers of arbitral tribunals, specifically, to award punitive damages, to interpret arbitral awards previously rendered between the same parties by other tribunals, and to impose legal rules upon a party as mandatory that are not part of the governing law selected by the parties; and (3) what are the powers of national courts to review arbitral awards, both as to jurisdiction and on the merits, and, having reduced an arbitral award to a judgment, to treat it as such. The tenth case is a loner, a decision of Australia's highest court holding that arbitral proceedings are not inherently confidential.

I. United States Courts

A. LAPINE TECHNOLOGY V. KYOCERA CORP

In *LaPine Technology v. Kyocera Corp.*, the U.S. District Court for the Northern District of California held that parties may not by agreement enlarge the court's

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role in reviewing arbitral awards under the Federal Arbitration Act (FAA).[1] This holding may aggravate a split among U.S. Federal Courts because the decision followed the decision of the Seventh Circuit and rejected decisions from the Fifth Circuit and the Southern District of New York. In *LaPine*, the contract in question provided in Section 8.10(b) that "The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) and the Federal Arbitration Act, 9 U.S.C. sections 1 et seq."[2] The contract provided further in Section 8.10(d) as follows:

> The arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous.[3]

Choosing to follow the rationale of the decision of the Seventh Circuit in *Chicago Typographical Union v. Chicago Sun-Times*, the court held that:

> While a court may have subject matter jurisdiction over the substance of a cause subject to arbitration, whether under diversity jurisdiction or otherwise, its power to adjudicate in the exercise of that jurisdiction, particularly where conferred by statute as here, cannot be changed or altered by the agreement of the parties. The role of the federal courts cannot be subverted to serve private interests at the whim of contracting parties.[4]

On that basis, the court reviewed the award only on the grounds specified in the FAA, thereby declining to apply sections 8.10(d)(ii) and (iii) of the parties' agreement.

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1. 909 F. Supp. 697 (N.D.Cal. 1995); Title 9 U.S.C. § 1 *et seq.*
2. 909 F. Supp. at 702.
3. *Id.*
4. 935 F. 2d 1501 (7th Cir. 1991). *Chicago Typographical Union* involved a labor union's appeal from an arbitral award on the basis of section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, which creates federal jurisdiction over suits to enforce labor contracts. The union argued that the arbitrator in his award had interpreted the parties' contract incorrectly. Declining to rule on whether the arbitrator's decision was incorrect, the Seventh Circuit held:

> Federal courts do not review the soundness of arbitration awards. An agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator's interpretation. If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract. Unless the award was procured by fraud, or the arbitrator had a serious conflict of interest—circumstances that invalidate the contractual commitment to abide by the arbitrator's result—his interpretation of the contract binds the court asked to enforce the award or to set it aside. The court is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong.

935 F.2d at 1504-05. The Court noted that the Supreme Court (in *United Paperworkers v. Misco*, 484 U.S. 29 (1987)) held that courts may look to the FAA in formulating rules for suits under section 301 arising from an alleged breach of an arbitration agreement. 935 F.2d at 1504. 909 F. Supp. at 703.

This decision stands in contrast to the decision of the U.S. District Court for the Southern District of New York in *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, in which the parties' arbitration agreement also "alter[ed] the role of the arbitrators and the courts . . . afford[ing] less weight to the decision of the arbitrator and provid[ing] for more extensive court involvement than is ordinarily the case."[5] There the court held that, "[S]ince resort to arbitration is itself a product of contract, there appears to be no reason, absent a jurisdictional or public policy barrier, why the parties cannot agree to alter the standard roles."[6] Finding no such jurisdictional or public policy impediment, the court in *Fils* reviewed the arbitral award in question in accordance with the standard of review set forth in the parties' agreement.[7]

The *LaPine* decision also stands in contrast to a recent decision of the Fifth Circuit Court of Appeals in *Gateway Technologies v. MCI Telecommunications*, in which the court reviewed an arbitration award that the parties agreed would be final and binding, "except that errors of law shall be subject to appeal."[8] The court held that, . . . "[T]he FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for a more expansive judicial review of the award."[9]

The *LaPine* court found further that the separate sections of the parties' arbitration agreement were severable; and, hence, that the court's refusal to follow the scope of review clause did not vitiate the agreement as a whole.[10] After finding no statutory basis under the FAA to vacate the award, the court confirmed the award.[11] In view of the substantial amount in dispute, however, an appeal is likely.[12]

