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DEVELOPMENTS AFFECTING THE CHOICE OF ARBITRAL SEAT AND INSTITUTION IN CHINA-RELATED CONTRACTS: MAINLAND CHINA, HONG KONG OR ELSEWHERE?

Parties drafting international arbitration clauses in contracts involving Mainland Chinese parties should be aware of a number of interesting developments and issues involving arbitration practice in Hong Kong, Mainland China and elsewhere in Asia when they come to consider the governing law, place of arbitration and arbitration institution (if any) in their contracts. The choices that are available to parties in the light of these developments are examined below.

1. The Growing Role of International Arbitration in Hong Kong and Mainland China

The best known international arbitral institutions in Hong Kong and Mainland China are experiencing an ever-increasing caseload, reflecting a growing trend towards the use of arbitration clauses in international commercial contracts in the region. For example, the China International Economic and Trade Arbitration Commission (CIETAC) administered 37 arbitrations in 1985 and 1,118 arbitrations in 2007. During the same period, the caseload of the Hong Kong International Arbitration Centre (HKIAC) increased from nine to 448 cases, increasing again to 602 cases in 2008.

International arbitration institutions are now recognizing the potential of Asia in general, and China in particular, as an increasing source of important commercial disputes. A clear demonstration of this is the decision by the International Court of Arbitration of the International Chamber of Commerce (ICC) to open a branch of its Secretariat in Hong Kong in November 2008, which includes a case management team overseeing Asian-seated arbitrations under the ICC Rules of Arbitration.

Meanwhile, Hong Kong is in the process of amending its arbitration law, and the HKIAC has recently introduced new rules to ensure that Hong Kong continues to be selected as a natural choice for Asian arbitrations and China-related cases in particular.

2. Do You Have a Choice as to Place of Arbitration, Institution and Governing Law? Restrictions Under PRC Law

In considering the place of arbitration, arbitral institution and rules and the governing law in China-related contracts, the first question is whether and to what extent the parties have a free choice as to these matters. PRC law retains three significant restrictions in this regard.

a. Seat of Arbitration

First, PRC law does not permit domestic Mainland Chinese disputes to be arbitrated outside of China. Article 128 of the PRC Contract Law provides that where PRC parties cannot settle their dispute by consultation, they may refer the dispute to an arbitration body based on an arbitration agreement. It further provides that only parties to a “foreign-related” contract may choose a Chinese arbitration body “or other arbitration body.” The
term “foreign-related” was clarified, firstly, in a Supreme People’s Court “Opinion on the Civil Code,” dated April 2, 1988, and subsequently in the Civil Procedural Law of April 9, 1991, as a civil matter in which one or both parties are foreigners, a foreign enterprise or foreign organization, where the subject matter of the contract is located outside the PRC or where the act which creates, modifies or extinguishes the rights and obligations under the contract takes place outside the PRC.

By virtue of Article 27 of “Certain Provisions Regarding the Handling by the People’s Courts of Cases Involving Foreign-related Arbitration and Foreign Arbitration (Draft for Comment)” issued by the Supreme People’s Court on December 31, 2004, an arbitration agreement between “domestic” parties to conduct arbitration in a “foreign country” is unenforceable. Importantly, Chinese-incorporated subsidiaries of foreign companies are likely to be treated as “domestic” for this purpose. Thus, where a foreign company contracts through a Chinese subsidiary with a Chinese party, it will not be able validly to provide for disputes to be arbitrated outside of China. This may be a relevant consideration for non-Chinese parties in structuring their investments in China.

It is generally assumed that for the purposes of Article 128, a “Chinese arbitration body” means a Mainland Chinese arbitration body, so that PRC law would not recognize arbitration in Hong Kong as valid for a non-foreign-related case.

b. Non-Institutional Arbitration

Second, Article 16 of the Arbitration Law imposes a mandatory requirement for institutional arbitration by requiring a valid arbitration agreement under PRC law to contain the “arbitration commission chosen by the parties.” Article 18 provides that if an arbitration agreement contains no (or unclear) provisions regarding arbitral matters or “the arbitration commission to hear the matter,” the parties may reach a supplementary agreement, failing which the arbitration agreement shall be void. An agreement providing for ad hoc arbitration (e.g., under the UNCITRAL Arbitration Rules) seated within the PRC therefore has no legal basis. Accordingly, an arbitration award in an ad hoc arbitration seated in the PRC may be refused enforcement or set aside under Articles 58, 63, 70-71 of the Arbitration Law.

These references to an “arbitration commission” are usually accepted to be a reference to one of the recognized PRC arbitration commissions, so that an
arbitration agreement providing for ICC, LCIA or other non-Chinese institutional arbitration to take place within Mainland China may be void under PRC law, although this remains a question debated in China.

In practice, numerous contracts governed by PRC law contain *ad hoc* arbitration clauses, even contracts drafted by state-owned PRC bodies. However, the seat of such arbitrations will be outside the PRC, which is permissible for foreign-related contracts as set out above.

It may be noted that the requirement under Article 16 of the Arbitration Law to specify an “arbitration commission” applies to an *arbitration agreement* governed by PRC law, which is not necessarily synonymous with an arbitration agreement contained within a *contract* governed by PRC law. The August 2006 Supreme People’s Court “Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law” provides that if the parties have not agreed on the applicable law of the arbitration agreement but have agreed the place of arbitration, the arbitration agreement will be governed by the law of the place of arbitration, even if contained in a contract governed by PRC law. Accordingly, where parties validly designate a foreign seat in a PRC-law-governed foreign-related contract, the arbitration agreement is likely to be governed by the law of the seat, and an *ad hoc* arbitration agreement may therefore be valid even if contained in a PRC law contract. For example, the scope and validity of an arbitration agreement providing for arbitration in Hong Kong should be governed by Hong Kong law, which does not require the designation of an “arbitration commission.”

China acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1987, subject to both the reciprocity and the “commercial” reservations. An arbitration award properly obtained outside the PRC in a Convention signatory state should be enforceable within the PRC in accordance with the terms of the Convention, whether the arbitration was *ad hoc* or institutional. On the other hand, a ground for refusal of enforcement of an award under the Convention is a failure to comply with the arbitral law of the place where the arbitration is seated. For the above reasons, an *ad hoc* arbitration award rendered in the PRC (i.e., where the place of the arbitration is the PRC) could give rise to questions as to the validity of the arbitration procedure under PRC law in the event enforcement of that award is sought in another Convention country.

**c. Governing Law**

A third key restriction to be considered in China-related contracts relates to the choice of governing law. In July 2007, the Supreme People’s Court issued “Provisions on Several Issues Concerning the Application of the Law in Trials of Foreign-related Civil and Commercial Contracts.” Article 126 of the Contract Law provides that parties to “foreign-related” contracts are free to choose the governing law except in the case of PRC/foreign equity joint venture contracts, PRC/foreign cooperative joint venture contracts and contracts for PRC/foreign cooperation in the exploration and exploitation of natural resources. The July 2007 Provisions expand the scope of “foreign-related” contracts for which PRC law is mandatory to contracts for: the assignment of equity in a foreign investment enterprise; the management by a foreign party of a PRC/foreign equity or cooperative joint venture; the purchase by a foreign party of equity in a domestic enterprise; the subscription by a foreign party to an increase in capital of a domestic enterprise; the purchase by a foreign party of the assets of a domestic enterprise; and for any other contract for which the applicable laws and regulations require PRC law to be the governing law of the contract. As a result, most contracts for mergers and acquisitions within the PRC must be governed by PRC law. This does not necessarily prevent the parties from selecting a foreign-seated arbitration in such a contract if this choice is otherwise valid, i.e., if the contract is “foreign-related” for the purposes of Article 128 of the Arbitration Law, as discussed above.
In summary, the parties’ choice of arbitral seat, arbitral institution and governing law may be restricted under PRC law, depending, *inter alia*, upon the identity of the parties and the subject matter of the contract. In many situations therefore, institutional arbitration within Mainland China will be the only available option, so it is useful to consider developments in this arena.

