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International Commercial Arbitration

MARC J. GOLDSTEIN*

I. Proceedings to Set Aside Awards Rendered in the United States

Two recent federal appellate decisions reached opposite conclusions about the relevance of the Federal Arbitration Act¹ (FAA) to a motion to set aside an international arbitration award rendered in the United States. The question is whether article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)² provides

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1. Federal Arbitration Act, 9 U.S.C. § 1 (1994) [hereinafter FAA].

2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, 21 U.S.T. 2517 [hereinafter New York Convention]. Article V of the Convention states:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

the exclusive grounds on which a court may vacate such an award, or whether, instead, an award may be set aside by an American court based upon one or more grounds set forth in section 10 of the FAA³ or upon one of the so-called "implied" grounds for refusing to enforce an award that has been recognized under the FAA. The most significant "implied" ground that American courts have recognized is "manifest disregard of the law."

The United States Court of Appeals for the Second Circuit held, in *Alghanim & Sons v. Toys R Us, Inc.*,⁴ that "manifest disregard of the law" and other "implied" grounds for setting aside a domestic award are permissible grounds to vacate an international arbitration award⁵ rendered in the United States.⁶ In contrast, the United States Court of Appeals for the Eleventh Circuit held, in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*,⁷ that the grounds for refusing recognition and enforcement of an international arbitration award stated in article V of the New York Convention are also the exclusive grounds on which a court at the place where the award was made may set aside the award.

The *Alghanim* case in the Second Circuit involved an international arbitration award made in New York in an arbitration between a Kuwaiti claimant and an American defendant. The award was in favor of the claimant in an amount in excess of \$46 million. The claimant moved to confirm the award in the United States District Court for the Southern District of New York, and the American defendant cross-moved to vacate the award. Defendant argued that under chapter 1 of the FAA, the award could be set aside as irrational and in manifest disregard of the law, even though these grounds are not set forth in article V of the New York Convention. The Second Circuit agreed, holding that article V(1)(e) of the New York Convention recognizes the power of a court at the place of arbitration to vacate an award pursuant to the arbitral procedural law of the forum. That power is recognized by article V(1)(e), the Court noted, because that section authorizes any court asked to

3. FAA § 10, 9 U.S.C.A. § 10 (1970). Section 10 of the FAA provides:

(a) In any of the following cases the 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—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

4. *Alghanim & Sons v. Toys R Us, Inc.*, 126 F.3d 15 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1042 (1998).

5. An "international arbitration award" here refers to an award to which the New York Convention applies, pursuant to article I thereof, either because it was "made in the territory of a State other than the State where the recognition and enforcement of such award is sought," or it is "not considered as domestic awards in the State where their recognition and enforcement are sought." Under section 202 of the FAA, an award is considered "domestic," and thus, outside the scope of the Convention, if it involves only United States citizens *and* has no reasonable relation with one or more foreign states, such as property located abroad or an envisaged contractual performance abroad.

6. Thus, an award in a case between New York and Delaware corporations, in an arbitration held in Pennsylvania, would still be an award to which the Convention applies if the dispute involves property located abroad, contract performance abroad, or some other reasonable relation with a foreign state.

7. *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

recognize and enforce an award to do so on the ground that the award has already been set aside by a court at the place of arbitration.⁸

The Second Circuit observed:

[w]e read article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award . . . because the Convention allows the district court to refuse to enforce an award that has been vacated by a competent authority in the country where the award was rendered.⁹

In support of its position, the Second Circuit cited the views expressed by foreign courts and leading commentators on the Convention, that the Convention simply does not govern an action to set aside an award, and that article V of the Convention contemplates that an award may be set aside, in the country where the award was made, on all grounds permitted by the procedural arbitral law of that country.¹⁰

The Eleventh Circuit reached the opposite conclusion in *Industrial Risk Insurers*. That case involved an international arbitration award rendered in Tampa, Florida. The losing party moved to vacate the award in the United States District Court for the Middle District of Florida, and appealed from that court's denial of the motion. The Eleventh Circuit affirmed, citing *Alghanim* for the proposition that the grounds for refusing enforcement of an award, set forth in article V of the Convention, are exclusive. But the court failed to consider the differences between a proceeding in which recognition of the award is sought, and one in which the only relief requested is to vacate the award. The court went on to hold that the award could not be vacated as "arbitrary and capricious," because this was not a ground for refusing enforcement under article V of the Convention.

These decisions highlight a fundamental tension in application of the New York Convention between the Convention's declared exclusivity with regard to enforcement of awards to which the Convention applies, and the apparent decision of the drafters of the Convention to permit free rein for the national (or other local) procedural arbitral law of the place of the arbitration with regard to setting aside an award.¹¹ The notion that Convention awards depend for their validity, in the first instance, on the procedural law of the situs conflicts fundamentally with the contemporary view of international arbitration as "anational," that is, that the proceedings and resulting awards have only a physical connection, but not a legal one, with the situs of the arbitration.¹²

8. New York Convention, *supra* note 2, art. V(1)(e). Article V(1)(e) provides that enforcement of an award may be refused where "[t]he award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

9. *Alghanim & Sons*, 126 F.3d at 21.