B. First Options of Chicago v. Kaplan

In *First Options of Chicago v. Kaplan*, the Supreme Court examined (1) how a district court should review an arbitrator's decision that the parties agreed to arbitration and (2) how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitral award.[13]

5. 584 F. Supp. 240 (S.D.N.Y. 1984); 909 F. Supp. at 702 (quoting *Fils*, 584 F. Supp. at 244).
6. 584 F. Supp. at 244.
7. *Id.*
8. 64 F.3d 993, 995 (5th Cir. 1995).
9. *Id.*
10. 909 F. Supp. 697.
11. *Id.*
12. *See* "Prudential-Bache Trade Asks Court to Confirm $ 257 Million Award," 10 Int'l Arb. Rep. 7 (May 1995). Although only LaPine and Kyocera were parties to the primary action before the District Court, Prudential-Bache Trade Services was a party to the underlying arbitration proceeding and a party to the counterclaim before the District Court. 909 F. Supp. 697.
13. 115 S. Ct. 1920 (1995); 63 U.S.L.W. 4459 (1995). This question is distinguished from an examination of the scope of an arbitration agreement established as valid.

The case concerned several related disputes between First Options of Chicago, a firm that clears stock trades on the Philadelphia Stock Exchange, and Mr. Manuel Kaplan, his wife, Carol Kaplan, and his wholly owned investment company, MK Investments, Inc. (MKI). The disputes centered around four separate agreements governing the workout of debts owed by the Kaplans and MKI to First Options incurred as a result of the 1987 stock market crash. When First Options's demands for payment under the agreement were not satisfied, First Options initiated arbitration. MKI, having signed the only agreement containing an arbitration clause, accepted arbitration. The Kaplans, who did not personally sign that document, did not. The arbitral tribunal nevertheless ruled on the merits of the parties' dispute with respect to both MKI and the Kaplans, and did so in favor of First Options.

The Kaplans then asked the U.S. District Court for the Eastern District of Pennsylvania to vacate the award (under 9 U.S.C. § 10) and First Options asked the Court to confirm the award (under 9 U.S.C. § 9). The District Court confirmed; but on appeal, the Third Circuit reversed, finding that the dispute between the Kaplans and First Options was not arbitrable.[14] First Options appealed to the Supreme Court, challenging both the standard of review applied by the Third Circuit in reviewing the District Court's decision as well as the Third Circuit's holding with respect to the standard of review applied by district courts reviewing arbitral awards.

The Supreme Court held that when a district court reviews an arbitrator's decision regarding whether the parties agreed to arbitrate, the court first must determine whether the parties agreed to submit that question to the arbitrator. If so, "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. . . . If, on the other hand, the parties did not agree to submit [that] question to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration," that is, de novo.[15]

In deciding whether the parties in fact agreed to arbitrate the question of whether an agreement to arbitrate existed, the Court held that courts should not assume that the parties have so agreed "unless there is 'clear and unmistakable' evidence that they did so."[16] The Court noted that the law treats silence or ambiguity about this question differently from silence or ambiguity about the question of "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement."[17] The Supreme Court held that First Options could not show clear and unmistakable evidence that the Kaplans agreed to arbitration.

14. 19 F.3d 1503 (1994).
15. 63 U.S.L.W. at 4461.
16. *Id.*
17. *Id.*

The Court then addressed the standard of review courts of appeals should apply when reviewing a district court's decision confirming an award. The Third Circuit held, in accordance with all of the other Circuits, save the Eleventh, that the applicable standard of review for the appellate court is the usual one, that is, to accept all findings of fact that are not clearly erroneous, but to decide questions of law de novo. First Options argued that the Supreme Court should instead adopt the Eleventh Circuit's view set forth in *Robbins v. Day*, that because of the federal policy favoring arbitration, appellate courts should apply a lenient abuse of discretion standard, even as to questions of law, when reviewing district court decisions that confirm (but not those that set aside) arbitration awards.[18]

The Supreme Court rejected the Eleventh Circuit's view and held that the Third Circuit was correct in finding that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards.[19]

C. Mastrobuono v. Shearson Lehman Hutton

In *Mastrobuono v. Shearson Lehman Hutton*, the Supreme Court upheld an arbitral award decided under New York law granting punitive damages, even though New York law prohibits arbitrators from awarding punitive damages.[20]

In a dispute arising out of a contract that expressly provided, "[This contract] shall be governed by the laws of the State of New York," a panel of arbitrators awarded punitive damages of $400,000 in addition to compensatory damages to the petitioner. The respondent filed a motion to vacate the award on the ground that the arbitrators exceeded their authority by awarding punitive damages. The District Court granted the motion, vacating the award of punitive damages, and the Seventh Circuit Court of Appeals affirmed.[21] The Supreme Court, however, reversed.

