This issue includes: Most Favored Nation Treatment in International Investment Law • Anti-suit Injunctions and West Tankers • Trends in Enforcement of Annulled Foreign Awards
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MOST FAVORED NATION TREATMENT – THE GOLDEN RULE OF INTERNATIONAL INVESTMENT LAW

What is MFN, or “most favored nation treatment?” This international investment treaty standard, along with that of national treatment, embodies the ancient Golden Rule—“Do to others what you would have them do to you.” Or in other words, treat others as you yourself would like to be treated. Some have called this an ethic of reciprocity underlining all human rights. MFN and national treatment are comparative standards of non-discrimination that have been refined into two basic questions: (i) are there comparators?—this is the question of “likeness” in investment and trade law parlance that is typically a major issue; and (ii) has there been more favorable treatment granted to these other similar investors or investments that I should be receiving?

MFN treatment is one of the oldest and most often included obligations in international treaty law. As applied to treaty interpretation, the eminent publicist Professor Georg Schwarzenberger described MFN treatment as having “the effect of putting the services of the shrewdest negotiator of a third country gratuitously at the disposal of one’s own country.”

In simple terms, if state “A” signed an investment treaty today that has an MFN provision, a foreign investor making an investment in state “A” would be assured that it would receive a better level of treatment provided under a future treaty to other foreign investors investing in state “A.” This puts all foreign investors in state “A” on the same best treatment footing on an ongoing basis. This also has the positive benefit of not allowing states to show preference in their future negotiations to other states and their investors.

Article 3 of the bilateral investment treaty between the United Kingdom and the Soviet Union (the Agreement between the Government of the United Kingdom and the Government of the USSR for the Promotion and Reciprocal Protection of Investments, signed on April 6, 1989, or “UK-Soviet BIT”) provides an example of an MFN provision as follows:

Article 3 Treatment of Investments:
(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of investors of any third State.
(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to investors of any third State.

The interpretation of MFN clauses as found in international investment agreements has become particularly vexing to treaty negotiators, practitioners, arbitrators and investors in the face of what some argue to be a diverging jurisprudence. Over the past eight years, a number of awards have been rendered by tribunals interpreting the MFN treatment obligation, including:

- Emilio Agustín Maffezini v Spain, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/7, January 25, 2000 [hereinafter Maffezini]
- ADF Group Inc v United States, Award, ICSID Case No ARB(AF)/00/1, January 9, 2003
Eight of these awards were rendered since the beginning of 2005. It should be first noted that investment treaties can notionally be divided into procedural and substantive law provisions. Substantive provisions relate to the obligations and protections set out in a treaty, such as MFN, national treatment, fair and equitable treatment and expropriation. The procedural provisions relate to the scope and content of the dispute resolution process, such as time limitations and choice of arbitration rules. It is widely agreed that MFN applies to substantive provisions. In other words, if there is a better formulation of a fair and equitable treatment type provision in a treaty with a third party, then the claimant may have the benefit of that better substantive treaty protection. Examples of this type of MFN application have been seen in a number of arbitrations, for example see: ADF, MTD and Tecmed.

However, the recent debate has raged concerning whether and how MFN should be applied with respect to procedural provisions of a treaty. As the Berschader tribunal succinctly described this debate:

“While it is universally agreed that the very essence of an MFN provision in a BIT is to afford investors all material protection provided by subsequent treaties, it is much more uncertain whether such provisions should be understood to extend to dispute resolution clauses. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject.”

The most-often cited examples of this divergence are the awards of the tribunals in Maffezini and Plama. The various tribunals following Plama (such as Berschader and Telenor), took a very strict interpretative approach to the application of MFN to such procedural provisions. As the Berschader tribunal concluded:

“… the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and
unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.”

The Vivendi tribunal, consistent with the line of cases following the Maffezini award (which includes Siemens, Suez, Vivendi, National Grid, Gas Natural), took the opposite stance, holding that:

“… the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina-UK BIT, dispute settlement are as important as other matters governed by the BITs and are an integral part of the investment protection regime that the respective sovereign states have agreed upon.”

The 2007 award of the tribunal in RosInvestCo is of particular interest as it is the most recent iteration in the development of this important area of investment law jurisprudence. As discussed below, this decision is of particular note because it is the first investment arbitration award to go beyond the specific arbitration clause provisions concerning the requirement to appear before local courts with a related time limitation.

The RosInvestCo arbitration relates to the circumstances surrounding the dispute between Yukos Oil Corporation (“Yukos”) and the Russian Federation. In this part of that lengthy and complicated saga, RosInvestCo, a UK company that invested in Yukos, is seeking compensation for what it described in its pleadings as: “… discriminatory and unlawful expropriatory actions … [rendering] RosInvestCo’s investment in Yukos nearly valueless.” However, as the applicable UK-Soviet BIT does not provide for investor-state dispute resolution other than for the determination of the amount of compensation for expropriation, the claimant argued that the ambit of the substantive obligations of Russia could be expanded through the application of the BIT’s MFN provision (Article 3 cited above). In particular, the claimant argued that the tribunal should not only be able to consider the question of the amount of compensation for the expropriation, but through the application of the MFN provision should also be able to decide on the question of expropriation itself. The Respondent, Russia, argued for a much stricter reading of the application of MFN, consistent with the decisions of the tribunals in Plama and Berschader. The tribunal sided with the Claimants by granting jurisdiction to hear the full expropriation claim.

An MFN or national treatment analysis usually includes two exercises: one to determine “likeness,” and the second to determine if there was more favorable treatment. With regard to likeness, as with many applications of MFN in the context of treaty interpretation, the tribunal appeared to assume the circumstances were “likely” in the context of the potential for other investors of third states to receive a better treaty treatment. The more favorable treatment being addressed had two elements—the broader arbitration clause and the full expropriation provision found in the Agreement between the Government of Denmark and the Government of the Russian Federation concerning the Promotion and Reciprocal Protection of Investments, dated November 4, 1993 (“Denmark-Russia BIT”).

The tribunal compared the arbitration clause in the UK-Soviet BIT, which provides for investor-state dispute resolution only in relation to the determination of the amount of compensation for expropriation, with the bilateral investment treaty later signed between Denmark and Russia, which provides for much wider investor-state dispute resolution covering “any dispute … in connection with an investment.” This would include the full range of substantive obligations typically conferred by such a clause, including the determination of whether there has been an expropriation requiring compensation. Following the general pattern of an MFN analysis, it was clear to the tribunal that Article 8 of the Denmark-Russia BIT provided for more favorable treatment than the equivalent arbitration clause in the UK-Soviet BIT. It was this treatment that the claimant sought to import into the UK-Soviet BIT.
In its analysis, the tribunal then examined very specifically the wording of Article 3(2) of the UK-Soviet BIT MFN provision. Firstly, the tribunal asked “Can the term treatment include the protection by an arbitration clause?” The tribunal indicated that it was not prepared to answer this question in general, but would only focus on “the sub-question whether it includes an arbitration clause covering expropriation.” In principle, the tribunal confirmed that expropriation is a “highly relevant” aspect of the treatment provided to an investor with regard to the investor’s procedural rights. In particular, the tribunal stated:

“For it is difficult to doubt that an expropriation interferes with the investor’s use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his ‘use’ and ‘enjoyment,’ procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state.”

Thus, the tribunal confirmed that the full expropriation provision could be imported as an example of a type of treatment interfering with the “use” and “enjoyment” by an investor of its investment.

Although the RosInvestCo tribunal stated clearly its intention not to enter into “the much more general question of whether MFN-clauses can be used to transfer arbitration clauses from one treaty to another,” certainly many readers of the award might well come to the conclusion that the tribunal was doing just that. The reason for this statement clearly relates to the desire of the tribunal to avoid the debate raging on the topic of MFN as to whether more favorable procedural provisions, as opposed to substantive protections, can be imported from third party treaties. The provisions at issue in the RosInvestCo award straddle both types of provisions as the effect of the award is to import a more favorable expropriation provision by virtue of an expansive arbitration clause.

The fact that the arbitration clauses at issue address very directly the scope of the subject matter jurisdiction, or *ratione materiae* jurisdiction, of the arbitration allows one to argue that the better “treatment” being assessed goes directly to the fundamental substantive protections of a BIT. Subject matter jurisdiction frequently refers to those jurisdiction requirements that provide the fundamental basis of consent, such as whether there is a legal dispute concerning an investment as defined in a treaty or under arbitral rules, such as the ICSID Convention. In this vein, the tribunal went on to state that:

“… While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.

If this effect is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to “only” procedural protection. However, the Tribunal feels that this latter argument cannot be considered as decisive, but that rather, as argued further above, an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions such as Article 5 of the BIT.”