3. Arbitrating in China: Developments in CIETAC Arbitration

CIETAC is the PRC’s principal international arbitration institution and was originally established to handle disputes arising from international or foreign-related economic and trade transactions. Such disputes can be contractual or non-contractual in nature.

CIETAC has become the busiest arbitration institution in the world. It has its headquarters in Beijing with Sub-Commissions in Shenzhen (1989) and Shanghai (1990). CIETAC maintains a Secretariat which handles applications for arbitration and provides administrative services.

The CIETAC Arbitration Rules were most recently revised and adopted with effect from May 1, 2005. Prior to the May 2005 revisions, concerns were frequently expressed with regard to the extent to which the parties were free to choose their arbitrator, the rules of procedure, the language of the arbitration and the forum.

Under the 2005 revisions, the parties are free to agree to apply other arbitration rules, or to agree to changes to CIETAC’s rules, except where such an agreement is inoperative or contrary to a mandatory rule of law of the place of arbitration (Article 4(2)). CIETAC is known to be currently administering at least one arbitration under the UNCITRAL Arbitration Rules, though for reasons outlined above, this arbitration is sited outside of the PRC where *ad hoc* arbitrations are not permitted.

Article 31 of the revised CIETAC Rules provides that, where the parties have agreed on the place of arbitration in writing, such agreement between the parties shall prevail. Under the prior CIETAC Rules, the seat of a CIETAC arbitration had to be within the PRC. The 2005 Rules allow the parties to agree to a foreign seat. That provides the parties with the benefit of a foreign (i.e., non-Chinese) arbitral award which, if obtained in a jurisdiction that is a party to the New York Convention (to which China is a signatory), can be enforced in China pursuant to the Convention.

The 2005 revisions provide that, subject to confirmation by the CIETAC Chairman, the parties may agree to appoint as sole arbitrator or chairman an individual who is not on the CIETAC panel of arbitrators. However, non-panelists will have to meet the same criteria as those applicable for admission to the CIETAC panel. CIETAC has expanded its panel of arbitrators to over 1,000, of which approximately 25% come from outside the PRC. Where contracts are between Chinese and non-Chinese parties, it is sensible to stipulate that the Chairman will be from a neutral country, since this is not expressly stated in the rules, and a Chinese chairman will usually be appointed for reasons of economy.

4. Arbitrating China-Related Disputes in Hong Kong

As described above, where a domestic contract is entered into between Chinese parties, arbitration outside of China is not possible. It follows that any arbitration between such parties will need to take place before a Chinese arbitral commission. In these circumstances, there is little scope for negotiation, and CIETAC arbitration will often be the obvious choice.

In the case of a contract between Chinese and non-Chinese parties however, a neutral forum is commonly selected, unless the Chinese party can insist on Chinese arbitration due to its commercial bargaining power or because it can cite the need to obtain approval from a governmental body that will insist upon the use of the local arbitration commission. The availability of such a neutral tribunal (appropriately supported by the Courts of the neutral state in which the arbitration takes place) is one of the main reasons why parties from different jurisdictions provide for arbitration.
a. Hong Kong’s Advantages as a Compromise Venue in China-Related Cases

Hong Kong may be seen as an ideal compromise venue for disputes between Chinese and non-Chinese parties. Although technically part of China, it is commonly regarded by PRC and non-PRC parties alike as a neutral venue, and has a long history as a bridge between Eastern and Western cultures. It shares both a cultural heritage and close economic ties with the Chinese Mainland, while being the international financial and commercial capital of Asia and retaining a common law legal system (as distinct from Mainland China’s civil law system).

One of the important advantages of Hong Kong as an arbitral venue is the presence of a stable, independent and arbitral-friendly judicial system. For many years, Hong Kong has applied the UNCITRAL Model Law to international arbitrations and benefits from a specialist Construction and Arbitration court list, so that all arbitration matters come before a judge experienced in international arbitration practice.

Hong Kong is home to a strong legal community, with an established body of experienced arbitration counsel and arbitrators, including both local Hong Kong lawyers and expatriates from a number of regions. In the HKIAC, it also boasts a well-run and outward-looking international arbitration institution. Hong Kong also benefits from excellent infrastructure, including a famously efficient airport, and is strategically placed to be convenient for China, Japan and Korea as well as South East Asia.

Hong Kong arbitral awards are enforceable in the PRC. They are not enforced under the New York Convention, as the Convention applies only to enforcement of arbitral awards in states other than the state in which the award was made, and Hong Kong is a special administrative region of the PRC. However, a Memorandum of Understanding, in force between Hong Kong and the PRC since early 2000, provides for mutual enforcement of arbitral awards effectively in the same way as would be the case under the Convention.

As noted above, PRC law does not recognize ad hoc arbitration, since a valid Chinese arbitration agreement must specify an arbitral commission. In late 2007, the Hong Kong Secretary for Justice sought clarification of the legal basis for the enforcement in Mainland China of Hong Kong awards made pursuant to ad hoc arbitration. The Supreme People’s Court wrote a letter dated October 25, 2007 confirming that awards made by ad hoc arbitration tribunals in Hong Kong would be enforceable in Mainland China, provided that such awards did not fall within the limited grounds for non-enforcement set out in Article 7 of the Memorandum of Understanding (replicating the grounds for non-enforcement in the New York Convention).

Enforcement of any foreign arbitral award in China brings certain challenges, largely due to the need to enforce in the local courts of the party or assets against whom enforcement is sought, and while there is now a supervisory mechanism under which a local court intending not to enforce an international award must first seek advice from the Supreme People’s Court, the enforcing party does not participate in this process. Whether the Mainland Chinese courts will be more reluctant to refuse enforcement of an arbitral award from Hong Kong than from other international seats is an interesting question about which little data is currently available.
Parties providing for arbitration in Hong Kong may select from any of the available arbitration institutions, such as the ICC, LCIA (London), SIAC (Singapore), HKIAC (Hong Kong) or SCC (Stockholm), all of which administer arbitrations sited anywhere in the world. They are also free to provide for arbitration under the UNCITRAL Arbitration Rules.

b. New HKIAC Administered Arbitration Rules
The Hong Kong International Arbitration Centre (HKIAC) has traditionally used the UNCITRAL Arbitration Rules for international arbitrations, under which its primary role is that of appointing authority to ensure that the tribunal is formed effectively (an appointing authority being required where the UNCITRAL Arbitration Rules are used). This has been a substantial contrast to the more heavily-administered arbitration offered by institutions such as the ICC and the SIAC (especially since the SIAC’s adoption of its revised rules in 2007 which mirror the ICC approach in many ways). While both approaches have their place, for experienced and substantial parties the UNCITRAL Arbitration Rules are often all that is required, and for arbitration in Hong Kong, the HKIAC is for many the obvious appointing authority.

With effect from September 1, 2008, however, the HKIAC has introduced new Administered Arbitration Rules. These have much in common with the UNCITRAL, LCIA and Swiss International Arbitration Rules. They are likely to make HKIAC arbitration increasingly attractive to Mainland Chinese parties because, as discussed above, ad hoc arbitration (including under the UNCITRAL Arbitration Rules) is not permitted by PRC law in relation to arbitrations within Mainland China, and Mainland parties may be more comfortable submitting their disputes to administered arbitration at the HKIAC than was the case under the UNCITRAL Arbitration Rules regime. However, under the new Administered Arbitration Rules, the institution’s role remains less substantial than under the ICC or SIAC Rules, there being no institutional scrutiny of the award.

for example. The institutional costs therefore remain lower than ICC arbitration, and the parties may select whether the arbitrators are to be compensated by agreed hourly rates or in accordance with a set scale of fees calculated by reference to the amount in dispute.