The parties' agreement contained a clause explicitly authorizing arbitration in accordance with the rules of the National Association of Securities Dealers (NASD). The NASD's Code of Arbitration Procedure provides that arbitrators may award damages and other relief; and an NASD manual states, "The issue of punitive damages may arise with great frequency in arbitrations. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy."[22] Also relevant to the Supreme Court's determination was the rule that in such matters "regard must be given to the federal policy favoring arbitration"

18. 954 F.2d 679, 681-82 (11th Cir. 1992).

19. 63 U.S.L.W. at 4462. For further discussion of the *First Options* case and its relationship to the European doctrines of *Kompetenz-Kompetenz* and *compétence-compétence, see* W. Park, "The Arbitrability Dicta of First Options v. Kaplan," 12 Arb. Int'l (forthcoming in 1996).

20. 63 U.S.L.W. 4195 (1995).

21. 812 F. Supp. 845 (N.D. Ill. 1993) and 20 F.3d 713 (1994).

22. 63 U.S.L.W. at 4198.

and that "ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration."[23]

The Court held that the parties' intent with respect to punitive damages was ambiguous in light of the parties' express choice of law and arbitration rules. The Court held that the best way to harmonize that apparent ambiguity was to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply. However, "the laws of the State of New York" would not include the State's special rules allocating power among alternative tribunals that limit the authority of arbitrators such as the rule permitting courts but not arbitrators to award punitive damages.[24]

Although this decision relates to a domestic arbitration and is in essence an interpretation of the grounds pursuant to which an award may be vacated under Title 9 U.S.C. § 10(d) of the Federal Arbitration Act relating to domestic arbitration, the decision stands as relevant to any examination by a U.S. court of choice-of-law provisions.[25] The decision also relates to the power of arbitrators to award punitive damages, including those awarded in an arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).[26]

D. VIMAR SEGUROS Y REASEGUROS S.A. V. M/A SKY REEFER

In a decision relevant to international maritime disputes, *Vimar Seguros y Reaseguros S.A. v. M/A Sky Reefer*, the Supreme Court overturned a leading decision emanating from the Second Circuit Court of Appeals.[27]

In *Indussa Corp. v. S.S. Rauborn*, the Second Circuit held that the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (COGSA or the Act) nullifies any dispute resolution provision contained in a bill of lading governed by COGSA that includes a foreign forum selection clause.[28] The court found that a dispute resolution clause in a bill of lading designating a foreign forum "puts 'a high hurdle' in the way of enforcing liability [under COGSA], and thus is an effective

23. *Id.*

24. 63 U.S.L.W. at 4199.

25. 9 U.S.C. § 10(d) provides in relevant part:

> [T]he United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration.
>
> . . .
>
> (d) Where the arbitrators exceeded their powers. . . .

26. *See* 9 U.S.C. § 201 *et seq.* In particular, 9 U.S.C. § 208 provides that "Chapter 1 [including 9 U.S.C. § 10] applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the [New York] Convention as ratified by the United States."

27. 63 U.S.L.W. 4617 (1995).

28. 377 F.2d 200 (1967) (en banc).

means for carriers to secure settlements lower than if cargo [owners] could sue in a convenient forum.''[29] Section 3(8) of COGSA provides that:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.[30]

The Second Circuit decision held that Section 3(8) thus nullified foreign dispute resolution clauses in bills of lading governed by COGSA because such clauses unduly increased the transaction costs of litigation necessary to impose liability under the Act. Following this decision, Federal Courts of Appeals without exception have invalidated foreign forum selection clauses, including foreign arbitration clauses, under Section 3(8) of COGSA.[31]