This approach in effect conflates procedural protections, especially those relating to subject matter jurisdiction and the scope of the dispute, as being of the same character as substantive protections—they both provide important protections for investments. The tribunal then stepped back slightly and suggested that, for the purpose of the award, this conclusion is not “decisive” and thus the reader may consider it *obiter dictum*. However, and at the very least, the RosInvestCo
award stands for the proposition that subject matter jurisdiction concerning a broad arbitration clause may provide access to a full expropriation claim through the mechanism of a most favored nation treatment provision. Although restricted to the certain facts and the specific treaty provisions at issue in the arbitration, the RosInvestCo award provides valuable further insight in respect of the operation of this most ancient and venerable of international treaty law obligations.

As part of the continuing expansion of Fulbright’s global international arbitration practice, Richard Hill, who has been based in Fulbright’s London location since January 2005, has relocated to Fulbright’s Hong Kong office effective August 1, 2008. Hill is a partner in Fulbright’s international arbitration group.

Hill is one of only 15 international arbitration lawyers in Hong Kong to be recommended by Who’s Who Legal (2009), the International Who’s Who of Commercial Arbitration (2009), the International Who’s Who of Business Lawyers (2009) and GlobalArbitrationReview.com.

ENGLISH COURT ANTI-SUIT INJUNCTIONS AND THE ECJ ADVOCATE-GENERAL’S OPINION IN WEST TANKERS: THE END OF AN ERA?

The English Courts have for many years exercised jurisdiction to restrain foreign court proceedings brought by a party in breach of an arbitration agreement where the seat of the arbitration is England. This supervisory power is generally regarded by commercial parties as an important advantage of choosing England as the seat of the arbitration. In contrast, the courts of other EU Member States have shown themselves generally unwilling to grant anti-suit injunctions in support of arbitration.

The granting of anti-suit injunctions by the English Courts, as the supervisory courts of the seat of the arbitration, has inevitably run into conflict with the principles of comity and mutual trust as between the courts of European Union Member States enshrined in European Regulation (EC) No. 44/2001 of December 22, 2000, on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (the Regulation).
The effect of the Regulation is that questions of jurisdiction as between the courts of EU Member States are dealt with on a “first seized” basis. A court which is subsequently seized of a matter can only continue with its proceedings if the court first seized declines jurisdiction. Anti-suit injunctions issued in respect of proceedings already on foot in another EU Member State therefore offend against the right of the court first seized to determine its own jurisdiction. The Regulation does not, however, apply to arbitration (Article 1(2)(d)). A national court of a Member State may not interpret the Regulation in a manner which calls into question the competence of another Member State court.

Decision of the House of Lords in West Tankers

In Allianz SpA (formerly RAS Riunione Adriatica di Sicurta SpA and ors.) v West Tankers (2007), the underlying dispute concerned the collision of a ship with a jetty in Italian waters. The charterparty was governed by English law and provided for arbitration in London. The insurers nevertheless sought to pursue subrogated claims in tort against the ship owner, West Tankers, before the Court in Syracuse, Sicily. The applicant sought to enjoin the insurers from continuing with proceedings in the Italian Courts. The insurers questioned whether the grant of such an injunction was consistent with the Regulation.

The English House of Lords upheld the anti-suit injunction granted by the English High Court at first instance and sought to resolve this tension on the basis that arbitration is excluded from the scope of the Regulation by Article 1(2)(d). Lord Hoffman stated that, “… The proceedings now before the House are entirely to protect the contractual right to have the dispute determined by arbitration. Accordingly, they fall outside the Regulation and cannot be inconsistent with its provisions. The arbitration agreement lies outside the system of allocation of court jurisdictions which the Regulation creates …”

Lord Hoffman also noted that, “While it is true that all Member States adhere to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which article 71 of the Regulation declares to be unaffected), the Convention is not a Community instrument and does not create a system for the allocation of jurisdiction comparable with the Regulation.” All European Union Member States are parties to the New York Convention, Article II of which provides:

“… 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration … [and] … 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”
While the House of Lords upheld the anti-suit injunction in its judgment delivered on February 27, 2007, it nevertheless sought the preliminary ruling of the ECJ in respect of the following question under the Regulation: “Is it consistent with the [Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?”

**ECJ Advocate-General’s Opinion**

On September 4, 2008, Advocate-General Kokott issued her Opinion in the *West Tankers* case, rejecting the position of the House of Lords. At the time of writing, the decision of the ECJ is still awaited, but it is widely expected that it will follow the Opinion issued by the Advocate-General.

Advocate-General Kokott opined that the grant of anti-suit injunctions in support of arbitration agreements is inconsistent with the regime of the Regulation. She stated that the relevant proceedings for the purposes of the Regulation were the proceedings before the Italian Court, and not the arbitration proceedings.

In deciding whether the arbitration exception applied, the court should focus upon the substantive issue in the proceedings against which the injunction was directed. If the substance of the subject matter of those proceedings (in the *West Tankers* case tort claims brought in the Italian Courts) fell within the scope of the Regulation, then the arbitration exception was not engaged.

Whether an arbitration agreement is valid is not an issue exclusively related to “arbitration” for the purposes Article 1(2)(d) of the Regulation. In such a case it was for the foreign court first seized (and not the arbitral tribunal or the courts at the seat of the arbitration) to rule upon the preliminary issue of whether the claims were subject to an arbitration clause, in accordance with Article II(3) of the New York Convention, and whether the proceedings should be stayed and referred to arbitration. The New York Convention does not give the courts of the seat of the arbitration either primacy or the exclusive right to decide the issue of jurisdiction.

The Opinion has been greeted with dismay by some arbitration lawyers, particularly those from the common law tradition. In making the reference to the ECJ in *West Tankers*, Lord Hoffman observed,

“… it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centers of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community to handicap itself by denying its courts the right to exercise the same jurisdiction.”

Advocate-General Kokott considered these and other observations made by the House of Lords as to the parties’ autonomous decision to choose London as the seat of their arbitration, which choice could be said to include the remedies in support of arbitration available in London. She was not persuaded by such observations. Instead she noted that adherence to Article II(3) of the New York Convention by the Italian Courts would ensure that the agreement to arbitrate was not circumvented. She also dismissed the argument that London would suffer as an arbitral venue if the English Courts were no longer able to issue anti-suit injunctions in respect of court proceedings commenced in EU Member States. She considered this an economic argument which could not justify infringements of EU law.
It remains to be seen whether the ECJ will adopt the views of Advocate-General Kokott and, if so, whether this will have any negative effect upon the attractiveness of London as an international arbitration seat. Although the Advocate-General’s Opinion is not binding, it is thought likely by many that the ECJ will follow it.

While the effect of the likely ECJ decision has been described by some commentators as potentially threatening to the attractiveness of London as a seat of arbitration, such a position will bring the English Courts into line with the practice of courts in European Member States, which have traditionally declined to issue anti-suit injunctions. Indeed, the English Courts have always had due regard to issues of comity in considering whether to grant an anti-suit injunction in respect of foreign court proceedings.

Moreover, all EU Member States to which the Regulation applies are also signatories to the New York Convention. Their courts should therefore be expected to stay proceedings on the substantive claims brought in breach of an arbitration agreement and refer the matter to arbitration, unless the court holds that the arbitration agreement is null and void, inoperable or incapable of being performed. To this extent the Opinion should not be seen as an erosion of the principle of kompetenz-kompetenz.

The arbitral tribunal, once constituted, may rule upon its own jurisdiction. The tribunal may also consider the appropriateness of injunctive orders in respect of foreign court proceedings commenced in breach of the arbitration agreement, having due regard to considerations of comity.

The more likely negative impact for parties considering London as a venue for arbitration is the potential waste of time and costs in the event one party decides to commence tactical proceedings in the courts of another EU Member State, in breach of the arbitration agreement. However, such action should give rise to a potential claim for damages for breach of the arbitration agreement.

Parties should, in any event, take care to draft their arbitration agreements with clarity and precision to ensure that there is no valid basis for a signatory, or a foreign court, to challenge the validity of the agreement.

Kevin O’Gorman Appointed Co-chair of the International Commercial Dispute Resolution Committee of the ABA Section of International Law

Fulbright partner Kevin O’Gorman has been appointed co-chair of the International Commercial Dispute Resolution Committee of the ABA Section of International Law for a term beginning in August 2008. O’Gorman has served as vice-chair of the committee since 2005.

O’Gorman is based in Houston and has represented a wide variety of clients in international arbitrations before the International Chamber of Commerce, the LCIA, the International Centre for Dispute Resolution, the International Centre for Settlement of Investment Disputes and under the UNCITRAL Arbitration Rules. He is a frequent speaker on international arbitration and serves as an Adjunct Professor at the University of Houston Law Center.