The establishment of the ICC’s Secretariat in Hong Kong in November 2008 gives parties a real choice between two rather different types of administered arbitration in Hong Kong, which is to be welcomed.

c. Reforms to the Arbitration Law of Hong Kong
The Hong Kong Department of Justice has released a consultation paper and draft legislation for reforming Hong Kong’s arbitration law. The proposed revisions will bring about the unification of Hong Kong’s regimes for domestic and international arbitration, with both types of arbitration coming to be governed by the UNCITRAL Model Law, which has applied to international arbitration in Hong Kong for many years.

The pending reforms incorporate into Hong Kong law certain of the amendments to the Model Law adopted by UNCITRAL in 2006, which do not yet apply to international arbitrations in Hong Kong. These include the first option to Article 7, which provides express confirmation that the requirement that an arbitration agreement shall be in writing includes situations where its content is recorded in virtually any written or electronic form. Also incorporated will be the new Articles 17 and 17A to 17G dealing with tribunal-ordered interim measures, which define interim measures, state the conditions for granting and amending interim measures and address the provision of security and liability for costs and damages associated with such measures.

The proposed reforms also change Article 18 of the UNCITRAL Model Law to state that a party will be given a “reasonable” opportunity to present its case, rather than the “full” opportunity stated in the Model Law. This is an interesting reform, which responds to the criticism that tribunals sometimes fail to take control of
5. Other Choices of Arbitral Forum for China-Related Disputes

Stockholm has been a traditional seat of arbitration for disputes between Chinese and Western parties, and London and Paris are also often selected as compromise venues in disputes between parties from Asia and North America.

Singapore is also actively promoting itself as an international arbitration venue. The International Centre for Dispute Resolution (the international section of the American Arbitration Association) has recently established an office in Singapore, as has the Permanent Court of Arbitration, a United Nations body that deals with inter-state disputes and certain other functions, such as designating an appointing authority under the UNCITRAL Arbitration Rules where the parties have failed to do so. The Singapore International Arbitration Centre (SIAC) remains very active, and in recently appointing a leading Australian arbitrator as its new Chairman, it has demonstrated its commitment to an internationalist approach. The Singapore Government also has announced certain tax incentives where arbitral hearings take place in Singapore.

For the reasons outlined above, however, Hong Kong appears to remain the favored venue for China-related cases. In 2007, the HKIAC administered 81 claims involving mainland Chinese parties, while SIAC administered nine such claims. In the five years from 2003 to 2007, HKIAC administered 275 cases involving Mainland Chinese parties, while SIAC and the ICC administered 52 and 87 such cases, respectively. All of these cases involved both Chinese and non-Chinese parties (because, as stated above, domestic Chinese disputes cannot be arbitrated outside of Mainland China) and Hong Kong appears to be the most commonly-selected venue in such contracts between Mainland PRC and other parties.

In the first annual ACQ Finance Magazine Country Law Awards, Fulbright was named Commercial Arbitration Law Firm of the Year in the United States. The awards recognize law firms’ outstanding work in various areas of the law and in 35 geographic regions of the world.
APPLICATIONS UNDER SECTION 1782 TO OBTAIN DISCOVERY IN INTERNATIONAL ARBITRATION: AN UPDATE

I. Introduction

For decades, litigants have relied on 28 U.S.C. § 1782 to obtain discovery in the United States for use in foreign court proceedings. In recent years, parties have also sought to use Section 1782 to obtain discovery in the international arbitration context.

Section 1782 provides that, “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal ...” While the phrase “foreign or international tribunal” clearly applies to conventional courts abroad, its application to other “tribunals,” such as international arbitration tribunals, has been the subject of much debate. This article canvasses the major U.S. federal court decisions that relate to this issue, including recent cases in the Fifth and Third Circuits.

II. Early Decisions: National Broadcasting and Biedermann

Two U.S. Circuit Courts, the Second and Fifth, first addressed this issue a decade ago. In 1999, the Second Circuit in National Broadcasting Company, Inc. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999), held that Section 1782 did not apply to private international arbitration tribunals. In that case, the party seeking discovery made a Section 1782 application to obtain documents in New York in aid of an ICC arbitration seated in Mexico. The court in National Broadcasting ruled that the private arbitral tribunal in Mexico was not a “foreign or international tribunal” within the meaning of Section 1782 and denied the application. The court reasoned that Section 1782 covered only “governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.”

The Fifth Circuit ruled similarly in the same year in Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999), stating that “[e]mpowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process ...” In that case, the district court had granted a Section 1782 application in aid of a private commercial arbitration before the Stockholm Chamber of Commerce. The Fifth Circuit reversed the district court’s decision and reasoned that Section 1782 “was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations.”

III. In Intel, the United States Supreme Court Considered the Scope of Section 1782, But Not Whether Section 1782 Extends to Private Arbitral Tribunals

In 2004, the U.S. Supreme Court addressed the application of Section 1782, but not in the arbitration context. In Intel v. Advanced Micro Devices, Inc. (“AMD”), 542 U.S. 241 (2004), the Supreme Court held that the Commission of the European Communities (“European Commission”) qualified as a “foreign or international tribunal” within the meaning of Section 1782. The European Commission is the European Community’s
competition law (antitrust) enforcement body. It conducts antitrust investigations and can issue decisions imposing liability on corporations that violate antitrust laws. Those decisions are then reviewable by the European Court of Justice (after review by its Court of First Instance).

In Intel, AMD filed an antitrust complaint before the European Commission against Intel. AMD then sought documents in California in support of its complaint through a Section 1782 application, filed before a federal district court. The district court denied the application and AMD appealed the decision. The Ninth Circuit reversed and Intel appealed that decision to the Supreme Court. Intel argued that the European Commission was not a “foreign or international tribunal” within the meaning of Section 1782, and that, therefore, the application should be denied. The Supreme Court disagreed and granted AMD’s Section 1782 application. In support of its holding, the court referenced the legislative history of Section 1782 and noted that the legislature intended to include “quasi-judicial” bodies within the meaning of “foreign or international tribunal” instead of limiting Section 1782 strictly to conventional courts. The Supreme Court determined that the European Commission was a “quasi-judicial” body covered by Section 1782. The European Commission, the Supreme Court reasoned, acted as a first-instance decision maker that had quasi-judicial qualities, subject to review by a conventional court.

The Supreme Court in Intel did not purport to overrule National Broadcasting or Biedermann and did not decide the question of whether a private international arbitration tribunal would be considered a “foreign or international tribunal” under Section 1782. The Supreme Court did include in its opinion a reference to a law review article by Professor Hans Smit that suggested that arbitral tribunals would fall within the scope of Section 1782. However, Professor Smit was only cited for the proposition that quasi-judicial bodies fall under Section 1782.

**IV. Section 1782 and Investor-State Arbitrations: Oxus Gold**

Following Intel, in 2006, a New Jersey magistrate judge granted a Section 1782 application in aid of an investor-state arbitration. *In re Oxus Gold PLC*, No. Misc. 06-82, 2006 WL 2927615 (D.N.J. October 11, 2006), involved an *ad hoc* arbitration filed under the U.K.-Kyrgyz Republic bilateral investment treaty (BIT), administered under the UNCITRAL Arbitration Rules. In granting the application, the *Oxus Gold* court relied on both *Intel* and *National Broadcasting*. In citing Intel, the *Oxus Gold* court quoted the Supreme Court’s “quasi-judicial” body language with approval, suggesting that a tribunal constituted under the auspices of a BIT was such a body. The court also cited the Second Circuit’s National Broadcasting decision, suggesting that the tribunal had the governmental qualities contemplated by the Second Circuit to put it within the reach of Section 1782. (Notably, the *Oxus Gold* court agreed with National Broadcasting’s conclusion that private arbitral tribunals would not fall under Section 1782). The *Oxus Gold* court reached its holding by reasoning that (i) this arbitration was being conducted by “the United Nations Commission on International Law [sic], a body operating under the United Nations and established by its member states”—the type of “quasi-judicial” or “intergovernmental” tribunal contemplated by both Intel and National Broadcasting, and (ii) investor-state arbitrations do not arise from a private contract, but, rather, from a BIT, which is a treaty concluded between two sovereign states.