10. *Id.*

11. The Second Circuit in *Alghanim & Sons* cited a number of leading commentators on the drafting of the Convention, all of whom had come to the conclusion that the effect of article V(1)(e) is to permit an award to be set aside at the place of arbitration on grounds permitted by domestic procedural law. The Court observed: "There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law." *Id.* at 22.

12. A leading exponent of the anational view, Jan Paulsson, has written that the "core objective" of the New York Convention was to "free the international arbitral process from the domination of the law of the place of arbitration." Jan Paulsson, *Rediscovering the New York Convention: Further Reflections on Chromalloy*, 12 MEALEY'S INT'L ARB. REP. 20, 24 (1997). In the same article, Mr. Paulsson expressed the "anational" view as follows:

As we reach the end of the century, I do not believe that much wind is left in the sails of die-hard territorialists, who cling to the abstract notion that nothing of legal significance can happen anywhere if it is not either approved or tolerated by the local sovereign. Accordingly, they consider

Advocates of the "anational" view have strongly endorsed the decision in 1996 by a United States District Court for the District of Columbia, which granted enforcement to an international arbitration award made in Egypt, even though that award had been set aside by an Egyptian court before enforcement was sought in an American court.¹³ *Cbromalloy Aeroservices v. Arab Republic of Egypt*, however, was firmly grounded in the text of article V, which provides that enforcement of an award *may* be refused on the basis, *inter alia*, that a local court at the place of arbitration has set aside the award. The *Cbromalloy* court reasoned that where the award had been set aside in Egypt on grounds that would not independently permit an American court to refuse recognition and enforcement, the court could properly exercise its discretion to grant recognition and enforcement. While the result in the Eleventh Circuit case is consistent with the "anational" view insofar as it makes the Convention's defenses to enforcement exclusive in a proceeding to vacate a Convention award, that court's construction and application of the texts of the Convention and the FAA appear to be seriously flawed. The essential shortcoming of the Eleventh Circuit's analysis is its assumption that article V of the New York Convention provides the applicable grounds for a motion to vacate an international arbitration award rendered in the United States, and not merely the applicable defenses to a motion to confirm an award.

This assumption is contrary to the text of article V of the Convention, which sets forth the grounds on which "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked," upon the presentation of sufficient proof to "the competent authority where the recognition and enforcement is sought. . . ." In *Industrial Risk Insurers*, however, there had been no application to confirm the award before the federal district court in Tampa. Since that court was not one in which "recognition and enforcement [had been] sought," article V should have had no role to play. Article V of the Convention does not refer to the grounds on which a motion to vacate a Convention award may be granted. The setting aside of an award is referred to only in article V(1)(e), which provides that a court in which enforcement of the award is sought may refuse enforcement on the grounds that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." The Eleventh Circuit failed to take into account the Convention's dual regime governing the validity of awards, consisting of courts at the place of arbitration applying national or local procedural law in vacatur proceedings, and courts anywhere that are asked to recognize and enforce the award, applying the Convention. As the Second Circuit had correctly observed in *Alghanim*, the New York Convention simply does not identify legal standards governing a motion to vacate an international arbitration award that is made, as was the motion to the district court in *Industrial Risk Insurers*, to the competent judicial authority at the place where the award was made. According to article V(1)(e) of the Convention, this matter is governed by the procedural law applica-

it heretical for an award to be enforced abroad if it has been set aside in the country where it was rendered. This abstract vision simply does not correspond to contemporary commercial reality. Japanese and American businessmen may meet in an Indian airport and sign a contract relating to a European venture and given legal effect in Europe without anyone pausing to consider whether the contract is "heretical" because it has not complied with Indian formalities. Similarly, an arbitrator is not an emanation of a sovereign, and when he resolves an international dispute his award may be given effect without necessary reference to the acceptance or tolerance of the legal system of the place where he rendered his award.

With respect to the "anational" view of international arbitration, and the implications of *Alghanim*, see generally Thomas Carbonneau, *Debating the Proper Role of National Law Under the New York Arbitration Convention*, 6 *TUL. J. INT'L & COMP. L.* 277 (1998).

13. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.C. 1996).

ble to the arbitration, which will be the law of the situs of the arbitration unless the parties have agreed otherwise.¹⁴

One important question left unanswered in *Albanim*, and answered without adequate analysis in *Industrial Risk Insurers*, is the basis for federal subject matter jurisdiction in a proceeding brought by the losing party to vacate a Convention award. The Eleventh Circuit assumed there is federal jurisdiction over such a proceeding based upon chapter 2 of the FAA.¹⁵ Chapter 2 itself is ambiguous on this point. Section 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." But since a motion to vacate the award is a proceeding governed not by the Convention, but by the procedural arbitral law of the place of arbitration, arguably such a motion is not an "action or proceeding falling under the Convention."