With more than 20,000 members in 90 countries, the ABA Section of International Law focuses on the full range of international legal issues. The section seeks to promote and further the development of interest and research in international and comparative law, to promote knowledge and formulate professional opinion of international law among members of the legal profession and others, to promote professional relationships with lawyers similarly engaged in foreign countries, and to advance the rule of law in the world.
THE ENFORCEMENT OF ANNULLED FOREIGN AWARDS: WORLDWIDE TRENDS

Introduction
Currently in force in more than 140 Contracting States, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NY Convention”) was originally intended to facilitate the enforcement of foreign awards by, among other things, limiting the grounds on which the enforcement of those awards might be refused. The NY Convention, however, says nothing about the grounds for annulling or refusing to enforce domestic awards, a matter that is left for each Contracting State to address as it deems appropriate in its domestic legislation. In this context, a Contracting State may choose (for example, by means of grounds for challenge set out in its arbitration statute or established by the case law of its national courts) to allow a domestic award (i.e., an award rendered in its territory) to be vacated for any reason.

The freedom that most states enjoy when dealing with domestic awards has given rise to two important international legal issues. First, can an award be enforced abroad after being annulled in its country of origin? Second, how should courts treat foreign awards they have enforced, but which have subsequently been annulled or replaced in their country of origin? (Following Article V(1)(e) of the NY Convention, the expression ‘country of origin’ of an award is used here to denote “the country in which, or under the law of which, that award was made”).

Article V(1)(e) of the NY Convention is at the center of any effort to answer these two questions. According to this provision, the “[r]ecognition and enforcement of the award may be refused … [upon] proof that … [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in” its country of origin.

The (Non-) Enforcement of Annulled Foreign Arbitration Awards
In practice, the words “may be refused” have become critical for the interpretation of Article V(1)(e). For some practitioners, the fact that the provision uses the permissive term “may” rather than the imperative “shall” means that NY Convention Contracting States have discretion to refuse the recognition and enforcement of a foreign award. According to this approach, Article V(1)(e) would permit enforcement of an award notwithstanding its annulment in its country of origin.

This was actually the result in the 1996 case involving Chromalloy Aeroservices (Matter of Arbitration Between Chromalloy Aeroservices, A Division of Chromalloy Gas Turbine Corp. and The Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996)). Chromalloy was a U.S. corporation that entered into a contract with Egypt in 1988 to provide service to the Egyptian Air Force’s helicopters. In late 1991, however, Egypt announced it was terminating the contract. Arbitration ensued in Cairo, Egypt, as provided by the terms of the agreement. Chromalloy obtained an award in its favor. Thereafter, Egypt filed an appeal with the Egyptian Court of Appeal, and Chromalloy sought to enforce the award in a U.S. Federal District Court. The Egyptian Court suspended and ultimately nullified the award on the grounds that the arbitrators had, incorrectly, applied Egyptian civil law instead of Egyptian administrative law. Egypt sought to dismiss the enforcement action pending in the U.S.

In its opinion, the District Court cited the discretionary standard in Article V(1)(e) and then turned to the mandatory language of the “more favorable rights provision” in Article VII, which states: “The provisions of the present Convention shall not … deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law … of the country where such award is sought to be relied upon” (emphasis added).
Relying on Article VII, the District Court concluded that recognizing the Egyptian court’s annulment would be against the strong U.S. policy in favor of arbitration. Additionally, the District Court reasoned that the annulment was based on a choice of law issue that the Tribunal held did not affect the outcome of the arbitration. In the Court’s view, at worst the Tribunal had committed a mistake of law not subject to review. Finally, the Court emphasized, Egypt had breached its contractual agreement not to appeal the arbitration award. For these reasons, the District Court held that the Egyptian court’s decision was without res judicata effect. The arbitrators’ original award in favor of Chromalloy was thus upheld, and the U.S. District Court decided to give effect to the award and not the ruling annulling it. Interestingly, to reach that conclusion the U.S. District Court conducted a thorough analysis of the merits of the Egyptian court decision that annulled the original award.

Since Chromalloy, some commentators have questioned the District Court’s application of domestic U.S. law. Meanwhile, other U.S. courts have been reticent to enforce annulled awards. In Baker Marine, the Second Circuit refused to enforce an award nullified at the seat of arbitration in Nigeria (Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2nd Cir. 1999)). At dispute in Baker Marine was a contract by which Baker Marine and Danos were jointly to provide barge services for Chevron in Nigeria. Pursuant to an arbitration clause, the parties submitted to arbitration in Lagos, Nigeria, under the UNCITRAL arbitration rules and the substantive laws of Nigeria.

Baker Marine prevailed in two separate arbitrations against Chevron and Danos, and then sought enforcement of both awards in the Nigerian Federal High Court. Both awards were annulled as inconsistent with Nigerian law. Among other things, the Nigerian court found that the Danos award was unsupported by the evidence and that punitive damages in the Chevron award were improper. Baker Marine sought to enforce the awards in a New York Federal Court. However, enforcement was denied on the grounds that under the NY Convention, comity required respecting the decision of a competent authority at the seat of arbitration.

On appeal, the Second Circuit distinguished Baker Marine from Chromalloy—inter alia, because unlike the parties in Chromalloy, in Baker Marine the parties had not agreed to preclude appeal. Moreover, and more generally, the Second Circuit rejected any “mechanical application of domestic arbitral law” to rule on the enforcement of a foreign award, and relied instead on Article V(1)(e). As Baker Marine had shown no adequate reason for rejecting the authority and judgment of the Nigerian court, the Second Circuit concluded that the Nigerian court’s annulment should stand. The District Court’s refusal to enforce the award was thus affirmed.

Commentators have questioned whether Baker Marine and Chromalloy are genuinely distinguishable. But Baker Marine’s appeal to comity appears to have gained credence in U.S. courts, while Chromalloy appears to remain somewhat of an exception.

The D.C. Circuit recently followed the reasoning of Baker Marine in TermoRio (TermoRio S.A. E.S.P. v. Electrantà S.P. 487 F.3d 928 (D.C. 2007), cert. denied, 128 S.Ct. 650 (2007)). State-owned Electrantà agreed to buy power from TermoRio pursuant to a Power Purchase Agreement. After Electrantà allegedly reneged on its obligations, the parties submitted to ICC arbitration in Colombia in accordance with their agreement. The Tribunal found in favor of TermoRio. Electrantà subsequently sought to overturn the award in a Colombian court. Colombia’s highest administrative court annulled the award on the grounds it violated Colombian law, which, the court ruled, did not expressly permit ICC arbitration—or, for that matter, any other type of international institutional arbitration—at the date of the contract.

As in Baker Marine, TermoRio sought to enforce the award in U.S. District Court. The Court dismissed the action. On appeal, the D.C. Circuit relied on Article V(1)(e) and held the arbitration award was “lawfully nullified, by the country in which the award was made,” and hence TermoRio had no cause of action to seek enforcement: “[a]n arbitration award does not exist ... if it has been lawfully ‘set aside’ by a competent authority in the State in which the award was made. This principle controls the disposition of this case.” Nevertheless, the
TermoRio court did acknowledge Chromalloy by accepting a “narrow public policy gloss on Article V(1)(e),” whereby an award might be enforced notwithstanding annulment in a court at the seat of arbitration, if that annulment is repugnant to fundamental notions of decency and justice.

Very shortly after the TermoRio decision, a court in Rubi, Spain sought to define the reasons for permitting enforcement notwithstanding annulment at the seat of arbitration. The Rubi First Instance Court No. 3 considered a request by the losing party in an ICC arbitration in Paris to dismiss the award pursuant to Article V(1)(e). In the alternative, the losing party sought to stay the award pending a nullification proceeding pending before French courts. The Rubi Court, however, declined the motion to dismiss or stay and enforced the award.

In the Court’s view, nullification of an award at the seat of arbitration could only prevent its recognition under Article V(1)(e), if either the nullification was made on jurisdictional grounds or on the basis of a gross breach of due process. Finding neither at issue in the French court proceeding, the Rubi Court enforced the award.

The Rubi Court’s reading of Article V(1)(e) was supplemented by the limitations in Article IX of the 1961 European Convention on International Commercial Arbitration (“European Convention”). Under Article IX, the grounds for refusing to enforce arbitral awards annulled at the seat of arbitration, “shall only constitute a ground for the refusal of recognition” for the reasons enumerated in Article IX(1)(a)-(d) (emphasis added). This limitation applies to states that are also parties to the NY Convention, by virtue of European Convention Article IX(2). By contrast, the 1975 Inter-American Convention on International Commercial Arbitration (the “Panama Convention”) contains no similar provision and instead follows the permissive language of NY Convention Article V(1)(e), whereby a court “may” refuse enforcement if the award has been annulled at the seat (Art. V(1)).