*Oxus Gold* makes the incorrect statement that the arbitration involved in that dispute was administered by the United Nations Commission on International Trade Law (UNCITRAL). In fact, it was administered by an *ad hoc* arbitral tribunal applying the UNCITRAL Arbitration Rules. (UNCITRAL promulgated the UNCITRAL Arbitration Rules, but it does not administer arbitrations). Nevertheless, because this dispute was supported by a treaty entered into by two governments (the BIT), the court found that the tribunal was “state sponsored” and qualified as
a “quasi-judicial” or “intergovernmental” body. Moreover, had this investor-state dispute been administered by the International Centre for the Settlement of Investment Disputes (ICSID)—an inter-governmental organization that administers investor-state arbitrations — the reasoning in Oxlus Gold regarding administration of the arbitration would be more pertinent. (Most BITs provide that investor-state disputes are to be decided either by an ad hoc arbitral tribunal under the UNCITRAL Arbitration Rules or that they are to be administered by ICSID under the ICSID Arbitration Rules).

The foregoing illustrates that neither Intel nor National Broadcasting makes clear whether Section 1782 applications should be granted in aid of investor-state disputes. They do not directly address the issue. It seems, however, that investor-state arbitral tribunals might have at least some of the governmental qualities needed to put them within Section 1782’s reach.

V. Section 1782 and Private International Arbitrations: Roz Trading and Recent Decisions

In In re Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006), a federal district court in Georgia interpreted Intel liberally and granted a Section 1782 application in aid of a private international arbitration. The court in Roz Trading relied on Intel’s “quasi-judicial” language while interpreting the word “tribunal” very broadly. In doing so, the Roz Trading court suggested that arbitral tribunals constituted under the auspices of the International Arbitral Centre of the Austrian Federal Economic Chamber qualified as a “foreign or international tribunal” within the meaning of Section 1782. Notably, the Roz Trading court also expressly rejected the Second Circuit National Broadcasting and Fifth Circuit Biedermann decisions, holding that they came before Intel and were therefore implicitly rejected.

In October 2008, a district court in Massachusetts granted a Section 1782 application in aid of a private international arbitration in In re Application of Babcock Borsig AG, No. 08-MC-10128, 2008 WL 4748208 (D. Mass. Oct. 30, 2008). The Babcock court, just as in Roz Trading, rejected National Broadcasting and Biedermann while relying on a broad interpretation of Intel. In citing Intel, the Babcock court pointed to Intel’s reference to Professor Smit as support for its conclusion that private international arbitration tribunals fall within Section 1782. In addition, the Babcock court cited In re Application of Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007), a Minnesota federal district court case, as further support for this proposition. The Hallmark court also had granted a Section 1782 application in aid of a private international arbitration while similarly relying on Intel’s cite to Professor Smit’s law review article.

Concluding that Roz Trading, Babcock and Hallmark went too far in their application of Section 1782 to private international arbitrations, the court in La Comision Ejecutiva Hidroelectrica Del Rio Lempa (“CEL”) v. El Paso Corp. 2008 WL 5070119 (S.D. Tex. 2008) came to the opposite conclusion in November 2008. In El Paso, CEL sought the production of documents through a Section 1782 application from a non-party (El Paso) for use in a private commercial arbitration proceeding being conducted in Switzerland. CEL cited Intel as well as Roz Trading and Hallmark in support of its application. The court rejected CEL’s arguments and followed the Fifth Circuit’s decision in Biedermann.

In denying CEL’s application, the El Paso court rejected the notion that Intel stood for the inclusion of private international arbitration tribunals within the meaning of Section 1782. The El Paso court emphasized that the Supreme Court in Intel did not address whether Section 1782 applied to arbitral tribunals. Intel, rather, dealt with the application of Section 1782 to the European Commission, an intergovernmental body: “Intel broadened the scope of § 1782’s ‘foreign and international tribunals’ only so far as to clarify that it applied not only to court proceedings but also to proceedings before the [European Commission].” The court added that the European Commission was not comparable to an arbitral tribunal: “the fact that the [European Commission] acted as a quasi-adjudicative proceeding before review by true judiciary powers makes it an animal of a very different stripe from an arbitral tribunal.”
In rejecting previous district court decisions, the court in *El Paso* also stated that the *Intel* court’s reference to Professor Smit’s article was inapplicable and non-binding as support for Section 1782 applications in aid of international arbitration. The *El Paso* court first explained that the article was not cited for the proposition that an arbitral tribunal might fall under the scope of Section 1782. Rather, it was cited as support for including the European Commission as a quasi-judicial agency within the meaning of Section 1782. Next, the *El Paso* court emphasized that the article citation was not even the *Intel* court’s *dicta*, but merely the opinion of Professor Smit:

“Smit, not Congress, and not the Supreme Court, was of the opinion § 1782 also applied to arbitral tribunals. The Supreme Court gave no indication they agreed with Smit on this issue, now before the district court … Until, and, if, the Supreme Court itself adopts Hans Smit’s statements as its own within the text of the opinion itself, Hans Smit’s opinions on arbitral tribunals has no more weight and authority than any other article. Smit’s opinion is not even Supreme Court *dicta*.”

CEL appealed this decision to the Fifth Circuit. Interestingly, CEL also brought a similar application seeking discovery from the actual party to the arbitration, Nejapa Power Co. LLC, at around the same time in Delaware. In that case, *La Comisión Ejecutiva Hidroeléctrica Del Río Lempa v. Nejapa Power Co., LLC* (“Nejapa”), No. 08-135, 2008 WL 4809035 (D. Del October 14, 2008), the court granted the Section 1782 application. The court’s reasoning there was terse. It declared that “the Supreme Court’s decision in *Intel* (and post-*Intel* decisions from other district courts) indicate that Section 1782 does indeed apply to private foreign arbitrations.” This case has been appealed to the Third Circuit.

**VI. Conclusion**

The foregoing cases show a divergence in authority on whether Section 1782 applications can be granted in the international arbitration context. Nevertheless, a few conclusions can be made. First, at least two circuit courts have clearly stated that Section 1782 applications do not apply in the private international arbitration context.

While several district courts have cited *Intel* as support for granting such applications, at least one has held that that *Intel* does not address the issue. Second, with regard to investor-state disputes, at least one court, *Oxus Gold*, has opined that Section 1782 would apply to investor-state tribunals. In any event, it will be interesting to see whether the *El Paso* and *Nejapa* cases, pending before the Fifth and Third circuits, will clarify the applicability of Section 1782 to international arbitral tribunals.

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**THE ECJ’S DECISION IN WEST TANKERS ON ANTI-SUIT INJUNCTIONS MEANS A GREATER ONUS ON ARBITRAL TRIBUNALS TO SUPPORT THE ARBITRATION AGREEMENT FOR LONDON-SEATED ARBITRATIONS**

In *West Tankers Inc v. RAS Riunione Adriatica di Sicurita SpA & Ors* ([2007] UKHL 4) (“West Tankers”), the applicant sought an anti-suit injunction from the English Courts to prevent the respondent from continuing with proceedings in the Italian Courts commenced in breach of an arbitration agreement providing for arbitration in London. The English House of Lords referred to the Court of Justice of the European Communities (the “ECJ”) the question of whether it is incompatible with Brussels Regulation No. 44/2001 (the “Regulation”) for a court of an European Union (“EU”) member state to make an order to restrain a person from commencing or continuing proceedings before the courts of another EU member state on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the Regulation expressly excludes arbitration from the scope of the Regulation.
The Regulation requires the courts of an EU member state to defer to the EU court first seized (in this case, the Italian Court) to determine issues of jurisdiction where the subject matter of the case falls within the scope of the Regulation.