However, two other sections of chapter 2 appear to support the conclusion that chapter 2 does create federal subject matter jurisdiction over motions to vacate Convention awards. First, the phrase "falling under the Convention" in section 203 is evidently borrowed from section 202, which provides in essence that non-domestic arbitration agreements and awards "fall[] under the Convention." Chapter 2 contains no further definition of an "action or proceeding falling under the Convention," but does, in section 205, provide for removal from state to federal court "[w]here the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the Convention. . . ." Thus, a motion to vacate a Convention award initiated in a state court is clearly subject to removal. Since it would be nonsensical for federal jurisdiction based upon removal to exist where the matter could not be brought in federal court originally, the sensible construction of these sections, taken together, is that a proceeding to set aside a Convention award involves a federal question under section 203 of the FAA, and thus may be brought in federal court in the first instance, without regard to the citizenship of the parties.¹⁶

As the Second Circuit held in *Albanim*, the applicable procedural standards in such a proceeding are furnished by chapter 1, section 10 of the FAA, which applies in a Convention case under chapter 2, section 208 of the FAA. That Section provides for a residual application of chapter 1 in Convention cases, to the extent not in conflict with the Convention. No conflict arises from the existence under the law of the place of arbitration of a ground for vacatur that is not among the defenses to enforcement found in article V because the Convention specifically envisions that eventuality in article V(1)(e).

14. The Second Circuit cited leading commentators on the drafting history of the Convention in support of its position. *Albanim & Sons*, 126 F.3d at 22. Further, at the time the Convention was drafted it was already well established, particularly in European civil law countries, that the procedural law applicable to an arbitration is the "lex loci," i.e., the law of the place of the arbitration.

15. The Eleventh Circuit correctly concluded that an award rendered in Florida based on American substantive law, in an arbitration between American and German parties, is a Convention award, and held that this was sufficient basis to find federal subject matter jurisdiction based upon the Convention. *Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

16. See, e.g., *Matter of the Application of Lurgi Metallurgie GmbH*, 1997 U.S. Dist. LEXIS 19148 (S.D.N.Y. Dec. 3, 1997) (stating that federal question jurisdiction exists, based on Convention and chapter 2 of the FAA, over petition to stay arbitration, where the arbitration agreement falls under the Convention).

The opposite conclusion would create some anomalous results. Notably, in an arbitration between two non-American parties, the federal courts would not have diversity jurisdiction. Further, since the dispute between them would almost inevitably not involve interstate or foreign commerce of the United States, their arbitration agreement and the resulting award would fall entirely outside the scope of the Federal Arbitration Act, such that a motion to vacate an award to which the Convention clearly applies would fall within the exclusive jurisdiction of the state court at the place of arbitration.

In an era of global commerce and an emerging transnational legal community with progressively more uniform legal standards, it is troublesome to conclude that the legal standards applicable to vacatur of Convention awards in United States courts are evolving through the law applicable to judicial review of domestic arbitration awards. Even sophisticated parties and experienced practitioners might wrongly assume that the Convention is exclusive in the domain of international awards. Modification of the Convention to prescribe the exclusive grounds for vacatur of awards, or to clarify the power of an enforcing court, a la *Cbromalloy*, to enforce an award previously vacated by a local court at the situs may be necessary to secure a truly anational "legal regime governing the validity of international arbitration awards."

II. Parallel Award Recognition Proceedings in Different Jurisdictions

Another Second Circuit panel was required this past year to address enforcement issues under the New York Convention that arise from the Convention's dual regime of local and transnational review of awards. In *Europcar Italia, S.P.A. v. Maillano Tours, Inc.*,¹⁷ the court was called upon to review a district court's discretionary refusal, under article VI of the Convention,¹⁸ to adjourn proceedings to enforce an award made in Italy, pending parallel proceedings in Italian courts to confirm and to set aside the same award.

In *Europcar*, the award had been made in an informal arbitral proceeding known in the Italian legal system as *arbitrato irrituale*. Before the Tribunal of Rome, the losing American party sought to have the award set aside based on the contention that its signature on the arbitration agreement had been forged. In a separate proceeding in the same court, the prevailing Italian claimant sought confirmation of the award. The claimant also moved to confirm the award in New York, while the Italian proceedings were pending, and the respondent countered by asking the district court to adjourn the case based upon article VI of the Convention. The district court refused to adjourn, and proceeded to confirm the award without awaiting the judgment of the Italian court.