**Enforcement in the Event of Multiple and Conflicting Foreign Arbitral Awards**

A further twist to Article V(1)(e) jurisprudence, that is not squarely addressed by the TermoRio and Rubi courts, concerns conflicting awards. Although Article V(1)(e) has sometimes been read to permit an annulled award subsequently to be enforced, it can also happen that an enforced award may subsequently be annulled or replaced. In Hilmarton, for example, a Swiss award was enforced in France after being annulled in Switzerland and was later replaced by a second and conflicting award. In these circumstances, courts face a new problem of whether to enforce the second award, as a matter of comity, or stand on the enforcement of the first award, as a matter of res judicata.

Following TermoRio’s rationale, for example, it would appear the French court enforced what was, in the D.C. Circuit’s parlance, a non-existent award. How should a court respond if, instead, an award is annulled only after it is enforced and hence only later becomes “non-existent?” Albert Jan Van den Berg anticipated this problem in his 1981 book on the NY Convention: “If
a subsequent setting aside occurs, it would seem to beeasonable to cancel the order by which the enforcement
is granted. The question would seem to have to be solved
by virtue of Article III of the Convention under the law
of the procedure of the country where the enforcement is
granted.” This is in fact the approach taken by the 1998
German arbitration statute, which permits courts to
refuse to enforce a previously recognized award that has
since been set aside abroad (§ 1061(3) ZPO Ausländische
Schiedsprüche).

In France, however, the French Supreme Court has
taken a different approach. The Court encountered the
problem of conflicting awards—first in the 1994 case
Hilmarton and again in the 2007 case, Rena Holding. In
both instances, the French Supreme Court ultimately
declined to “cancel” the first award's enforcement.

In Hilmarton, the prevailing party in a Swiss
arbitration, OTV, successfully enforced the award
in France after the award had been overturned by a
Swiss court. When a Swiss tribunal issued a second
award in the same case, this time in favor of Hilmarton,
Hilmarton sought enforcement in France. The Versailles
Court of Appeal recognized the second award, but
the French Supreme Court later ruled that res judicata
attached to the first award, which thus precluded
enforcement of the second award.

The French Supreme Court recently affirmed this
approach to conflicting foreign arbitral awards in Rena
Holding (PT Putrabali Adyamulia v. Rena Holding,
June 29, 2007, case No. 06-13.293 and No. 05-18.053).
An Indonesian company, PT Putrabali, had sold spices
to a French company, Société Est Epices (later Rena
Holding). The spices were subsequently lost at sea due
to a shipwreck. Rena refused to pay for the spices and
Putrabali filed for arbitration in London before the
International General Produce Association.

Rena prevailed. However, an English judge partially
vacated the award and remanded to the tribunal.
Subsequently, a second award was handed down,
this time in favor of Putrabali and ordering payment
by Rena. Rena nevertheless sought and obtained
enforcement of the first award in France. The second
award was ultimately found unenforceable in the French
Supreme Court by reason of res judicata attaching to the
proper enforcement of the first award. That enforcement
was proper, the Court concluded, because an arbitration
award is autonomous from the legal order of a particular
country and because Article VII of the NY Convention
permits French courts to rely on French law, which
does not include annulment at the seat of arbitration
as grounds for denying enforcement (Article 1502 of
the Nouveau Code de procédure civile).

Rena Holding confronts a problem that courts in both
Baker Marine and TermoRio sought to avoid. Part of the
rationale for Baker Marine, later echoed in TermoRio,
was that the “mechanical application of domestic arbitral
law to foreign awards under the Convention would
seriously undermine finality and regularly produce
conflicting judgments.” However, the application of
domestic arbitral law in Hilmarton and Rena Holding
is not the only way to produce conflicting judgments.
Even deference to courts at the seat of arbitration does
not settle the issue of finality, as an award might be
annulled at the seat of arbitration only subsequent
to its enforcement abroad.

Conclusion
Whether a court insists that only one valid and
enforceable award can “exist” or, alternatively, recognizes
the autonomy of conflicting awards, but declines to
enforce both on res judicata grounds, the problem of
finality continues to be debated. Given either approach,
the so-called “race to judgment” by the prevailing party
in an arbitration can produce conflicting results, if that
award is later annulled or replaced. Fortunately, this
result has been rare. Nevertheless, parties must carefully
consider the implications of choosing a particular seat of
arbitration when drafting an arbitration clause.
THE ROLE OF THE EXPERT IN INTERNATIONAL ARBITRATION

Most disputes will be concerned with two primary forms of evidence. Contemporary documentation and witnesses of fact will be employed by the parties and relied upon by the arbiter(s) of the dispute, primarily to determine questions of fact. However, the complex disputes with which most readers will be familiar involve not only the question of what happened, but also more intricate issues of cause and effect. Those issues often give rise to questions of opinion. Invariably, complex disputes will therefore also involve the presentation of a third type of evidence: expert evidence. International arbitration is no exception. However, international arbitral tribunal practice in the evaluation and assessment of expert evidence does vary, often reflecting differences in the common and civil law approach to evidence. Accordingly, before entering into the arbitration process, it is important for all participants, parties, arbitrators and experts alike to understand the differing expectations placed on experts.

What Is the Expert's Role?
The perception of the expert’s role varies across a broad spectrum. For present purposes, that spectrum can be broken down, simplistically, into three: the unquestionably impartial approach of experts in legal systems where, such as in the French courts; an expert can only be appointed by the courts, the partisan approach of experts common to the US courts; and, thirdly, somewhere in between.

The tribunal appointment of experts (something which is contemplated in most of the major institutional and ad hoc arbitration rules) is more familiar to lawyers from civil law jurisdictions. In this tradition, the court plays a more inquisitorial role and so it follows that the expert should be instructed by, and owe a duty only to, the court. This approach does, however, give rise to concerns that the court is abdicating its decision-making function. Parties might also be concerned with whether the expert has an appropriate background and has been asked to consider all the relevant material and issues. These concerns as to transparency and the tribunal’s over-reliance on the expert can lead to enforcement issues. To those experienced in civil law practice, it seems disingenuous that an expert appointed by the parties could remain sufficiently impartial so as to accurately inform the court. This might cause concerns for a party working with European experts or before a European tribunal for the first time. Such a party might find that it is unable to collaborate with its experts to the degree it expects.

At the other end of the spectrum, the US Federal Rules of Evidence make no mention of any need for expert independence. This lack of an express obligation of independence has led to a school of partisan experts who perceive their role as advocate of their client’s case. In past surveys of the US Federal Judicial Center, judges and lawyers agreed that the biggest problem with expert evidence was that experts often abandoned objectivity and became mere advocates for the party that was paying their bills. The extreme result of this is that competing expert reports cancel each other out. Such expert evidence often provides no benefit to the court. Recognizing this, the rules imposed by certain US-based professional organizations in relation to expert witnesses have undergone some revision in this regard (see, for example, the Code of Ethics of each of the American Institute of Certified Public Accountants and the American Society of Appraisers).

Arguably, English civil procedure has developed to lie somewhere between these extremes. Some would say that in practice the appointment and use of experts is not all that different in the UK when compared to the US. Certainly the ability to test expert evidence by cross-examination is consistent in both jurisdictions. However, the English Civil Procedure Rules include a number of measures designed to ensure that experts remain impartial. For example, the expert’s primary duty is to assist the court. This duty overrides any obligation to the person from whom the expert has received instructions or by whom he is paid. Moreover, an expert must confirm to the court that he has understood and complied with that duty. Additionally, institutions such as the Academy of Experts provide similar guidelines for their members. These are included in standard form declarations which members are encouraged to sign when acting as experts.
Some useful principles of good practice are also set out in an English case, *The Ikarian Reefer* (1993). These principles provide that, *inter alia:*

- Expert evidence “should be, and should be seen to be, the independent product of the expert, uninfluenced as to formal content by the exigencies of litigation ...”
- The expert “should provide independent assistance to the Court.”
- The assistance provided should be by way of “… objective, unbiased opinion relating to matters within [the expert’s] expertise. An expert witness should never assume the role of advocate ...”
- The expert should “state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.”
- “If after exchange of reports, an expert witness changes his view on a material matter … such change of view should be communicated (through legal representatives) to the other side without delay and where appropriate to the court.”

**Practice in International Arbitration**

International arbitration practice often strives to balance competing civil and common law traditions. This is demonstrated by a gradual harmonization of positions. The above principles laid down in *The Ikarian Reefer* undoubtedly influence the approach of arbitrators from England and perhaps other common law jurisdictions. Increasingly, they arguably accurately reflect international practice, also.