On February 10, 2009, the ECJ handed down its judgment in *Allianz SpA v. West Tankers* (Case C – 185/07). As widely expected, the ECJ held, consistent with Advocate General Kokott’s Opinion delivered on September 4, 2008, that an anti-suit injunction by the English Courts in this case would not be compatible with the Regulation.

The ECJ considered that, although arbitration proceedings were outside of the scope of the Regulation, as the claim for damages in the Italian Court proceedings fell within the scope of the Regulation, a preliminary issue in those proceedings concerning the applicability of the arbitration agreement must therefore also fall within its scope. The ECJ considered the granting of an anti-suit injunction to be contrary to the general principle that “every [EU] court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.”

As all EU Regulation states are signatories to the 1958 New York Convention, their courts can legitimately be expected to stay proceedings on 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, inoperative or incapable of being performed. However, some commentators argue that the courts in some EU countries may not be relied upon to make prompt decisions consistent with the New York Convention requirements.

The ECJ decision in *West Tankers* brings the English Courts into line with the practice of courts in the rest of the EU, and this decision has already been followed by the English Courts in two recent cases (*DHL GBS (U.K.) Ltd v. Fallimento Finmatica SpA* ([2009] EWHC 291 (Comm)) and *Youell and others v. La Reunion Aerienne and others* ([2009] EWCA Civ 175)). However, the English Courts may still grant an anti-suit injunction in respect of proceedings brought in breach of an arbitration agreement in courts outside the EU.

Commentators have suggested this decision will impede the popularity of London as an international arbitration venue. However, the attractions of London as an arbitral seat are far from being limited to the availability of anti-suit injunctions. Moreover, the arbitral tribunal once constituted is not completely powerless in the face of court proceedings commenced by one of the parties in breach of the arbitration agreement. An arbitral tribunal with its seat in the EU is not bound by the *lis pendens* provisions of the Regulation to stay the arbitration proceedings in the face of court proceedings elsewhere in the EU.

The referral of substantive claims to a foreign court may constitute a breach of the arbitration agreement, entitling the innocent party to damages for breach of contract and other appropriate relief. In the face of such conduct, a robust arbitral tribunal may admonish the offending party, at the invitation of the opposing party or of its own volition, and warn that party of the potential consequences of its actions.

Section 48(5) of the English Arbitration Act 1996 (the “Act”) provides that the arbitral tribunal has the same power as the Court “… (a) to order a party to do or refrain from doing anything …” Such a power can be reflected either in a final award or in a partial award. Such an award may include a declaration as to the validity and effectiveness of the arbitration agreement (i.e., an award on jurisdiction) and, at the discretion of the tribunal, injunctive relief as appropriate.

Section 41(5) of the Act enables the arbitral tribunal to make a peremptory order (usually in the form of an “unless” order) where a party has failed to comply with any order or direction of the tribunal. Section 42 of the Act gives the English Court the power to make an order requiring a party to comply with a peremptory order made by the tribunal.

It remains to be seen whether arbitral tribunals in London-seated arbitrations and the English Courts will
be willing to exercise such powers in support of the arbitration agreement. They may instead be influenced by considerations of comity, or by submissions to the effect that the scheme of the Regulation gives rise to issues of public policy in the U.K., and in other EU states, that may affect the validity and enforceability of a decision of the tribunal that runs contrary to the Regulation. The opposing party also might attempt to seek anti-anti-suit relief from the English Courts in respect of any such measures by the tribunal, relying on the ECJ decision in West Tankers.

Proposals to amend the Regulation are now under consideration. These include recommendations contained in the Heidelberg Report (by Professors Hess, Pfeiffer and Schloss, University of Heidelberg, Study JLS/C4/2005/03) to the effect that arbitration should be brought within the scope of the Regulation, and that exclusive jurisdiction to rule upon challenges to the validity of the arbitration agreement should be conferred upon the courts of the seat of the arbitration. Some commentators have described this latter proposal as regressive and contrary to the widely-accepted principle of kompetenz-kompetenz. The European Commission is planning to put out a Green Book on the reform of the Regulation in April 2009.

FULBRIGHT REPRESENTATIVE MATTERS
The following non-exhaustive list is illustrative of the geographical scope and significance of Fulbright’s recent international arbitration matters:

- Representation of a party in relation to claims under a substantial EPCM project. The contract provides for arbitration in London under the UNCITRAL Arbitration Rules.
- Representation of a Canadian energy company in an investment treaty arbitration under the UNCITRAL Arbitration Rules against a Latin American state and in an ad hoc arbitration against one of Latin America’s largest mining companies.
- Representation of an independent North American oil and gas exploration, development and production company on the bilateral investment treaty implications of the restructuring of its investment in a major offshore oilfield.
- Representation of an international telecommunications company in an LCIA arbitration concerning an agreement for satellite TV services in various Middle East countries.
- Representation of a semiconductors manufacturer in a multi-million U.S. dollar ICC arbitration against an Asian counterparty. The seat of the arbitration is Singapore.
- Representation of a U.S. power generation company in an UNCITRAL arbitration against a Central American state-controlled public utility and a related ex parte application for discovery (including documents and depositions) pursuant to 28 U.S.C. 1782, on appeal to the Third Circuit in the U.S.
- Representation of a European company, the assignor of several arbitration claims, in relation to claims under Chapter 15 of the U.S. Bankruptcy Code for the sale price due on the assignment.

FULBRIGHT ARBITRATION NAMED LATIN LAWYER “DEAL OF THE YEAR” 2007 & 2008

For the second year in a row, Latin Lawyer honored Fulbright’s work as one of the top three “Deals of the Year” for Duke Energy & Electroquil Partners & Electroquil v. Ecuador, an ICSID arbitration involving power purchase agreements. Fulbright won the award last year for representing UEG Aracauria in one of South America’s largest arbitration cases to date.
Representation of companies in a leading engineering, construction and energy services group in a number of complex arbitrations against European and Asian counterparties. The arbitrations are seated in different European cities and the applicable rules include the ICC and SCC Arbitration Rules.

Representation of an Israeli company in an arbitration commenced under a bilateral investment treaty in connection with a Central American state’s alleged failure to reimburse certain taxes and efforts to enforce a previous UNCITRAL arbitral award.

Representation of the Latin American subsidiaries of a U.S. energy company in two ICSID arbitrations against two different Latin American states. Fulbright’s client in these arbitrations recently received well-publicized and favorable awards on the merits.

Representation of a Canadian energy company in a complex foreign trade dispute against a Caribbean state-controlled entity which arises out of the termination of an energy services contract. Arbitration is pending under the UNCITRAL Arbitration Rules, seated in Switzerland.

Representation of two independent oil companies and a drilling company in ICC arbitrations against a commission agent. The disputes involve oilfield exploration services in West Africa.

Representation of two Brazilian companies in an arbitration before the AAA’s International Centre for Dispute Resolution against an Asian producer of household electrical appliances.

Representation of a U.S. drilling company in an ICDR arbitration against the Asian subsidiary of a U.S. independent oil and gas company. This case involved one of the first applications for emergency interim relief under Article 37 of the ICDR International Arbitration Rules.

Representation of a provider of financial services in an LCIA arbitration against a credit card company. London is the seat of the arbitration.

Representation of a distributor of semiconductors and electronic passive components in a CIETAC arbitration seated in Shanghai against an international telecommunications company.

Representation of separate groups of U.S. investors in relation to two NAFTA arbitrations concerning water rights in Mexico and the energy sector in Canada.

Representation of an Eastern European government in an ICC arbitration arising from a commercial lease and licensing agreement.
New ICDR Disclosure Guidelines Are To Be Welcomed

The ICDR Guidelines for Arbitrators Concerning Exchanges of Information, which came into effect on May 31, 2008, send a clear reminder to the international arbitration community of the need to avoid unnecessary cost and delay, particularly in relation to the document exchange process. The Guidelines themselves are a model of brevity (they are less than three pages long and comprise eight sections). The Guidelines must be followed by parties and tribunals in all ICDR arbitrations commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases commenced before that date. The ICDR has stated that the Guidelines will be reflected in the next revision of the ICDR International Arbitration Rules.