The Second Circuit vacated the district court's order and remanded the case for reconsideration of the adjournment motion. In doing so, the court identified a series of factors that the district court should take into account in deciding whether to grant a motion to adjourn enforcement of a Convention award, including: (1) the goal of arbitration to resolve disputes expeditiously; (2) whether the award will receive greater scrutiny, under a less deferential standard of review, in the courts of the country of origin; (3) whether the proceedings in the country of origin are to enforce the award (a factor in favor of adjournment), or to set it aside (which would militate against adjournment); (4) whether the foreign proceedings were commenced first, which might raise international comity concerns; (5) whether the proceedings in the country of origin were initiated to hinder or delay resolution of the dispute; (6) the relative hardships to the parties resulting from adjournment or continuation of the enforcement proceedings; and (7) "any other circumstances that could tend to shift balance in favor of or against adjournment."¹⁹

17. *Europcar Italia, S.P.A. v. Maillano Tours, Inc.*, 156 F.3d 310 (2d Cir. 1998).

18. New York Convention, *supra* note 2, art. VI. Article VI provides:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

19. *Europcar*, 156 F.3d at 317-18.

Perhaps the only consolation to be taken from this numbing array of factors is that district courts are free to apply them, to grant or deny requests to adjourn enforcement proceedings, subject only to very limited appellate review for "abuse of discretion." The Second Circuit held that this is the applicable standard of review of a district court decision on a motion to adjourn under article VI of the Convention.

But *Europcar* illustrates once again that the decision of the Convention's drafters to preserve an appellate role for courts at the situs of the arbitration has serious efficiency costs. Like *Albanim* and *Industrial Risk Insurers*, *Europcar* suggests that reform may be needed to redefine the role of courts at the arbitration situs in the review of Convention awards. In *Europcar*, the motion to vacate the award was made on a ground, fraud in the procurement of the arbitration agreement, that the Convention permits to be raised as a defense to recognition and enforcement,²⁰ wherever enforcement might be sought. Arguably it serves no good purpose to permit the losing party to seek vacatur of the award in the courts of the country of origin on a ground that could be asserted as a defense to enforcement. The adverse effects of this aspect of the Convention's dual appellate regime include: the opportunity for forum-shopping by the party seeking to avoid enforcement and recognition of the award; parallel enforcement and vacatur proceedings in multiple jurisdictions with the attendant risk of inconsistent determinations; and wasteful and time-consuming motions to adjourn enforcement proceedings, which force judges to balance the policies of arbitration with notions of international comity. Convention reformers might well consider whether the opportunity for judicial vacatur at the situs, upon a ground recognized under article V as a defense to enforcement, is a redundant level of review. The elimination of this right would not substantially diminish the portfolio of legal rights that the parties to an international arbitration generally expect to arise from the selection of an arbitral forum. Experience suggests that the right of appeal to local courts at the situs to set aside the award under local law is rarely a criterion for forum selection.

Until such reform occurs, however, enforcing courts should be mindful of the Second Circuit's admonition to take a dim view of a losing party's efforts to hinder or delay enforcement. Motions to vacate awards, made upon grounds that may be asserted defensively under article V in an enforcement proceeding, might well be viewed as presumptively dilatory, and thus as rarely presenting an enforcing court with a compelling reasons to delay enforcement proceedings.

III. Use of Section 1782 to Obtain U.S. Discovery in Aid of Foreign Arbitration

Thirty-five years after the enactment of 28 U.S.C. § 1782, a federal appellate court has held, in a case of first impression at the appellate level, that a private commercial arbitration under the auspices of the International Chamber of Commerce (ICC) is not a "proceeding in a foreign or international tribunal" for which discovery may be obtained by compulsion from non-parties as provided in this statute.²¹

20. New York Convention, *supra* note 2, art. V(1)(a). Article V(1)(a) of the Convention provides that recognition and enforcement may be denied, *inter alia*, where the arbitration "agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. . . ."

21. 28 U.S.C. § 1782 (1998) provides, in pertinent part:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in

The United States Court of Appeals for the Second Circuit, in a decision awaited with great interest in the arbitration community, held in *National Broadcasting Co. v. Bear Stearns & Co.*,²² that neither the text nor the legislative history of § 1782 supports the conclusion that Congress intended to have federal district judges compel non-parties to international arbitrations to provide discovery for use in those proceedings. The court's decision affirmed a district court order which had quashed subpoenas issued to several New York investment banks in connection with an arbitration in Mexico between NBC and a Mexican television broadcasting company.

Considering first the ordinary meaning of the statute's text, Judge Jose Cabranes writing for unanimous Second Circuit panel, concluded that the word "tribunal" did not unambiguously include, or exclude, international arbitration panels.²³ Then, proceeding to examine the legislative history, the court found clear evidence of a congressional purpose to extend discovery assistance to non-conventional foreign adjudicative bodies, such as administrative tribunals, but was unable to find any expression of congressional intent to extend assistance to tribunals that were not either units of a foreign government or creatures of intergovernmental agreements. Finally, the court observed that the conclusions mandated by the statutory text and legislative history were fully supported by the policies underlying the FAA, which treats arbitration as a creature of the contract between the parties that ordinarily should not impose obligations on non-parties except as specified in the FAA itself.