In *Vimar Seguros* the Supreme Court rejected this analysis. The Court found that the phrase ''lessening such liability'' in Section 3(8) of COGSA does not relate to potential increases in the transaction costs of litigation associated with liability under the Act, but rather is aimed at express waivers or limitations of liability as formerly found in bills of lading.[32] The Supreme Court noted that such an interpretation is supported by the goals of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (the Hague Rules) and that COGSA is based on the Hague Rules.[33] Sixty-six countries, including the United States, are now parties to that Convention; and, according to the Supreme Court's decision, none interpret Section 3(8) of the Hague Rules to prohibit foreign forum selection clauses.[34] Indeed, English courts, for example, expressly rejected such reasoning long ago.[35]

II. English Courts

A. Far E. Shipping v. AKP Sovcomflot

A recent decision by the Queens Bench Division (Commercial Court), *Far E. Shipping v. AKP Sovcomflot*, held that the New York Convention allowed English courts to stay execution of an arbitral award after the award was converted into an English judgment for purposes of execution.[36]

29. 377 F.2d at 203.

30. 46 U.S.C. App. § 1303(8).

31. *See* 63 U.S.L.W. at 4618-19. The *Indussa* decision nullified only foreign forum selection clauses. Clauses providing for domestic arbitration, therefore, were not affected by that decision.

32. *See* 63 U.S.L.W. at 4619.

33. *See* 51 Stat. 233 (1924); 63 U.S.L.W. 4619.

34. *See* Department of State, Office of the Legal Adviser, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1995, at 381 (July 1995); 63 U.S.L.W. at 4619.

35. *Id.*, citing Maharani Woollen Mills Co. v. Anchor Line, (1927) Lloyd's List L. Rep. 169 (C.A.) (Scrutton, L.J.).

36. [1995] 1 Lloyd's Rep. 520 (Q.B.). *Id.* at 523.

In this case, the plaintiff made payments on behalf of the defendant to certain Japanese banks pursuant to an agreement for construction and acquisition of shipping vessels from Japan. The transaction lead to an arbitration proceeding in Moscow before the Maritime Arbitration Commission of the Chamber of Trade and Industry of the Russian Federation, from which the plaintiff received an award of over six million dollars plus interest and costs. The Commission awarded these damages on August 20, 1993; and the Russian Supreme Court rejected the defendant's appeal on January 18, 1994.

Following unsuccessful attempts to enforce the award in Russia, the plaintiff sought to enforce the award in England under the New York Convention. On May 26, 1994, the plaintiff obtained leave from an English court to enforce the award in the same manner as a judgment of an English court. On July 5, 1994, the court issued a consent order staying execution of that judgment upon defendant's payment of the amount of the judgment into an escrow account. The court granted the stay because the defendant filed another appeal from the award to the Russian Supreme Court.

After the Russian Supreme Court dismissed the defendant's second appeal, the plaintiff applied for removal of the stay of execution. The defendant objected on the grounds that the rules of the court provided that the court may stay execution of a judgment when "there are special circumstances which render it inexpedient to enforce the judgment." The defendant argued that here such a stay was proper because several contractual disputes were not addressed by the arbitral award. The defendant sought to submit such further disputes to arbitration before the London Court of International Arbitration (LCIA), but the plaintiff disputed the validity of further arbitration. The defendant commenced proceedings in England to compel arbitration before the LCIA and obtained leave from the court to serve a writ on the plaintiff in Russia.

The plaintiff argued that the court's authority to refuse immediate enforcement of the arbitral award was limited to the specific grounds set forth in the English Arbitration Act of 1975, which gave effect to the New York Convention; and that none of those grounds applied in the instant case.

The court rejected the plaintiff's argument, basing its authority to stay enforcement of the arbitral award on English procedural rules that apply when an award converts into an English judgment for purposes of execution. The court held further that Article III of the New York Convention did not prohibit the stay. Article III provides:

> Each Contracting State shall recognize all arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[37]

37. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III.