The Guidelines mandate the tribunal to “manage the exchange of information … with a view to maintaining efficiency and economy” and exhort the parties and the tribunal to “endeavor to avoid unnecessary delay and expense.” In recent years there has been criticism of the international arbitration process on the grounds that it is taking on too many of the arguably less-welcome attributes of the U.S. court process, in particular in relation to the production of documents, which some parties have attempted to re-cast into broad U.S.-style discovery. The Guidelines set out to give parties and the tribunal the ability to streamline the document production process, while maintaining the integrity of that process. In particular, the Guidelines send a strong message that wide-ranging U.S.-style discovery will not, generally, be applicable to international arbitrations and expressly state that depositions, interrogatories and requests to admit are not appropriate procedures for obtaining information in international arbitration.

Key provisions in the Guidelines include:

- The parties are to exchange documents on which each intends to rely (Section 2 of the Guidelines);
- Parties may request documents from the other parties, but only where the requesting party is able to describe a document or class of documents with reasonable specificity, and provide an explanation of their relevance and materiality to the outcome of the case (Section 3);
- Tribunals may allocate the costs of providing information among the parties and may require a requesting party to justify the time and expense that complying with the request may involve (Section 8(a)); and
- If a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may consider such failure in allocating costs between the parties (Section 8(b)).

Additionally, arbitrators are instructed to be “receptive to creative solutions” for exchanging information in ways that avoid costs and delay (Section 6).

The Guidelines are a potentially useful aid to the document exchange process, and experienced practitioners or tribunals alike dealing with difficult parties may find it helpful to be able to point to the Guidelines (and particularly the requirement to manage the process efficiently and cost-effectively) to help to keep the arbitration on track.

The Guidelines are available at www.icdr.org.
Recent Developments in Electronic Disclosure in International Arbitration

The issue of the disclosure of electronic data in international arbitration proceedings has provoked vigorous expression of a wide range of views, from those that believe that the challenge can usefully be met by guidelines, protocols or institutional rule changes to those who believe that existing rules make adequate provision for electronic disclosure or that additional measures are both unnecessary and inappropriate.

Given the particular challenges raised by disclosure of electronic information, and the fact that individual arbitrators, parties and their counsel may be unfamiliar with these challenges, it is perhaps helpful for arbitration institutions to provide an appropriate measure of guidance in order to address and avoid the potential issues and problems that may arise in some cases.

Such rules or guidelines for electronic disclosure in international arbitration should aim to distill from the litigation experience only those principles that are appropriate for application in an arbitration context, always recognizing the fundamental difference between the discovery obligation in common law litigation and the disclosure of documents in an arbitration.

In recognition of the need to address the challenge of electronic disclosure, a number of international arbitration institutions have introduced or are considering rule changes, guidelines or protocols, including the AAA/ICDR, the Chartered Institute of Arbitrators and the CPR. The ICC formed a working party in August 2008 to provide a report on techniques for the production of electronic documents. The IBA has formed an IBA Rules of Evidence Subcommittee to consider appropriate revisions to the IBA Rules. Much of the discussion amongst the IBA Arbitration Committee members leading up to the IBA annual meeting in October 2008 concerned the disclosure of electronic documents.

ICDR Guidelines

In May 2008, the ICDR Guidelines for Arbitrators concerning Exchanges of Information were issued, to apply to all international cases administered by the ICDR commenced after May 31, 2008, unless the parties agree expressly to opt out of their application. The Guidelines adopt a strictly minimalist approach to guidance on the disclosure of electronic documents, which are addressed in a single paragraph:

“4. Electronic Documents

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search.”

The ICDR Taskforce charged with preparing the Guidelines concluded that “… no further provision made specifically with electronic disclosure in mind was appropriate. The concern of the Task Force was that if further specific rules were to be developed, it might encourage a line of argument that issues in respect of electronic disclosure should be treated differently from similar issues arising in the context of any other documentary disclosure requests: the fact that such specific provision had been made could be said to be indicative of an acknowledgement that the general standard imposed by the Guidelines should not necessarily be applied to electronic disclosure. The Taskforce determined, therefore, that no separate guidelines would be drawn up for electronic disclosure.”

(See “The ICDR Guidelines for Information Exchanges in International Arbitration: An Important Addition to the Arbitral Toolkit” by John Beechey, Dispute Resolution Journal, vol. 63, no. 3 (August-October 2008)).
CIArb Protocol for E-Disclosure in Arbitration

The Chartered Institute of Arbitrators Protocol for E-Disclosure in Arbitration was issued in October 2008.1 As stated in the introduction to the Protocol (“Purpose of the CIArb Protocol for E-Disclosure in Arbitration”), it is not intended to be applied in all arbitrations, but only in those cases in which the time and cost burdens of giving disclosure of electronic documents may be an issue. Nor is it intended to be overly prescriptive. The parties are free to agree otherwise than as provided. It is intended to act as a prompt or checklist for those arbitrators, parties and counsel who may be less familiar with the issues that may arise in giving disclosure of electronic data.

The CIArb Protocol flags for early consideration by the parties and by the tribunal those techniques and tools that are available to reduce the burden of giving electronic disclosure, in those cases in which issues relating to disclosure of electronic documents are likely to arise. In such cases, the Tribunal should raise with the parties the question of whether e-disclosure may arise for consideration at the earliest opportunity, and in any event no later than the preliminary hearing.

CPR Protocol


Recognizing that there may be different expectations on the part of arbitration users and their counsel, the CPR Protocol offers various “modes” of electronic disclosure “ranging from minimal to extensive,” so that the parties may choose the general way in which their arbitration proceedings will be conducted in the area of document disclosure. The listed modes of disclosure of electronic information range from disclosure by each party limited to copies of electronic information to be presented in support of that party’s case to disclosure of electronic information regarding non-privileged matters that are relevant and material to any party’s claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.

In addressing the disclosure of electronic information, the CPR Protocol states that, “Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need.” “Extraordinary need” is not defined. Given the continuing advances in the methods, speed and costs of storage and retention of electronic data, it may be the case that gathering data from even a wide range of users or custodians will not be particularly costly or burdensome in the circumstances of the case. The circumstances of the particular case may, in any event, justify such efforts even if costly or burdensome.

The CPR Protocol also provides that issues regarding the scope of the parties’ obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference or as soon as possible thereafter.

Revisions to the IBA Rules on the Taking of Evidence in International Commercial Arbitration

The Rules of Evidence Subcommittee of the IBA Arbitration Committee has commenced a wide-ranging review of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the IBA Rules), first issued in 1999. This process will take account of the views of arbitration users from a wide range of jurisdictions and legal traditions. The lengthy and careful process of consultation that led to the IBA Rules resulted in a broad consensus of support that has been their greatest strength. It is to be hoped that the revisions to the IBA Rules will make adequate and helpful provision for the challenges posed by the disclosure of electronic documents, either by way of revisions to the IBA Rules or in the form of a protocol or guidelines for disclosure of electronic documents that may accompany the revised IBA Rules for use in those cases where such issues arise. The latter approach may answer the concerns of those who believe that rule changes will induce parties to refer to them in cases where this is not appropriate.

1 David Howell, Co-chair of Fulbright’s International Arbitration Group was the principal drafter of the CIArb Protocol.
ICC Task Force on Production of Electronic Documents in Arbitration

The ICC Task Force on Production of Electronic Documents in Arbitration was created in August 2008. It is mandated to study and identify the essential features and effects of the disclosure of electronic documents in international arbitration and to produce a report (possibly in the form of notes or recommendations) on the production of electronic documents in international arbitration. The Task Force is composed of over 68 members from 14 different countries. The ICC report that will result hopefully will be able to draw upon the efforts of other institutions in this area, described above.