The Second Circuit's decision appears likely to gain wide acceptance in view of its careful scrutiny of the legislative history.²⁴ The Second Circuit's task was complicated by the fact that the drafter of the bill that included § 1782 was Professor Hans Smit, at that time a director of a project at Columbia University Law School that furnished assistance to the Commission on International Rules of Judicial Procedure. In a recent article, Professor Smit has asserted that § 1782 was intended by the drafter to cover private arbitrations, and should be so construed.²⁵ The Second Circuit, however, noted that the Senate Report on § 1782 relied on a 1962 article by Professor Smit, which expressed the view that an international tribunal owes both its existence and its powers to an international agreement.²⁶ As the Second Circuit's decision notes, Professor Smit's 1962 article, and the 1964 House and Senate reports on

a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . .

22. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 1999 U.S. App. LEXIS 933 (2d Cir. Jan. 26, 1999).

23. Preliminarily, the Court noted that section 7 of the FAA prescribes the circumstances under which arbitrators may issue a subpoena, and that section 7 is narrower than section 1782 in several respects, notably that the arbitrators may only issue a subpoena to a person residing within the judicial district where the arbitration takes place, and that under the express language of section 7 the subpoena may only command the person to appear or produce information for use in the hearing (and, by implication, not for discovery). The Court noted that, were it to find that a "tribunal" under section 1782 includes a private international commercial arbitration tribunal, it would be necessary to decide whether section 7 of the FAA is exclusive, in which case section 1782 would be in conflict with the FAA. *Id.* at 7-9.

24. For a comprehensive review of the relevant legislative history, case law, and commentary that also reached the conclusion that section 1782 should be construed not to apply to private international commercial arbitrations, see Donald Rivkin & Barton Legum, *Attempts to Use Section 1782 to Obtain US Discovery in Aid of Foreign Arbitrations*, 14 *ARB. INT'L* 213 (1998).

25. Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 *SVR. J. INT'L L. & COM.* 1, 5 (1998).

26. *Nat'l Broad. Co.*, 1999 U.S. App. LEXIS 933 at *18, quoting Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 *COLUM. L. REV.* 1264, 1267 (1962).

§ 1782, can be searched in vain for affirmative evidence of an intention to include private, contractual, arbitral tribunals within the scope of the statute.

Numerous decisions of the United States Supreme Court over the last decade have emphasized the contractual, consensual nature of the arbitration process, and the strong federal policy reflected in the FAA to give effect to the agreement of the parties. The Second Circuit's decision is in keeping with that philosophy, and reflects the widely shared perception that discovery in private international arbitration should proceed as the parties have agreed, or as the applicable rules may provide or the arbitrators may direct. Further, by declining to recognize an anomalous benefit that would inure mainly to foreign parties involved in arbitrations with American adversaries, the Second Circuit's decision may be seen as advancing the cause of a more uniform regime of transnational rules governing the arbitration process.

IV. Other Judicial Decisions in the United States

In other noteworthy developments in United States courts during the past year:

(1) Two more federal appellate courts, the Ninth and Eleventh Circuits, held that the "anti-waiver" provisions of the federal securities laws do not bar enforcement of freely-negotiated forum-selection and choice-of-law clauses even though the consequence of enforcing such clauses is to bar a suit in federal court under the civil liability sections of the federal securities laws.²⁷ Given the unanimity among the federal courts of appeals that have addressed this issue in a series of actions involving disputes between the Lloyd's insurance market and American "names" in Lloyd's syndicates, there appears to be little remaining doubt that a freely-negotiated arbitration clause in an international commercial agreement will be enforced under the FAA, even where the effect of such an agreement is to bar a fraud claim under the federal securities laws because of a choice of foreign substantive law. That conclusion seems to follow *a fortiori* from the Lloyd's decisions enforcing forum-selection clauses that designated the English courts to resolve disputes applying English law, together with the strong federal policy favoring enforcement of arbitration agreements, reflected in the FAA and repeatedly affirmed in decisions of the Supreme Court of the United States.²⁸

It should be noted, however, that the Supreme Court stated in a footnote of its 1985 decision in *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*²⁹ that it would have little hesitation in condemning, as a violation of public policy, "choice-of-forum and choice-of-law clauses that operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations. . . ."³⁰ Up to the present time, however, the Court has repeatedly declined

27. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3436, 1999 U.S. LEXIS 494 (Jan. 11, 1999); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1995) (en banc), *cert. denied*, 119 S. Ct. 365 (1998).

28. *See, e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

Indeed, one of the two Supreme Court cases central to the analysis in the Ninth and Eleventh Circuit cases, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), involved an agreement to resolve disputes by private arbitration before the International Chamber of Commerce. The Court referred to such an arbitration clause as "a specialized kind of forum selection clause. . . ." *Id.* at 519.

29. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

30. *Id.* at 637.

to grant certiorari in the Lloyd's cases, which have presented the analogous public policy question in the context of statutory remedies for securities violations.³¹

(2) The United States Court of Appeals for the Second Circuit affirmed confirmation of a Convention award, agreeing with the district court that the losing party had waived the right to oppose confirmation, on the basis of alleged corruption of the arbitrators, by proceeding with the arbitration after the facts suggesting the alleged corruption had come to light.³²

(3) A federal district judge in Michigan enforced an arbitration agreement under chapter 2 of the FAA, rejecting the contention that the parties' choice of Ontario law to govern their contract made Ontario law applicable to the question of arbitrability.³³

(4) A federal district judge in New York declined to compel arbitration of a dispute between the Andersen Worldwide organization and certain of its member firms, where the issues of the scope of arbitrable disputes and the proper forum were already pending before an ICC tribunal. The court held that "[t]he ICC should decide whether these issues are properly litigated in the pending ICC arbitration, in another ICC arbitration, or in another forum under the Swiss Inter cantonal Arbitration Convention."³⁴ While the court did not cite the ICC's Rules of Arbitration, its holding is consistent with the position on the relative competence of national courts and arbitral institutions reflected in article 6(2) of the new ICC Rules (in force as from January 1, 1998). Under article 6(2), a dispute concerning arbitrability may be decided in the first instance by the ICC Court of Arbitration, and, if the ICC Court is *prima facie* satisfied as to the existence of an arbitration agreement, "any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself." According to article 6(2), a party to a pending ICC case may apply to a court to determine the existence of a valid agreement to arbitration only if the ICC Court finds no such agreement *prima facie* and notifies the parties that the arbitration cannot proceed.

V. Comprehensive Revision of ICC Rules of Arbitration

New ICC Rules of Arbitration (Rules) went into effect on January 1, 1998.³⁵ The Rules apply to ICC arbitrations commenced after that date. In large measure the Rules are designed to streamline administration of cases by the ICC, as well as to reflect developments in arbitration practice. No dramatic changes are effected by these Rules, although there are some new provisions designed to remedy gaps in coverage, such as the new article concerning appointment of arbitrators for multi-party arbitrations.

The most obvious change in the Rules is structural: the Rules are now organized into seven subdivisions that track the normal chronological course of an ICC case: Introductory Provisions, Commencing the Arbitration, The Arbitral Tribunal, The Arbitral Proceedings, Awards, Costs,

31. See, e.g., *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992).

32. *AAOT Foreign Econ. Ass'n Technostroyport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980 (2d Cir. 1998).

33. *Westbrook Int'l, LLC v. Westbrook Tech., Inc.*, 1998 U.S. Dist. LEXIS 13325 (E.D. Mich. Aug. 25, 1998).

34. *Andersen Consulting Bus. Unit Member Firms v. Andersen Worldwide Société Coop.*, 1998 U.S. Dist. LEXIS 3252 (S.D.N.Y. Mar. 18, 1998).

35. See generally W. CRAIG ET AL., ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES WITH COMMENTARY (1998).

Miscellaneous. In addition, certain rules formerly found in the internal rules of the ICC Court can now be found in the body of the Rules, enabling users to better understand the role of the court in case administration.

A number of the Rule changes were intended to reduce delays and clarify provisions concerning the payment of advances on costs. The substantive content required in the Request for Arbitration and the Answer has been reduced to permit cases to be launched more quickly (articles 4 and 5). The Secretary General is empowered to confirm the nominations of arbitrators, eliminating delays that formerly occurred when only the court could confirm such nominations (article 9). The arbitration may move forward under the new Rules even though one party may be in default in payment of the advance on costs, but the Secretary General may order the tribunal to suspend work if the full advance is not paid, thus creating an incentive for the non-defaulting party to pay the full advance (article 30(4)). The parties are now authorized to reach agreement to shorten the deadlines provided for in the Rules, to permit the case to be conducted and resolved on an abbreviated timetable (article 32(1)).

New article 10 of the Rules concerning the appointment of arbitrators in multi-party cases follows the lead of the World Intellectual Property Organization (WIPO) Rules, and the ICC's own practice, in providing for the court to appoint the arbitrators where multiple claimants or multiple defendants fail to nominate a single arbitrator jointly and the parties are unable to agree on another method for the appointment of the tribunal. The ICC had adopted this practice in response to the French Cour de Cassation decision in the *Dutoo* case, in which an ICC award was set aside on grounds of public policy because the requirement that multiple defendants nominate a single arbitrator while a sole claimant also nominated a single arbitrator violated the principle of equality of the parties. The solution of having the court appoint all three arbitrators ensures equality of the parties, but at the expense of the important right of a party to have a party-appointed arbitrator.³⁶ The Rules leave open the possibility that a tribunal having more than three members might be appointed in certain circumstances, although this would be a departure from ICC practice.