The court held that "while the [New York] Convention is concerned to see that the rules of the enforcing States do not impose 'more onerous conditions' than in respect of domestic awards, it does not require that a regime any more advantageous to a foreign judgment creditor be created in respect of [New York] Convention awards."[38]

Under the circumstances, however, the court removed the stay as the defendant's prospects for recovery on the additional claims were remote. Significant questions remained as to whether an enforceable agreement to arbitrate before the LCIA governed those claims. The court concluded, therefore, that the present case contained "no special circumstances which render it inexpedient to enforce" the plaintiff's judgment.[39]

B. Mangistaumunaigaz Oil Prod. v. United World Trading

In another decision issued last year by the Queens Bench Division, *Mangistaumunaigaz Oil Prod. v. United World Trading*, the Commercial Court held that a clause in a contract for the sale of crude oil that stated "Arbitration, if any by ICC rules in London" constituted a valid and binding agreement to arbitrate.[40]

In 1992, Mangistaumunaigaz Oil Production Association (MOP), a state-owned enterprise of the Republic of Kazakstan, and United World Trading, Inc., of Colorado (UWT) entered into a contract for the sale of crude oil that contained the above language. When UWT allegedly failed to pay for certain oil shipments made under the contract, MOP submitted a request for arbitration to the ICC.

UWT challenged the jurisdiction of the ICC, arguing that the parties did not agree to arbitrate. UWT argued that the parties' agreement reflected the intention of the parties, namely, that the clause was not binding unless a further and specific agreement existed for arbitration, in which case the arbitration would be an ICC arbitration in London.

Justice Potter of the Queen's Bench disagreed. He held that the clause reflected the parties intention "to settle any dispute which might arise between them by arbitration according to ICC rules in London." Any other construction, he added, would strain common sense.

III. German Courts

A recently reported decision of the Court of Appeal of Dresden, Germany, upheld the validity of an arbitration clause even though the clause failed to identify the arbitral forum accurately.[41] This decision follows similar precedents in the national courts of other countries, such as France and Switzerland. The arbitration

38. *Id.* at 524.
39. *Id.* at 525.
40. *Reprinted in* 10 Int'l Arb. Rep. C-1 (June 1995).
41. *See* Betriebs-Berate, Beilage 5, at 18 (April 27, 1995); ASA Bulletin 1995 (no. 2) at 247.

clause in question provided, "All disputes arising in connection with the present contract shall be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Vienna."[42] The Claimant argued that the reference to arbitration was ineffective because the clause misidentified the ICC location as Vienna, rather than Paris. The Respondent argued that the reference to arbitration was effective, but should be understood as providing for arbitration before the International Arbitration Centre of the Federal Economic Chamber in Vienna.

After considering various ICC awards, the German court determined that the ICC was competent to administer the dispute and that reference to a city other than Paris did not render the arbitration agreement ineffective. The Court held that the reference to Vienna should be read as an indication of the parties' intention to fix the place of arbitration in Vienna because, in determining the place of arbitration, the ICC Court of Arbitration gives priority to the parties' choice.[43] The German court further found that the language of the arbitration clause mirrored the language of the ICC's standard arbitration clause and that the language was consistent with international trade usage.

In rejecting the Defendant's argument that the parties intended to designate the Vienna Federal Economic Chamber as arbiter, the Court noted that (i) the arbitration clause did not refer to the Vienna Rules; (ii) the form of the clause differed from the standard clause recommended by the Vienna Rules; and (iii) the contract in dispute had no connection with Austria; and, therefore, an international forum such as the ICC better corresponded to the interests of the parties than a national forum such as the Austrian institution.

IV. Australian Courts

The High Court of Australia's decision last year in *Esso Australia Resources v. Plowman* brought to light the differences among national courts regarding confidentiality in arbitrations.[44] *Esso Australia* held that the Minister for Energy and Minerals, who was not a party to the arbitration, could acquire arbitration documents and information through discovery. The editors of *Arbitration International*, who, in fact, devoted an entire issue to the *Esso Australia* decision, stated in an editorial on the subject that:

> The recent decision of the High Court of Australia in *Esso/BHP v. Plowman* casts severe doubts on the question whether, as a general legal principle, international commercial arbitration is 'confidential'. It is a dramatic decision, with significance far beyond the shores of Australia. The High Court declares that, contrary to widespread understanding

42. *Id.* Translation from German original.

43. ICC Rules, Art. 12.

44. 128 A.L.R. 391 (1995), *reprinted in* 10 Int'l Arb. Rep. A-1 (May 1995). The High Court of Australia is the highest court of appeal in Australia with the status equivalent to that of the Supreme Court in the United States or the House of Lords in England.

elsewhere (including England), there is no firm basis in contract to support the confidentiality of a commercial arbitration, as distinct from the privacy of the arbitral hearings.[45]

Arbitrations should be held in private.[46] Some national courts hold that this rule is implicit in an agreement to arbitrate and does not necessarily flow from the rules of a given institution. For example, the English decision in *Oxford Shipping v. Nippon Yusen Kaisha (The Eastern Saga)* states that "The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration. . . ."[47] Some disagreement remains on the extent to which arbitrations are confidential.