International arbitration has also seen an increase in the use of relatively new mechanisms such as “hot-tubbing” or “witness conferencing.” Such techniques were pioneered in the Australian Federal Court and a regularly quoted description is set out in the Australian case of *BGP Properties Pty Limited v Lake Macquarie City Council* (2004). Essentially, experts are brought together before the tribunal and the parties and, prompted by questioning from the tribunal, encouraged to discuss and debate their differences. At the very least, a genuine analysis of the issues is thereby promoted. This is especially so when preceded by meetings between the experts to clearly identify their remaining differences. Thus, the tribunal is better placed to decide between competing opinions.

Arguably the process favors the more confident and articulate expert, but no more so than cross-examination. It might also be of little extra benefit where there are genuine issues of scientific difference, particularly in developing fields of expertise. However, the process also encourages savings in time and cost by ensuring experts engage one another and narrow the issues between them. Experts will more easily engage the views of, or even make concessions to, a credible colleague sitting directly across the table.

Credibility is after all arguably the most important consideration. Face-to-face with a professional colleague in an open setting, experts will act to maintain their credibility seemingly at the expense of their client’s position. However, this credibility is equally as important to a party’s case. In international arbitration, the admissibility of expert evidence is unlikely to be affected by the independence and impartiality of an expert. Under the arbitration rules of the major institutions, arbitrators generally have a wide discretion in this regard. However, these matters do go directly to the credibility of an expert witness and so to the weight attached to the expert’s evidence. The challenge for parties, and their lawyers, is therefore not just to ensure that an expert is sufficiently “on-side” with their case. They must also ensure that credibility is maintained through the appearance of impartiality. Reliance on an overtly partisan expert might also call into question other aspects of the client’s case and, indeed, counsel’s own credibility before a tribunal.
**Fulbright’s Baker Appointed to Committee Reviewing the IBA Rules on the Taking of Evidence in International Commercial Arbitration**

On the occasion of the 10-year anniversary of the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules"), the IBA Arbitration Committee announced a new subcommittee to carry out a review of the IBA Rules, how they are being applied and areas where further detail may be beneficial. Fulbright’s C. Mark Baker has been appointed to the subcommittee, which consists of members from a wide range of jurisdictions and is chaired by Richard H. Kreindler.

Members of the original Working Party of the IBA Arbitration Committee responsible for creating the IBA Rules are advising the subcommittee. In 1999, on the recommendation of that Working Party, the IBA Council adopted the IBA Rules to replace the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, originally issued in 1983.

In the course of its review, the subcommittee plans to consider recommendations and views from a broad spectrum of practitioners.

**CHARTERED INSTITUTE OF ARBITRATORS PROTOCOL FOR E-DISCLOSURE IN ARBITRATION**

In recognition of the need to address the challenge posed by the disclosure of electronic documents in some international arbitration cases (not all), several international arbitration institutions have introduced or are considering rule changes, guidelines or protocols on electronic disclosure. These have included the CPR, the AAA, the ICC and the IBA, which has launched a review of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules”).

The Chartered Institute of Arbitrators’ Protocol for E-disclosure in Arbitration (the “Protocol”) was issued in October 2008. The Protocol is intended for adoption in those cases (not all) in which the time and costs of electronic disclosure may be an issue, and to act as a prompt to arbitrators, counsel and the parties to engage constructively with the practicalities of e-disclosure in such cases.

The scope of disclosure and the basis for ordering disclosure contemplated by the Protocol are those reflected in the IBA Rules and reflect the key balancing considerations referred to in Rule 9 of the IBA Rules (such as reasonableness, proportionality, fairness and equality of treatment). The parties are free to limit disclosure by agreement. It is recognized that there is no obligation to give disclosure in arbitration, except as may be ordered by the tribunal, agreed between the parties in the applicable rules or otherwise, or under the applicable law. The Protocol also reflects those of the Sedona Principles that are helpful and appropriate in an international arbitration context.
The Protocol is reproduced below:

CHARTERED INSTITUTE OF ARBITRATORS:
PROTOCOL FOR E-DISCLOSURE IN ARBITRATION

Purpose of CIArb Protocol for E-disclosure in Arbitration

This Protocol is for use in those cases (not all) in which potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue. It is intended:

- to achieve early consideration of disclosure of documents in electronic form (“e-disclosure”) in those cases in which early consideration is necessary and appropriate for the avoidance of unnecessary cost and delay;
- to focus the parties and the Tribunal on e-disclosure issues for consideration, including the scope and conduct of e-disclosure (if any); and
- to address e-disclosure issues by allowing parties to adopt this Protocol as part of their agreement to arbitrate a potential or existing dispute.

CIArb PROTOCOL FOR E-DISCLOSURE IN ARBITRATION

Early consideration

1. In any arbitration in which issues relating to e-disclosure are likely to arise the parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents and seek to agree the scope and methods of production.

2. The Tribunal shall raise with the parties the question of whether e-disclosure may arise for consideration in the circumstances of the dispute(s) at the earliest opportunity and in any event no later than the preliminary meeting.

3. The matters for early consideration include:
   (i) whether documents in electronic form are likely to be the subject of a request for disclosure (if any) during the course of the proceedings, and if so:
   (ii) what types of electronic documents are within each party’s power or control, and what are the computer systems, electronic devices, storage systems and media on which they are held;
   (iii) what (if any) steps may be appropriate for the retention and preservation of electronic documents, having regard to a party’s electronic document management system and data retention policy and practice, provided that it is unreasonable to expect a party to take every conceivable step to preserve every potentially relevant electronic document;
   (iv) what rules and practice apply to the scope and extent of disclosure of electronic documents in the arbitration, whether under the agreed arbitration rules, the applicable arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Commercial Arbitration), this Protocol or otherwise;
   (v) whether the parties have made, or wish to make, an agreement to limit the scope and extent of electronic disclosure of documents;
(vi) what tools and techniques may be usefully considered to reduce the burden and cost of e-disclosure (if any), including:

(a) limiting disclosure of documents or certain categories of documents to particular date ranges or to particular custodians of documents;
(b) the use of agreed search terms;
(c) the use of agreed software tools;
(d) the use of data sampling; and
(e) the format and methods of e-disclosure;

(vii) whether any special arrangements with regard to data privacy obligations, privilege or waiver of privilege in respect of electronic documents disclosed may be agreed; and

(viii) whether any party and/or the Tribunal may benefit from professional guidance on IT issues relating to e-disclosure having regard to the requirements of the case.

Request for disclosure of electronic documents

4. Any request for the disclosure of electronic documents shall contain:

(i) a description of the document or of a narrow and specific requested category of documents;
(ii) a description of how the documents requested are relevant and material to the outcome of the case;
(iii) a statement that the documents are not in the possession or control of the party requesting the documents; and
(iv) a statement of the reason why the documents are assumed to be in the possession or control of the other party.

Order or direction for disclosure of electronic documents

5. In making any order or direction for e-disclosure, or for the retention and preservation of electronic documents, the Tribunal shall have regard to the appropriate scope and extent of disclosure of electronic documents in the arbitration whether under the agreed arbitration rules, the applicable arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and this Protocol. The Tribunal shall have due regard to any agreement between the parties to limit the scope and extent of disclosure of documents.

6. In making any order or direction for e-disclosure, the Tribunal shall have regard to considerations of:

(i) reasonableness and proportionality;
(ii) fairness and equality of treatment of the parties; and
(iii) ensuring that each party has a reasonable opportunity to present its case

by reference to the cost and burden of complying with the same. This shall include balancing considerations of the amount and nature of the dispute and the likely relevance and materiality of the documents requested against the cost and burden of giving e-disclosure.
7. The primary source of disclosure of electronic documents should be reasonably accessible data; namely, active data, near-line data or offline data on disks. In the absence of particular justification it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations. A party requesting disclosure of such electronic documents shall be required to demonstrate that the relevance and materiality outweigh the costs and burdens of retrieving and producing the same.

Production of electronic documents

8. Production of electronic documents ordered to be disclosed shall normally be made in the format in which the information is ordinarily maintained or in a reasonably usable form. The requesting party may request that the electronic documents be produced in some other form. In the absence of agreement between the parties, the Tribunal shall decide whether production of electronic documents ordered to be disclosed should be in native format or otherwise.

9. A party requesting disclosure of metadata in respect of electronic documents shall be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the same, unless the documents will otherwise be produced in a form that includes the requested metadata.

Procedure and costs

10. The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure.

11. The Tribunal shall establish a clear and efficient procedure for the disclosure of electronic documents, including an appropriate timetable for the submission of and compliance with requests for e-disclosure.