Article 23 of the Rules clarifies the power of an arbitral tribunal to grant interim and conservatory measures, and the circumstances in which such measures may be obtained from a court during the pendency of an ICC case. While the power of an arbitral tribunal to grant interim measures of protection has long been recognized in ICC practice, it was not recognized explicitly in former article 8(5). Article 23 also recognizes the power of an arbitral tribunal to make an award on interim measures, a power that for many years has been recognized in the UNCITRAL and American Arbitration Association Rules, among others. This raises the possibility that at least some awards on interim measures may be recognized and enforced, in some jurisdictions, under the New York Convention. Article 23 also amends former article 8(5) to provide that resort may be had to a court, to obtain interim measures, in "appropriate" circumstances after the tribunal has been constituted, but those circumstances no longer need to be "exceptional" as article 8(5) formerly required.

The ICC declined to adopt a specific set of procedures for expedited or "fast-track" arbitration, and the leading commentators report that "[a]ccording to past practice, the Secretariat will cooperate with the parties to work out an appropriate fast-track procedure when the parties

36. See Marc J. Goldstein, *Constituting the Arbitral Tribunal for the Multi-Party Case: Possible Solutions for Institutional Rules*, in *THE COMMERCIAL WAY TO JUSTICE, 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE OF ARBITRATORS* 101 (Geoffrey M. Beresford Hartwell ed., 1997).

wish to do so."³⁷ This does not, however, clearly cover the situation where one party claims urgency and seeks a departure from the time periods provided in the Rules, while the other party perceives no such need. Neither the Rules nor the ICC's practice reflect any sentiment in favor of "fast-track" arbitration without the consent of all of the parties.

VI. Other Institutional Developments

A. SWEDEN

At the time of this writing the Arbitration Institute of the Stockholm Chamber of Commerce (Arbitration Institute) was about to adopt new Arbitration Rules, and Sweden's Parliament was expected shortly to approve a new Arbitration Act. Both the Act and the Rules were scheduled to come into force on April 1, 1999. In recent years Sweden has played host to an increasing number of international arbitrations in which both or all parties are non-Swedish, and most international arbitrations in Sweden take place under the auspices of the Arbitration Institute. The most significant new rule, article 24 concerning the applicable law, clarifies that in the absence of agreement of the parties on the applicable law "the Arbitral Tribunal shall apply the law which it considers to be most appropriate," without having to refer to conflict of law rules. This approach is in conformity with recent trends in arbitral practice and institutional rules, including the American Arbitration Association International Arbitration Rules and the new ICC Rules.

B. UNITED STATES

In 1998, the American Arbitration Association's International Center for Dispute Resolution (Center), founded in mid-1996, experienced a continued increase in the number of new cases filed with the Center. Approximately 380 cases were filed in 1998, representing an eleven percent increase in case filings from 1997. Among non-American parties involved in those new cases, nearly twenty-five percent were from European countries, thirteen percent were from Asia, Australia and New Zealand, eleven percent from Latin America and the Caribbean, and ten percent from Canada. The AAA adopted amended International Arbitration Rules as of April 1, 1997, updating rules that had been patterned after the UNCITRAL Arbitration Rules. Significantly, those rules provide that where parties have provided for arbitration of an international dispute by the AAA without designating particular rules, the International Arbitration Rules will apply. This eliminates a source of confusion for parties involved in an international dispute who are more familiar with the AAA's Commercial Arbitration Rules applicable to domestic cases. Among the other important changes in the AAA International Rules are: (1) clarification of the arbitrators' power to select the applicable law, absent agreement of the parties, without reference to conflict of law rules (article 28(a)); (2) a waiver of the right to claim punitive damages unless the parties have expressly agreed otherwise (article 28(5)); (3) a new rule expressly recognizing the confidentiality of the proceedings, the award, and proscribing disclosure of confidential information disclosed during the proceedings (article 34); (4) modification of the rule on an interim measure to expressly recognize the power of an arbitral tribunal to grant injunctive relief (article 21(1)); and (5) a provision on arbitrator appointments in multi-party cases, that the administrator shall appoint all the arbitrators unless the parties have agreed otherwise (article 6(5)).