In the *Esso Australia* case, the question arose as to whether the Minister for Energy and Minerals, who was not a party to the arbitration, could obtain documents and information relating to an arbitration between Esso Australia, the Gas and Fuel Corporation of Victoria, and the State Electricity Commission of Victoria. In determining whether a rule of confidentiality precluded such disclosure, the Australian High Court sought to determine the rule's legal basis. The court distinguished between a rule arising out of the nature of arbitration from a rule arising merely from an implied term in an agreement to arbitrate. The High Court concluded that although the private character of the hearing and the authority of the arbitrators to exclude third parties from the hearings was an inherent characteristic of arbitration, confidentiality was not.[48]

The High Court stated that complete confidentiality of an arbitration is impossible for a variety of reasons. Such reasons include: (i) no obligation of confidentiality attaches to witnesses involved in arbitral proceedings; (ii) an arbitral award might come into the public domain through a variety of court proceedings relating to the arbitration; and (iii) the parties must be entitled to disclose the existence and details of the proceedings and the award in the event that, for example, either party must keep shareholders informed or collect on an insurance policy.[49] The High Court concluded:

[We] do not consider that, in Australia, having regard to the various matters to which [we] have referred, we are justified in concluding that confidentiality is an essential

45. Editorial, "The Decision of the High Court of Australia in *Esso/BHP v. Plowman*," 11 Arb. Int'l 231 (1995) (published under the auspices of the London Court of International Arbitration).

46. *See, e.g.*, J. Paulsson and N. Rawding, "The Trouble with Confidentiality," ICC International Court of Arbitration Bulletin 48 (1994); M. Collins, *Privacy and Confidentiality in Arbitration Proceedings*, TEX. INT'L L.J. 121 (1995). *See also* ICC Rules, Art. 15.4; UNCITRAL Arb. Rules, Art. 25.4; LCIA Rules, Art. 10.4.

47. 2 Lloyd's Rep. 373, 739 (1994). Similarly, Mustill & Boyd note in their treatise on arbitration that "It is . . . implicit in the nature of private arbitrations that the proceedings are confidential, and that strangers shall be excluded from the hearing." MUSTILL & BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND (2d Ed.) 303-04 (1989).

48. *See* H. Smit, "Confidentiality in Arbitration," 11 Arb. Int'l 337, 338 (1995).

49. *Esso Australia*, 10 Int'l Arb. Rep. at A-7.

attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purpose of the arbitration.[50]

As to whether parties should not disclose arbitration documents, as in discovery, the High Court concluded that such an obligation of confidentiality only attaches to documents that are produced compulsorily. That rule, the High Court noted, parallels the parties' obligations in an ordinary court proceeding when discovery is ordered.[51]

Parties for whom confidentiality of the arbitration is critical might take small comfort in the High Court's observation that:

An obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcript and notes of evidence given, they could insert a provision to that effect in their arbitration agreement. Importantly, such a provision would bind the parties and the arbitrator, but not others. Witnesses, for example, would be under no obligation of confidentiality.[52]

In contrast to the recently adopted Australian view, the English view of strict confidentiality is derived from the concept of implied privacy and may be summarized by Mr. Justice Colman's finding in *Hassneh Ins. of Israel v. Mew* as follows:

If it be correct that there is an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly, witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.[53]

This English principle even limits disclosure of the award to those situations when disclosure is necessary to enforce or protect the legal rights of a party to the arbitration agreement, and only then if the right in question cannot be enforced or protected in any other manner.[54]

The Australian decision, however, is consistent with U.S. precedent, such as the decision of the U.S. District Court for the District of Delaware in *United States v. Panhandle E. Corp.*[55] In that case, the United States Government, acting to protect a security interest as guarantor of ship financing bonds, sought documents relating to an ICC arbitration in Geneva between a Panhandle subsidiary and Sonatrach, the Algerian national oil and gas company. Panhandle argued