12. The Tribunal shall require that a producing party give advance notice to the requesting party of the electronic tools and processes that it intends to use in complying with any order for disclosure of electronic documents.

13. The Tribunal may, after discussion with the parties, obtain technical guidance on e-disclosure issues. Such discussion shall include the question of who is to be instructed to provide technical guidance and the costs expected to be incurred. The costs of this shall be included in the costs of the arbitration.

14. In the event that a party fails to provide disclosure of electronic documents ordered to be disclosed or fails to comply with this Protocol after its use has been agreed upon by the parties and the Tribunal or ordered by the Tribunal, the Tribunal shall be entitled to draw such inferences as it considers appropriate when determining the substance of the dispute or any award of costs or other relief.
DUBAI ENACTS NEW ARBITRATION LAW

On September 1, 2008, His Highness Sheikh Mohammed bin Rashid Al Maktoum, Vice President and Prime Minister of the UAE and Ruler of Dubai, enacted a new Arbitration Law of the Dubai International Financial Centre (the “DIFC”). The new law, based on the UNCITRAL Model Law, promotes a visible, user-friendly dispute resolution service for international investors and leaves the DIFC well-placed as a viable forum for international arbitration.

Legal and Arbitral Framework

The UAE has long held plans to establish a competitive commercial and financial center to rival the likes of New York, London and Hong Kong. To the federation’s credit, it recognized that the establishment of a credible, stable legal framework was central to those ambitions. Accordingly, in addition to the establishment of the DIFC (a financial free zone established in the emirate of Dubai under a modern regulatory regime and offering incentives to attract business), the UAE has launched a number of bold legal initiatives.

Perhaps most notably, the DIFC has its own laws and its own courts to apply them. The UAE itself is an Arabic-speaking civil code jurisdiction. However, the law applied by the DIFC courts is based on the common law. The official language of the courts is English, and the judiciary are all prominent members of the legal profession in common law jurisdictions. The current Chief Justice is Sir Anthony Evans, a former Lord Justice of Appeal at the English Court of Appeal, while the current Deputy Chief Justice is Michael Hwang SC, a prominent Singaporean barrister and arbitrator who has previously served as the Judicial Commissioner of the Supreme Court of Singapore.

Both in the UAE generally and in the DIFC, steps have also been taken to modernize arbitral law and practice and to bring it into line with international standards. In 2006, the UAE acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This ensured that awards rendered in the UAE and the DIFC are automatically enforceable in over 140 other states, subject only to the minimum requirements of the Convention.

Reciprocity of enforcement under the Convention is perhaps the single most-important reason for the global popularity of arbitration. The UAE’s accession was therefore an important first step in attracting parties to arbitrate in the UAE. However, the local arbitral law also plays an important role in attracting parties who desire a sound supervisory system. The expected finalization of a new draft UAE Arbitration Law (applicable to the whole of the UAE, except the DIFC—as opposed to the new DIFC Arbitration Law which is applicable to the DIFC only), based on the UNCITRAL Model Law, is therefore also a step in the right direction. Despite indications that it would be enacted earlier this year, the new UAE Arbitration Law currently remains in draft form as of the time of writing.

At an institutional level, the Dubai International Arbitration Centre (the “DIAC,” not to be confused with the “DIFC”), established in 2003 and operating as an autonomous and non-profit body out of the Dubai Chamber of Commerce & Industry, launched its new arbitration rules in May 2007. These rules were prepared by a body of renowned international arbitration figures and are designed to reflect “best practice” as adopted from the UNCITRAL, ICC, LCIA, WIPO and AAA arbitration rules. It must be hoped that Middle Eastern parties will be less skeptical of an independent Middle Eastern arbitral institution and its arbitration rules and therefore attracted to arbitration under its auspices.

More recently, a joint DIFC LCIA Arbitration Center has also been established. The center has its own arbitral rules, effective as of February 17, 2008, which are closely modelled on the LCIA Rules. Under the DIFC LCIA Rules, the LCIA Court plays exactly the same supervisory role as it does under the LCIA’s own rules in connection with such matters as the selection and appointment of Tribunals, determining challenges against arbitrators and controlling costs. The LCIA was first established in 1892, and is one of the world’s longest-established and most prestigious arbitral institutions. Its association with the DIFC lends it significant credibility as an arbitral venue.
The key determining factor in the success of the DIFC LCIA Arbitration Center as a regional international arbitral center will be the role of the supervisory courts. This has proved to be a critical factor in those other jurisdictions which have set out to establish regional international arbitration centers. The examples of both Hong Kong and Singapore are instructive. Both have adopted the UNICITRAL Model Law and appointed specialized arbitration judges to hear all claims commenced in the courts relating to international arbitration proceedings. This has helped to ensure a consistent application of local arbitral law in harmony with global trends.

As mentioned, the DIFC judiciary are all prominent common law practitioners. Many, however, including both the Chief Justice and the Deputy Chief Justice, are well-known arbitration practitioners, also. Parties looking to the DIFC as an arbitral venue can therefore have some confidence that the DIFC courts will wield their supervisory powers in a manner consistent with the courts of other more recognized arbitral centers. Moreover, the adoption on September 1, 2008, of the new DIFC Arbitration Law, based on the UNICITRAL Model Law, will ensure greater alignment with global practice.

The New DIFC Arbitration Law

That the prior DIFC Arbitration Law was also based on the UNCITRAL Model Law and was only introduced in September 2004, reflects Dubai’s desire to remain ahead of the game. The Model Law, which is recognized as an accepted international legislative standard, was revised in 2006. Given also the recent link-up between the DIFC and the LCIA, it was felt necessary to review the DIFC Arbitration Law.

The most significant revision made in the new DIFC Arbitration Law is the extension of the existing jurisdiction to allow overseas and domestic parties unconnected with the DIFC to seat their arbitrations in the DIFC. Previously only those parties with a connection to the DIFC were able to arbitrate there. Now the DIFC is in a position to attract businesses with little or no commercial interest in the free zone to arbitrate there.

The majority of arbitral awards rendered under the auspices of leading institutions are complied with as a matter of course. This reflects the difficulty of challenging an award or its enforcement in jurisdictions which are party to the New York Convention. However, means of enforcement of awards rendered in the DIFC should be a consideration to anyone contemplating an agreement to arbitrate in the zone. Sound enforcement mechanisms are in place.

For enforcement of an award rendered in the DIFC outside of the UAE, enforcement concerns are mitigated by the UAE’s accession to the New York Convention. Within the DIFC, enforcement of a DIFC award can only be refused by the DIFC courts on limited procedural grounds similar to those provided for in the New York Convention. To be enforced elsewhere in the UAE and within any Member State of the Gulf Cooperation Council, a DIFC award must be ratified by the DIFC courts and then enforced by the Dubai courts. Importantly, the Dubai courts have no jurisdiction to review the merits of any judgment or order of the DIFC courts.
All the pieces of the puzzle are in place for the DIFC to establish itself as a truly international arbitral center: accession to the New York Convention; acceptable local enforcement procedures; a modern arbitral law supported by a robust and experienced supervisory court; access for parties with no other connection to the free zone; and an association with one of the world’s leading arbitral institutions. Couple these developments with a burgeoning economy and a vast number of potential arbitration users already doing business in the region, and the future for arbitration in the DIFC seems bright.

Of course, some other regional arbitral institutions with supportive arbitral laws and judiciary have little or no case load to speak of. However, the DIFC has demonstrated a remarkable energy in modernizing its arbitration mechanisms and a willingness to accommodate aspects of other successful jurisdictions which are entirely foreign to the region. This flexibility of approach suggests that the DIFC will continue to adapt as the needs of international arbitration users change. If so, it is in a good position to fashion for itself a niche as a prominent center for international arbitration.

**CO-HEAD OF FULBRIGHT’S INTERNATIONAL ARBITRATION PRACTICE, DAVID HOWELL, EDITS NEW BOOK: ELECTRONIC DISCLOSURE IN INTERNATIONAL ARBITRATION**

Electronic documents are the new reality for parties to international arbitration. Many parties now conduct substantially all of their business in electronic form. It is now common for relevant and material documents in a dispute to exist substantially or even entirely in the form of electronically stored information. This includes both electronic documents and numerous fields of information about those documents (“metadata”).

While there has been a convergence in the accepted scope of disclosure in international arbitration (chiefly reflected in the IBA Rules on the Taking of Evidence in International Commercial Arbitration), there is widespread concern about the potential burdens of disclosure of electronic documents with regard to the litigation experience. Yet arbitrators are rapidly having to come to terms with these issues in an arbitration context in order to meet the needs and expectations of the parties and to address the time and cost burdens that electronic disclosure may involve.