Conclusion

The techniques and tools for managing the storage and recovery of electronic data continue to evolve. Improved software tools for identifying potentially relevant documents by search characteristics, and concept software tools for arranging documents for more efficient attorney review (normally the largest cost item in giving disclosure), continue to develop. These changes must be monitored if guidelines and protocols on electronic disclosure are to be kept up-to-date.

International arbitrators will be required to have an increasing awareness of the practical considerations that arise in the giving of electronic disclosure in international arbitration, in those cases in which it is an issue. Parties are entitled to expect that arbitral tribunals will address these issues in an informed and constructive manner. Counsel for the parties have an important role in assisting the tribunal to achieve this awareness. Guidelines, protocols or institutional rule changes may act as a prompt or checklist for those less familiar with the issues that may arise in the disclosure of electronically stored information, in those cases (not all cases) in which they arise for consideration.

"MANIFEST DISREGARD OF THE LAW" – DEAD OR ALIVE?

It is well-known that in the United States there are only a few grounds upon which a party may modify or otherwise challenge an arbitration award. Section 10 of the Federal Arbitration Act (FAA) recognizes only four grounds: (1) “the award was procured by corruption, fraud or undue means;” (2) “there was evident partiality or corruption in the arbitrators;” (3) “the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;” or (4) “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” (9 U.S.C. § 10.) Section 11 of the FAA gives judges the power to correct non-substantive matters which do not affect the merits of the award. (9 U.S.C. § 11.) The FAA also incorporates the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Panama Convention on International Commercial Arbitration, which provide their own grounds for refusal to recognize or enforce an international arbitration award.
In addition to the grounds set forth by the FAA, however, U.S. courts have created what has been considered by some to be another basis for vacatur of arbitration awards, known as “manifest disregard of the law.” This ground was created based on *dicta* from the U.S. Supreme Court decision in *Wilko v. Swan*, 346 U.S. 427 (1953), in which the Court stated that “the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation” (emphasis added).

Manifest disregard of the law does not have a concrete meaning and has been subject to varied interpretations by U.S. courts, although the courts that have recognized the manifest disregard standard have consistently emphasized that the bar is set extremely high for parties seeking vacatur on such grounds. Despite, or more likely in light of, the ambiguity relating to this doctrine, petitions to vacate arbitration awards frequently rely on, among other bases, the manifest disregard doctrine. However, a recent decision by the U.S. Supreme Court has thrown the debate relating to the manifest disregard standard into full swing with a number of courts weighing in on the continued viability of this doctrine and its meaning in light of this recent decision.

In *Hall Street Associates LLC v. Mattel Inc.*, 128 S. Ct. 1396 (2008), decided in March 2008, the U.S. Supreme Court decided that parties to an arbitration agreement may not, by contract, expand the grounds for judicial review of an arbitral award beyond those provided in the FAA. While not specifically addressed in *Hall Street*, some courts have concluded that, after *Hall Street*, the manifest disregard doctrine is no longer viable as grounds for vacatur of an arbitral award.

The U.S. First Circuit has suggested in *dicta* that the doctrine does not survive after *Hall Street*: “We acknowledge the Supreme Court’s recent holding in *Hall Street Assocs., L.L.C. v. Mattel* that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the FAA.” *See Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008). The U.S. Fifth Circuit, in *Citigroup Global Markets Inc. v. Bacon*, Case No. 07-20670 (5th Cir. March 4, 2009), also rejected the doctrine and stated:

“In the light of the Supreme Court’s clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, non-statutory ground for setting aside an award must be abandoned and rejected. Indeed, the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards. *Hall Street* made it plain that the statutory language means what it says: “courts must [confirm the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title,” 9 U.S.C. § 9 (emphasis added), and there's nothing malleable about “must,” *Hall Street*, 128 S. Ct. at 1405. Thus from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10.

To the extent that our previous precedent holds that non-statutory grounds may support the vacatur of an arbitration award, it is hereby overruled.”

Other examples include the Alabama Supreme Court and the Southern District of New York. In *Sherry Hereford v. D.R. Horton*, No. 1070396, 2009 WL 104666, at *4-5 (Ala. Jan. 9, 2009), the Alabama Supreme Court held that, based on *Hall Street*, “we hereby overrule our earlier statement in *Birmingham News* that manifest disregard of the law is a ground for vacating, modifying, or correcting an arbitrator’s award under the Federal Arbitration Act, and we also overrule any such language in our other cases construing federal arbitration law.” Similarly, the Southern District of New York in *Robert Lewis Rosen Associates v. Webb*, No. 07 Civ. 11403, 2008 WL 2662015 at *4 (S.D.N.Y. 2008), held that “the manifest disregard of the law standard is no longer good law.” *See also Prime Therapeutics LLC v. Omnicare, Inc.* 555 F. Supp. 993, 999 (D. Minn. 2008).
Other courts have concluded that the manifest disregard doctrine is still viable, albeit characterizing it as a judicial gloss on the FAA Section 10 grounds for vacatur. For instance, the district court in *Mastic N. America, Inc. v. MSE Power System, Inc.*, 581 F.Supp.2d 321, 325 (N.W.N.Y. 2008), stated that, “review under the doctrine of manifest disregard of the law is highly deferential and such relief is appropriately rare.” A New York trial court in *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 349 (N.Y. Cty. 2008), concluded that *Hall Street* did not “jettison” the “manifest disregard” standard of *Wilko*, but stated “this court will view ‘manifest disregard of law’ as judicial interpretation of the section 10 [FAA] requirement, rather than a separate standard of review.” The U.S. Second Circuit also recently confirmed the applicability of the manifest disregard doctrine in *Stolt-Nielsen SA v. Animalfeeds International Corp.*, 548 F.3d 85, 93 (2d Cir. 2008). The Second Circuit stated that it would follow the line of cases that view manifest disregard as “reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA” and that it “remains a valid ground for vacating arbitration awards.” The U.S. Sixth Circuit in *Coffee Beanery, Ltd. v. WW, L.L.C.*, 2008 WL 4899478 (6th Cir. November 14, 2008) held in an unpublished opinion that the *Hall Street* holding applies only to contractual expansion of judicial review.

Another recent development is the U.S. Supreme Court’s decision in October 2008 in *Improv West Associates v. Comedy Club*, No. 07-1334, 129 S. Ct. 45 (2008). In this case, the Supreme Court decided to reverse a decision by the U.S. Ninth Circuit (514 F.3d 833) and remand the case back to that court so the court could reconsider its decision to partially vacate an arbitration award for manifest disregard of the law in light of *Hall Street*. On review, the Ninth Circuit ruled, on January 29, 2009, that the manifest disregard ground for vacatur was simply a shorthand for a statutory ground under the FAA, specifically § 10(a)(4), (arbitrator(s) exceeded their powers). Thus, according to the Ninth Circuit, “manifest disregard of the law remains a valid ground for vacatur because it is a part and parcel of § 10(a)(4).”

**Conclusion**

The effect of *Hall Street* on manifest disregard of the law continues to puzzle the courts, and the ultimate effect of this decision still remains to be seen. While courts appear to be divided on the issue of the viability of the manifest disregard doctrine, there does seem to be a trend among courts that the grounds for vacatur in the FAA are exclusive and that to the extent the manifest disregard doctrine is still viable, it is subsumed in the FAA’s exclusive grounds. Therefore, while the debate continues, it seems that the courts that appear to have divergent views may really be saying the same thing.
ENGLISH COURT GRANTS ORDER IN SUPPORT OF ARBITRAL TRIBUNAL’S PEREMPTORY ORDER

Readers of this publication will be familiar with the English case of John Foster Emmott v. Michael Wilson & Partners. In Issue 2 of 2008, we reported that an application arising out of that case had led the English Court of Appeal to clarify issues relating to confidentiality in respect of documents generated in an arbitration seated in England.

A subsequent January 2009 decision of the English High Court in the same case has, for the first time, provided guidance as to the circumstances in which the English courts will enforce a peremptory order of an arbitral tribunal seated in England. The Court concluded that where the tribunal had reached a clear, firm and reasoned view, it was not necessary or appropriate for the Court to review the tribunal’s determinations with respect to the granting of the peremptory order.