50. *Id.* at A-8.
51. *Id.* at A-10.
52. *Id.* at A-8.
53. [1993] 2 Lloyd's Rep. 243, 247 (Q.B.).
54. *See* M. Jacobs, "Arbitration Confidentiality in Australia," 10 Int'l Arb. Rep. 21, 26 (July 1995), *citing* Insurance Company v. Lloyd's Syndicate, *reprinted in* 10 Int'l Arb. Rep. B-9 (Jan. 1995).
55. 118 F.R.D. 346 (D. Del. 1988).

against production on the ground that ICC Rules consider arbitration documents confidential, for which proposition Panhandle could cite only Article 2 of the Internal Rules of the ICC Court, which provides that the confidential character of the work of the ICC Court of Arbitration "must be respected by anyone who participates in that work in any capacity." The *Panhandle* court held, however, that such rule is meant to apply internally to the ICC to govern members of the ICC Court of Arbitration, and not to "parties to arbitration proceedings or the independent arbitration tribunal which conducts those proceedings."[56]

At the other end of the spectrum, however, is the French case of *Aïta v. Ojjeh*, in which the Court of Appeal of Paris rendered a judgment against a party who incorrectly sought annulment in France of an award rendered in London.[57] The Court of Appeal not only dismissed the challenge, but ruled that the very bringing of the proceedings violated the principle of confidentiality. The Court ordered the challenging party to pay a significant penalty to the party that won the arbitration, noting that the action "caused a public debate of facts which should remain confidential," and that "the very nature of arbitral proceedings [requires] that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed."[58]

Considering the varying approaches of national courts to the questions relating to the confidentiality of arbitrations, parties should either assume that all information relating to the arbitration may at some point become public or consider setting forth clearly in their arbitral agreements the degree of confidentiality expected. For certain contracts, such as those relating to intellectual property, these provisions may already be routine.[59]

V. Arbitral Awards

The International Chamber of Commerce's International Court of Arbitration (the ICC) rendered two arbitral awards of particular interest in 1992 that were not published until last year.

The first, ICC Case No. 6233 of 1992, relates to the arbitrability of tax disputes and the inherent power of arbitral tribunals to interpret arbitral awards.[60] In that case, the claimant entered into several contracts with the defendant, a sovereign

56. *Id.* at 350. *See also* J. Paulsson & N. Rawding, "The Trouble with Confidentiality," (1994) ICC International Court of Arbitration Bulletin 48, *reprinted in* 11 Arb. Int'l 303, 311 (1995) (discussing the *Panhandle* decision).

57. *Discussed in id.* at 312, *citing* Judgment of 18 February 1986, 1986 Revue de l'arbitrage 583.

58. *Id.* at 312.

59. *See* World Intellectual Property Organization: Mediation, Arbitration, and Expedited Arbitration Rules, *reprinted in* 34 I.L.M. 559 (1995) (WIPO Arbitration Rules), Arts. 73-76.

60. XX YB Comm. Arb. 58 (1995) (English translation of excerpts of French original) (providing expressly, with few exceptions, for the confidentiality of (1) the existence of the arbitration; (2) disclosures made during the arbitration; and (3) the resulting award).

State, which gave rise to two separate ICC arbitrations. One resulted in an arbitral award ordering the defendant to pay certain sums to the claimant, and the other ordered the claimant to pay certain sums to the defendant. The claimant requested a newly composed tribunal to interpret these two awards, particularly the portions relating to local taxes.

The defendant challenged the jurisdiction of the new tribunal to decide issues relating to the tax dispute between the parties. The new tribunal confirmed that its jurisdiction did not extend to deciding whether or not the claimant was to pay certain taxes to the defendant, as that issue concerned the defendant solely as tax authority. The tribunal held, however, that its jurisdiction did extend to all contractual matters falling within the scope of the parties' arbitration agreement, even if such matters are relevant to the state tax court's determination of taxes owed (the relevance of which, of course, would ultimately be determined by that court).

The defendant also challenged the jurisdiction of the new tribunal to interpret awards rendered by the previous tribunals. The defendant argued that the ICC Rules do not contain any provision concerning the interpretation of arbitral awards. The defendant argued that only the tribunal that renders an award can interpret that award, and if the rendering tribunal cannot interpret the award, then a state court should interpret the award. The tribunal disagreed, holding that arbitral tribunals, not state courts, have jurisdiction to interpret arbitral awards. This power, according to the tribunal, is based upon the arbitral agreement itself, the purpose of which is to bar the jurisdiction of state courts. The court further held that nothing authorizes a limitation of the effects of the arbitral agreement when the subject of the dispute is the interpretation of the award rendered on the basis of that agreement.