In recognition of the need to address this challenge, a number of international arbitration institutions have introduced or are considering rule changes, guidelines or protocols on electronic disclosure, including the CPR, the AAA/ICDR, the Chartered Institute of Arbitrators, the ICC and the IBA, which is now considering appropriate changes to the IBA Rules.

International arbitration is not litigation. There is no obligation to give disclosure in arbitration (except as agreed or as ordered by the tribunal) equivalent to the discovery obligation in litigation. One of the advantages of international arbitration over litigation is the greater flexibility it offers to the tribunal, the parties and their counsel in meeting the requirements of the dispute and the wishes of the parties. This extends to the appropriate means to address the issue of documentary disclosure.
**Electronic Disclosure in International Arbitration.** published by Juris Publishing and edited by David Howell, co-head of Fulbright’s International Arbitration practice, is a timely publication that gives a measured analysis of the procedural, practical and technical issues and the appropriate approach to electronic disclosure in international arbitration, including those lessons and principles that can usefully be adapted from the litigation experience. Contributors include leading arbitrators, arbitration counsel, in-house counsel and IT experts. Each of the authors brings a valuable perspective to the challenge of electronic disclosure in international arbitration, ranging from those who believe that the challenge can usefully be met by guidelines, protocols and institutional rule changes to those who consider that such adaptations are both unnecessary and inappropriate.

Also included in this volume are session transcripts of a conference on Electronic Evidence and Disclosure in International Arbitration held at the Harvard Club, New York, on January 31, 2008, the first conference entirely devoted to the study of these issues in an international arbitration context. The speakers included experienced arbitrators (both civil law and common law), counsel and commentators, some of whom were members of the original Sedona Conference, the principal drafters of the draft CPR Protocol and the CIArb Protocol on E-disclosure, in-house counsel responsible for electronic disclosure and some of the leading providers of IT electronic discovery tools.

The publication of this book is timed to coincide with the issue of the Chartered Institute of Arbitrators’ Protocol on E-disclosure in Arbitration. David Howell was the principle drafter of that Protocol. Both the book and the Protocol were published on October 2, 2008.

**KEEPING IT CONFIDENTIAL: THE DECISION IN EMMOTT V MICHAEL WILSON & PARTNERS**

Confidentiality in arbitration, of documents, awards and arguments, is consistently cited by parties as a crucial consideration in choosing to arbitrate rather than litigate: in PwC’s 2006 paper on corporate arbitration attitudes and practices, respondents ranked privacy as the second most important reason for using international arbitration after enforceability. In considering confidentiality, parties are often making a reasonable assumption that because arbitration is an inherently private process, it is also confidential. However, this assumption is not in all cases borne out by the law. Recently, in Emmott v Michael Wilson & Partners, the Court of Appeal in England provided useful clarification of the circumstances in which documents in an English arbitration may be ordered to be disclosed to a third party. The English Courts remain broadly supportive of an implied obligation on parties to arbitrations keeping documents confidential. Nonetheless, the Emmott case is a helpful reminder that the principle of confidentiality in arbitrations is not infallible and should not be taken for granted.

The question of how much protection documents submitted in arbitration should be given against disclosure to third parties goes to the core of the debate about what arbitration should be: a wholly private process within the control of the parties? Or part of a wider system of justice so that its documents and pleadings can be ordered to be disclosed by the Courts and scrutinized by third parties?
English Law Implies an Obligation of Confidentiality Into the Arbitration Agreement

Confidentiality in this context must be distinguished from privacy. English law has recognized that arbitration is a private process since at least 1880. Most arbitral institutions provide in their rules for arbitrations to be private, but not all institutions provide for arbitration to be confidential. Notably, the ICC and the UNCITRAL arbitration rules are silent on whether the parties are obliged to keep documents or awards confidential. The LCIA Rules, however, provide explicitly at Article 30 that, unless the parties agree otherwise, “all material in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings” shall be kept confidential. The English Arbitration Act 1996, which sets out the framework for arbitrations in England and Wales, is silent on the issue.

The English case of Dolling-Baker v Merrett (1991) first established that an arbitration agreement governed by English law contains an implied obligation of confidentiality. The case held that either consent of the parties, or an order or leave of the Court, is required before a party may disclose in other proceedings any information or documents from the arbitration. The Court in Dolling-Baker held that this implied term extended to “any documents for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award.” The obligation to keep documents confidential therefore applies in relation to all documents used in the arbitration, and not just those documents which are themselves inherently confidential (for example, documents containing trade secrets).

A Court May Order Disclosure Notwithstanding the Implied Obligation of Confidentiality

It is clear that this implied obligation of confidentiality has limits. English courts have jurisdiction to hear appeals and applications which relate to arbitrations, and parties are also entitled to produce arbitral awards in Court for the purposes of the defense of res judicata. The English Court in Moscow v Banker’s Trust Co. (2004) held that, as a general rule, court judgments pertaining to arbitration are public. The English Civil Procedure Rules provide that a court may, however, order that a court hearing relating to an arbitration be heard in private.

The Court in Dolling-Baker addressed a further limit on confidentiality in arbitration: the extent to which documents from an arbitration can be disclosed to third parties and disclosed in separate proceedings. The Court held that a party may apply to the Court for permission to disclose documents to third parties or courts where: 1) disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party; or 2) disclosure is in the public interest.

“Reasonably necessary” in this context was held in the English case of Glidepath BV v Thompson (2005) to mean “more than merely useful” to the applicant’s case. It must be “clearly shown to the court that the documents will play an essential part in establishing the right or the defence in question such that the applicant for access will be seriously prejudiced if access is denied.” The Court held in the same case that “to set the reasonable necessity threshold no higher than a requirement of evidential relevance would represent a most undesirable invasion by the courts of the confidentiality of arbitration in this country.” The judge in Glidepath also recognized that excessive expense or difficulty in otherwise obtaining the documents would be sufficient to amount to “reasonable necessity.”

In Glidepath itself (where the applicant was a third party claimant who was not a party in the arbitration) the Court found that the applicant did not require the documents to found his case, and so the application for disclosure was refused.

Disclosure in the Interests of Justice

Subsequent cases have confirmed that an order to disclose documents may be granted where it is in the public interest to do so. In Ali Shipping v Shipyard Trogir (1998), the English Court of Appeal stated that, in this context, the public interest meant the interests of justice, and the Court must take into account “the
importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witnesses concerned.” The Court gave the example of “witnesses of fact who may be demonstrated to have given a materially different version of events upon a previous occasion.”

**Emmott v Michael Wilson**
The most recent case to discuss the public interest exception to the principle of confidentiality in arbitration in England is *Emmott v Michael Wilson & Partners* (2008). The defendant in the application, Michael Wilson & Partners, had commenced related litigation and arbitration in several jurisdictions against the claimant, Mr. Emmott, and his business partners.

The disputes arose after Mr. Emmott joined MWP as a director and senior lawyer in 2001, having previously been a partner at a well-known London law firm. In June 2006, the claimant left MWP and ran his business instead through two companies which were incorporated in the British Virgin Islands (BVI). MWP alleged that the claimant’s actions were part of a scheme to divert MWP’s business, in breach of contract and in breach of trust. MWP commenced arbitration in London, Court proceedings in London for search and freezing orders in support of the arbitration and litigation in New South Wales (Australia), the BVI, Jersey and Colorado. In the London arbitration, MWP made allegations of fraud against Mr. Emmott, but following a successful strike-out application, was forced to withdraw those allegations and re-frame its case. In the NSW proceedings, similar allegations of fraud were made against Mr. Emmott’s business associates.

Mr. Emmott applied to the English court for permission to disclose to the NSW Court pleadings relating to the fraud allegations asserted in the arbitration in London. Both sets of proceedings raised the same or similar allegations in respect of the same fact pattern. In its pleadings in the NSW proceedings, however, MWP gave the NSW court the impression that it continued to allege fraud in the London arbitration. Mr. Emmott sought the disclosure of the arbitration documents on the grounds that it was in the interests of justice that the NSW Court should not be misled by MWP. The English Court of Appeal agreed and approved the first instance judge’s order for disclosure of redacted pleadings.

**Does the Court’s Decision in Emmott Go Too Far?**
The Court of Appeal held that the judge at first instance was correct in ordering disclosure of the pleadings from the arbitration because it was in the interests of justice that the NSW Court not be misled. However, the Court of Appeal did not explain how, in its view, the NSW Court could be misled in a way that would affect justice or be material to its decision in the case. The NSW Court’s potentially inaccurate perception of MWP’s claim in the London arbitration was not necessarily relevant to its decision on the fraud allegations before it. It is unclear from the judgment how the presence of similar allegations, subsequently withdrawn, in another set of proceedings might have influenced the NSW’s decision in the case.