37. ANNOTATED GUIDE, *supra* note 35, at 14.

C. UNITED KINGDOM

The London Court of International Arbitration (LCIA) also adopted revised arbitration rules which took effect January 1, 1998 for arbitrations commencing after that date. The rules have been restructured and streamlined to facilitate use, including a new article 4 on Notices and Periods of Time, and separate articles dealing with formation of the Arbitral Tribunal (article 5), Nationality of Arbitrators (article 6), and Party Nominations (article 7) containing rules formerly found in the lengthy article 3 of the 1985 version of the LCIA Rules. A new article 8 concerning arbitrator appointments where three or more parties are present follows the trend of divesting the parties of the right to nominate arbitrators unless all the parties are aligned into two separate sides each of which will nominate one arbitrator. New article 9 goes significantly further than other revisions of institutional rules to facilitate "fast-track" arbitration, permitting the LCIA Court in its discretion, and upon application by a party, to curtail time limits under the Rules in order to expedite formation of the Arbitral Tribunal. Former article 7 concerning the place of arbitration is replaced by a new article 16 entitled "Seat of Arbitration and Place of Hearings," and is designed to reflect in the rules the understanding in contemporary practice of the legal significance of the seat of the arbitration, notably that unless the parties agree otherwise, the procedural arbitration law applicable to the proceedings will be the law of the seat of the arbitration, and that the arbitration will be considered to be conducted at the seat of the arbitration even if the Arbitral Tribunal conducts proceedings or deliberations elsewhere. Article 23 concerning the jurisdiction of the Arbitral Tribunal sets forth a new subsection declaring that the parties, by agreeing to arbitrate under these Rules, shall be treated as having agreed that they will not apply to a judicial authority to determine the jurisdiction of the Tribunal, except with consent of all parties, permission of the Tribunal, or after an award on the jurisdiction issue.

VII. Supplementary Rules of Evidence Proposed by International Bar Association

During the past two years, the Arbitration and ADR Committee (Committee D) of the International Bar Association (IBA) has prepared revisions to the IBA Rules of Evidence for International Arbitration Proceedings, originally adopted in 1983. The Draft IBA Supplementary Rules Governing the Taking of Evidence in International Arbitration are designed to fill the void intentionally left in many institutional and *ad hoc* rules, as to applicable procedures governing the collection and presentation of evidence, before and during evidentiary hearings. The Rules present a method for conducting an arbitration, and are meant to represent a blending of common law and civil law procedures. As noted in the Rules, they are intended for adoption by the parties, either in the arbitration agreement or when a dispute arises, or to serve as guidelines for the arbitrators in the exercise of the procedural discretion reposed in them by institutional and *ad hoc* rules. The IBA hopes to conclude the drafting of the Rules in early 1999, with a goal to have them adopted by the IBA Council at its meeting in Boston in June 1999.

The Rules contain many practices and principles familiar to arbitrators and practitioners, reflecting widely accepted, but otherwise uncodified, procedural norms. Article 3 governing document production recognizes the right of the arbitrators to order production of documents relevant to the outcome, on their own initiative, as well as the right of a party to submit a document request to the tribunal, which may order the adverse party to comply. The broad scope of document discovery recognized in American civil practice is not recognized; instead a party's Request to Produce must contain a specific description of the documents or category

of documents requested, the matters to be proved by means of the documents requested, and a statement as to why the documents are assumed to be in possession of the adverse party. The Rules establish a procedure for submitting objections and for the tribunal to rule on such objections, including the possibility of inspection of a contested document by an independent and impartial expert. Article 10 of the Rules adopts the well-established principle that the tribunal may draw adverse inferences from the non-production of a document ordered to be produced.

Articles 4, 5 and 6 of the Rules govern, respectively, testimony of fact witnesses, party-appointed experts, and tribunal-appointed experts, and operate in conjunction with article 8, which prescribes evidentiary hearing procedures. A party must submit a written Witness Statement in advance of the hearing for each witness who may be called to testify; similarly party-appointed experts must furnish written Expert Reports. The written testimony may be admitted and considered even if the witnesses do not testify at the hearing, but the tribunal or the adverse party may request that the witness appear to testify in person. The Rules provide that the tribunal, absent exceptional circumstances, shall ignore the testimony of a witness whose Witness Statement or Expert Report is submitted but who is not made available to testify at the hearing if requested to do so. Article 6 concerning tribunal-appointed experts reflects such familiar practices as the expert's terms of reference, expert's statement of independence and challenge procedure, the expert's co-equal power with the arbitrators to require the parties to produce evidence, and the right of the parties to comment in writing on the expert's report and to question the expert at the evidentiary hearing.

The Rules can serve several useful functions, even if they are not widely adopted *in baec verba* in arbitration clauses or submission agreements. They are a valuable guide in counseling clients who may wish to, and be able to, select between national courts and international arbitration in transaction documents. The rules can be read quickly, and the principal differences from American civil practice can be readily discerned, by a non-litigating transactional lawyer. Clients and counsel who find themselves involved in international arbitration for the first time can read the Rules as a fair approximation of the procedures likely to be imposed, as a matter of discretion, by experienced arbitrators. And both Arbitral Tribunals and disputants will find the rules to be a useful guide to resolving potentially contentious, and time-consuming, procedural issues. Finally, to the extent Arbitral Tribunals adopt the rules in whole or in part, challenges to the validity of awards on grounds of unfair procedures will be reduced, as courts that are asked to vacate or refuse enforcement of awards may consult the Rules as a reliable guide to international norms of procedural fairness.