The tribunal noted that the ICC Rules do not require the same arbitral tribunal both to decide and to interpret an arbitral award. The tribunal stated that "arbitral jurisdiction by definition is ephemeral and occasional" and "many difficulties may impede the recomposition of the same arbitral tribunal."[61] The tribunal held that by making an award, a tribunal is discharged of the case, so that nothing stands in the way of the composition of a new tribunal to deal with a request for interpretation.[62] The tribunal therefore held that defendant's objection to a new tribunal's interpretation of the pre-existing award was unfounded.

In the second case, ICC Case No. 6320 of 1992, the tribunal considered the extent to which the United States Racketeer Influenced and Corrupt Organizations

61. XX YB Comm. Arb. at 60.

62. *Compare* the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), Art. 50(2), which provides in relevant part, "The request [for interpretation] shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted. . . ."

Act (RICO) applies in an international arbitration when the parties did not choose U.S. law to govern their dispute.[63]

In that case, a non-U.S. claimant initiated ICC arbitration against a U.S. defendant based on a contract for design, supply, and other services necessary to build a power plant in the claimant's country. A number of defects and problems delayed the project and claimant alleged that the defendant caused these defects and problems. In its arbitration request, the claimant raised claims of breach of contract, fraud, and racketeering.

The claimant based its RICO claim on allegations that the defendant committed similar fraudulent acts against the claimant and against three other U.S.-owned and based utilities. By so doing, claimant alleged, defendant committed a pattern of racketeering activities falling under the RICO statute.[64] The claimant asserted that the court must apply the RICO statute, even though the claimant was not a U.S. company and U.S. law did not govern the validity, construction, and performance of the contract in question.

The tribunal observed that decisions regarding the mandatory application of a particular national law or rule in international arbitration between private parties historically and exclusively involved the law of the court where the suit is brought, the *lex fori*. More recently, however, "foreign mandatory rules [have been] placed on an equal footing, for instance in a number of multilateral conventions, for cases where the relevant situation had a close or significant connection with the state having enacted such a rule."[65]

The tribunal accepted the premise that situations may arise in which an international arbitral tribunal should apply mandatory rules that are not part of the law that the parties have chosen to govern their dispute. The tribunal emphasized, however, that such an application outside the *lex contractus* must be subject to particularly stringent conditions. "The Tribunal must be satisfied that the mandatory rules different from the law that the parties have chosen to govern their claims or relationship must clearly be a 'loi de police.' "[66]

According to the tribunal, the state must have a strong and legitimate interest to justify the application of a mandatory state law in international arbitration. Additionally, if the law contains both public and civil (private) law rules, and if the extraterritorial application of only the civil rules is at stake, the state must have a strong and legitimate interest to justify the application of these civil law rules in international arbitration.[67]

63. XX YB Comm. Arb. 62 (1995); Title 18 U.S.C. § 1961.

64. XX YB Comm. Arb. at 95.

65. *Id.* at 98. Although the award as published does not cite examples to support its conclusion, such laws might include certain domestic consumer protection statutes that expressly provide that their provisions will apply regardless of attempts by private parties to limit their application through a choice of a foreign governing law. For a discussion of the application by arbitrators of such so-called mandatory laws, *see, e.g.*, W. PARK, INTERNATIONAL FORUM SELECTION, 113-23 (Kluwer, 1995).

66. *Id.*

67. *Id.* at 98-99.

The tribunal concluded that, even accepting the facts as alleged by the claimant, the United States did not have a sufficiently strong and legitimate interest in the case to justify application of the RICO statute as a mandatory rule of law. Thus, the tribunal held:

> While certain of defendant's actions invoked by claimant in support of its RICO claim are said to have taken place in the United States, the bulk of the alleged fraud occurred outside the United States. The center of the relations between the parties was in [another country] and the effects of the alleged RICO activity by defendant occurred there. These circumstances do not warrant the mandatory application of the treble damages provisions of the United States RICO statute in this case of international arbitration.[68]

Finally, the tribunal observed that the conclusion might be different if the national mandatory law in question reflected a principle of international public policy. The tribunal found, however, that the treble damages provision of the RICO statute did not reflect a principle of international public policy. The tribunal observed that RICO is specific to the United States and does not exist in other legal systems or international conventions.

68. *Id.* at 100-01.