As envisaged by the Court of Appeal in *Ali Shipping*, it might be more appropriate for a Court to order disclosure in relation to inconsistent factual accounts given by a witness in an arbitration and litigation. For example, in the case of *London and Leeds Ltd v Paribas* (1995), an expert witness gave evidence in a second arbitration which contradicted his opinion in a previous arbitration. The Court ordered the disclosure of his previous expert report.

In his judgment in *Emmott*, Lawrence Collins LJ implied that MWP was a troublesome claimant which had sought to run a litigation campaign against Mr. Emmott until he ran out of money. This conduct may have influenced Collins LJ’s view of MWP’s failure to inform the NSW Court of the correct position. MWP argued before the Court of Appeal that “the fact that cases be run differently against different parties is not a reason to permit them to know what is being said in
an arbitration to which they are strangers.” There may be circumstances where the decision to withdraw allegations or frame a claim differently in different proceedings is a legitimate tactical decision. The different standards of evidence required in different jurisdictions for asserting fraud may well influence the decision whether to make such a claim in a particular jurisdiction. In English law, for example, fraudulent misrepresentation is rarely successfully pleaded, because negligent misrepresentation is much more likely to be proven; whereas fraudulent misrepresentation is more likely to be alleged in proceedings in the US.

**Practical Implications for Parties Arbitrating in England**

Parties arbitrating in London who may be involved in related court proceedings in England or abroad should be alert to this example of the English Court ordering the disclosure of pleadings. As always, parties should carefully consider their strategy and the way their respective cases are framed in related proceedings. Further, if confidentiality is an important consideration for the parties, then parties should consider making express provision for confidentiality in their arbitration clause, rather than relying on the implied obligation of confidentiality found in English law. England remains an arbitration-friendly venue whose judiciary is reluctant to intervene in the private process of arbitration, but the judgment in *Emmott* is a useful reminder that occasionally there are other considerations which may override confidentiality obligations in certain circumstances.

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**UNASUR – South America Unites**

On May 23, 2008, 12 South American leaders signed a treaty to create a continental bloc modeled after the European Union. This treaty sets up the South-American Union of Nations (“UNASUR”), which is formed by Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Uruguay, Venezuela and Suriname.

According to the treaty, UNASUR aims “to build, in a participatory and consensual manner, an integration and union among its peoples in the cultural, social, economic and political fields, prioritizing political dialogue, social policies, education, energy, infrastructure, financing and the environment, among others, with a view to eliminating socioeconomic inequality, in order to achieve social inclusion and participation of civil society, to strengthen democracy and reduce asymmetries within the framework of strengthening the sovereignty and independence of the States.”

UNASUR brings together the 12 nations with a joint population of about 390 million and an annual GDP nearing US$2 trillion. The continent’s intra-regional trade amounted to more than US$72 billion in 2006, while its economy grew by 5.7 percent in 2007, mainly due to foreign direct investment which reached a record US$106 billion. According to the Economic Commission for Latin America and the Caribbean, the bloc’s economy will grow a further 4.7 percent this year.
The birth of UNASUR goes back to December 2004 when the 12 South American Presidents met in Cuzco, Peru, to establish the South American Community of Nations. Then in April 2007, at the South American Energy Summit held in Venezuela, the leaders decided to change the Community’s name to UNASUR and to establish a general secretariat based in Ecuador. The organization’s institutional framework expanded in 2007 with the setting up of the South American Energy Council and a major financial mechanism, the Banco del Sur (Bank of the South), even though the latter is still not yet fully on-stream. As part of the creation of UNASUR, South America is also considering implementing a common currency, as was done in the European Union.

On the economic front, UNASUR will be faced with the challenge of attempting to unite two large existing regional free trade schemes, Mercosur and the Andean Community, and at the same time integrate Chile, Guyana and Suriname in this process. Its immediate task at the time of writing, however, is to find a new secretary-general to manage the day-to-day affairs of the Union.

UNASUR also approves the creation of a judicial body to resolve conflicts with foreign companies. Although no formal steps have been taken to establish the UNASUR court, this is further indication of the possible abandonment of the World Bank’s International Center for Settlement of Investment Disputes (“ICSID”). This is especially likely in light of the public announcement of several Latin American countries to reconsider their participation in ICSID. Bolivia withdrew from the ICSID Convention last year, Ecuador has formally notified ICSID that it will not submit future disputes concerning natural resources, such as oil and gas, to ICSID and Venezuela’s new contracts are to stipulate that disputes should be resolved in local courts, not international tribunals. But until UNASUR makes available drafts of the court’s constitution, it is uncertain whether the court will act like the European Court of Justice or more like a regional version of ICSID. What is certain is that foreign investors will need to pay close attention to the impact that UNASUR will no doubt have on the development of international investment law in Latin America.
HONORS AND APPOINTMENTS

F Fulbright was recognized as a leader in dispute resolution by the 2008/2009 PLC Cross-Border Dispute Resolution Handbook.

F Fulbright’s international arbitration practice was nationally ranked by Chambers & Partners USA 2008.

F Fulbright was ranked among the top five leading law firms by Chambers & Partners Latin America 2009 for international arbitration: Latin America-wide.

F Three Fulbright arbitration lawyers were featured in the 2008/2009 PLC Cross-Border Dispute Resolution Handbooks Which Lawyer? Mark Baker was recognized as a leading individual and highly recommended in dispute resolution in arbitration, Kevin O’Gorman was recommended for dispute resolution counsel in Texas and David Howell was recommended as dispute resolution counsel in England.

F The American Lawyer named Fulbright to its “Litigation Department of the Year Honor Roll” as one of the top litigation firms in the U.S., with Fulbright’s international arbitration practice receiving special mention (2008).

F Fulbright was named as a leading firm for international arbitration in Chambers UK 2009.


F Two Fulbright lawyers, Mark Baker and Kevin O’Gorman, were nationally recognized as leading lawyers for their work in international arbitration by Chambers & Partners USA 2008. Mark Baker was additionally recognized on the regional level as a leading lawyer for his work in international arbitration in Texas.

F Mark Baker and Kevin O’Gorman have been named “Texas Super Lawyers” for 2009.

F Mark Baker and Kevin O’Gorman have been included in The Best Lawyers in America 2009 for international arbitration.

F Mark Baker was ranked among the top five lawyers by Chambers & Partners Latin America 2009 for international arbitration: Latin America-wide.

F Mark Baker was recognized by the 2008 Legal 500 U.S. Guide as a Leading Lawyer.

F Mark Baker was made a member of the IBA Subcommittee, which was created to carry out a review of the IBA Rules, how they are being applied and areas where further detail may be beneficial.

F Henry Burnett was named a “New York Super Lawyer” in alternative dispute resolution in 2008 for projects and energy disputes.

F David Howell was recognized as a leading energy and disputes lawyer in Chambers UK 2008 and in the Best of the UK List in Chambers UK 2009.

F David Howell was recognized for international arbitration in the 2008 Legal 500 UK Guide.

F David Howell was named as a leading individual for international arbitration in Chambers UK 2009.

F David Howell was recognized in the Guide to the World’s Leading Experts in Commercial Arbitration 2008.

F David Howell was made a member of the UK Chartered Institute of Arbitrators Subcommittee to draft a Protocol on E-disclosure in Arbitration.

F Kevin O’Gorman was named Co-Chair of the ABA’s International Commercial Dispute Resolution Committee.

F Kevin O’Gorman was admitted as a Fellow of the American Bar Foundation.

F Andrew Price has been named a “Texas Rising Star” for 2009.

F Jonathan Sutcliffe was recommended for international arbitration by Chambers UK 2008 and Chambers Europe 2008.

F Jonathan Sutcliffe was named as a leading individual for international arbitration in Chambers UK 2009.

F Jonathan Sutcliffe was noted for international arbitration in Legal 500 UK 2008.

F Joseph Zammit was chosen for inclusion in both “Best Lawyers in America” and “New York Super Lawyers.”
SCRIVENERS AND SPEAKERS
The scriveners and speakers listed below are those since the publication of the previous issue of the Fulbright 2008 International Arbitration Report in May 2008.


Lucy Greenwood spoke on “Advocacy in International Arbitration from an English Perspective”, USCIB Young Arbitrator Forum, Houston, Texas, June 2, 2008.


Paul Neufeld co-authored “Expressions of Intent: CANACO’s Article 1(1) and Traditional Writing Requirements for Arbitration Agreements,” CANACO Boletín Informativo, México D.F., Número Especial 2008.

Kevin O’Gorman organized the USCIB Young Arbitrator Forum Seminar and moderated the panel, “Advocacy in International Arbitration,” Houston, Texas, June 2008.


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