Court’s Power to Order Compliance with an Arbitral Tribunal’s Peremptory Order

The English Arbitration Act 1996 (the “Act”) limits the circumstances in which the Court may intervene in support of an arbitration to those cases prescribed in the Act (Section 1(c) of the Act). The powers of the English Courts under the Act to intervene in support of arbitral proceedings seated in England, Wales or Northern Ireland include a discretionary power to order compliance by a party with an arbitral tribunal’s peremptory order (Section 42(1) of the Act). A peremptory order is an order or direction of the tribunal which specifies a time for compliance (Section 41(5) of the Act). Such an order usually is made following failure by one or more parties to adhere to the tribunal’s procedural orders, and may take the form of an “unless” order, with specified consequences if the order is not complied with. An order of the Court ordering compliance with an arbitral tribunal’s peremptory order is made following failure by one or more parties to adhere to the tribunal’s procedural orders, and may take the form of an “unless” order, with specified consequences if the order is not complied with. An order of the Court ordering compliance with an arbitral tribunal’s peremptory order carries with it the advantage of sanctions for non-compliance (including contempt of court), that do not attach to an order of the tribunal.

John Foster Emmott v. Michael Wilson & Partners, [2009] EWHC 1 (Comm), involved Mr. Emmott, who was formerly a partner in Michael Wilson & Partners (“MWP”), a legal and business consultancy in Kazakhstan. He left MWP, and MWP commenced arbitration in London alleging that his subsequent actions were part of a scheme to divert MWP’s business, in breach of contract and in breach of trust. Mr. Emmott counterclaimed seeking a one-third ownership interest in MWP, pursuant to the partnership agreement, including certain shares in Steppe Cement, a Malaysian company, acquired by MWP in lieu of fees owed to MWP.

The arbitral tribunal issued a series of procedural orders requiring MWP to procure that 27% of its shareholding in the Steppe shares were to be held to the order of the chairman of the tribunal. MWP did not comply with the orders.

On November 27, 2008, the tribunal therefore issued a peremptory order, requiring compliance by a specified date. When MWP again failed to comply, Mr. Emmott applied to the English Court, pursuant to Section 42(1) of the Act, for an order requiring MWP to comply with the tribunal’s peremptory order. Mr. Emmott also applied pursuant to Section 44 of the Act for a freezing order restraining the transfer of the shares.

Section 42(2) of the Act provides that an application to the Court for enforcement of a peremptory order of the tribunal may only be made (a) by the tribunal upon notice to both parties, (b) by a party with the permission of the tribunal and with notice to the other party, or (c) where the parties have agreed that the powers of the Court under Section 42 shall be available. Mr. Emmott made the application with the permission of the tribunal.

Section 42(3) of the Act requires that the Court shall not act unless it is satisfied that the applicant has “…exhausted any available arbitral process in respect of failure to comply with the tribunal’s order.” In addition, the respondent must have failed to comply with the tribunal’s order within the time limit specified by the tribunal for compliance, or within a reasonable period if no time for compliance was prescribed (Section 42(4) of the Act).
Exercise of the Court’s Discretion to Make an Order Under Section 42(1) of the Act

In considering Mr. Emmott’s application under Section 42(1) of the Act, the Court addressed the question of whether it must satisfy itself that “the case is a proper one for the order which is sought.” It accepted that the Court should not merely “act as a rubber stamp” in respect of orders made by the tribunal. To do so would be inconsistent with the discretion conferred on the Court by Section 42(1) of the Act. However, the Court did not accept that it must in every case satisfy itself that the order was proper if that “meant that the court must review the decision made by the tribunal and consider whether the tribunal ought to have made the order in question.”

The Court referred to the general principles set out in Section 1 of the Act, the duties of the tribunal under Section 33 of the Act and the duties of the parties under Section 40 of the Act, referring to those three sections as the “three pillars” of the Act, and concluded that “one would expect the Court to support, rather than frustrate, the tribunal.” Given the Court’s limited power to re-hear or review decisions of the tribunal “… it would be surprising if a power to rehear or review was hidden within Section 42.”

The Court considered that it would not be appropriate to order compliance with a tribunal’s peremptory order where such an order was not required in the interests of justice to assist the proper functioning of the arbitral process. This might include a material change in circumstances after the peremptory order was made, a situation where the tribunal had breached its duty to act fairly and impartially between the parties or where the tribunal had made an order which it had no power to make. There was no evidence of any such circumstances in this case. The conditions of Section 42 of the Act having been met, the Court found that it was appropriate and in the interests of justice that it should support the tribunal’s peremptory order. MWP was ordered to comply with the tribunal’s peremptory order and a freezing injunction was also granted under Section 44 of the Act.

This case is a further example of the English High Court’s willingness to make appropriate orders in support of arbitration proceedings seated in London. It confirms that, in exercising its discretion to enforce a peremptory order made by a tribunal seated in England, the English Court will not consider it necessary to review whether the tribunal ought to have made the order. Provided the applicant has exhausted any available arbitral process in respect of non-compliance with the peremptory order, and there has been a failure to comply with the order within the required time, the Court will order compliance in support of the arbitration, except in those cases in which the Court considers that such an order is not required in the interests of justice to assist the proper functioning of the arbitral process.
EXTENDING AN ARBITRATION AGREEMENT TO A NON-SIGNATORY: THE GROUP OF COMPANIES DOCTRINE

The circumstances in which an arbitration agreement will be extended to bind a non-signatory are usually very limited. The “group of companies” doctrine has been relied upon in some cases to extend jurisdiction to non-signatory third parties in the same group of companies as the signatory party to the arbitration agreement. Jurisdiction may, for example, be extended under the doctrine where such non-signatories have participated in the formation and execution of the relevant contract(s). The application of the doctrine is controversial, has been rejected by the courts in some countries while being endorsed by the courts in others, and gives rise to keen debate amongst international arbitration practitioners. Adding to the discussion is a recent decision of the Swiss Federal Supreme Court which, despite supportive earlier authority, rejected the doctrine.

The Group of Companies Doctrine

The best known case applying the group of companies doctrine is the French case of Dow Chemical Group v. Isover-Saint-Gobain (ICC Case No. 4131). In Dow Chemical, although not party to the contracts in question, certain companies within the Dow Group played a central role in the conclusion, performance and termination of those contracts. The arbitral tribunal concluded that this involvement demonstrated a mutual intention of all involved that the contracts would also bind the non-signatory Dow companies. In extending jurisdiction to the non-signatories, the tribunal concluded that “it is neither sensible nor practical to exclude the claims of companies who have an interest in the venture and who are members of the same corporate family.”

The arbitral tribunal’s award on jurisdiction was challenged by Isover-Saint-Gobain but was ultimately upheld by the Paris Court of Appeal (Isover–Saint-Gobain v. Dow Chemical France, CA Paris, October 21, 1983) and has since been followed by a number of ICC tribunals (ICC Case Nos. 4972, 5721, 5730 and 6519). In Switzerland, the Swiss Federal Supreme Court also recognized the group of companies doctrine in the case of YSAL v. Z Sari ATF (129 III 727-4P.115/2003). In a decision from 2003, the Court in YSAL allowed the extension of arbitral jurisdiction to a non-signatory on the basis of his active involvement in the management and implementation of the construction project at the center of the dispute.

An analogous approach was taken by a U.S.-based arbitral tribunal acting under the auspices of the Society of Maritime Arbitrators in the case of MAP Tankers, Inc. v. MOBIL Tankers, Ltd (extracted in VII Yearbook Commercial Arbitration (1982)). Similarly, while not strictly relying on the group of companies doctrine, the U.S. courts have allowed the piercing of the corporate veil where a signatory to an arbitration agreement is merely the ‘alter ego’ of a non-signatory. In the case of Bridas S.A.P.I.C. v. Government of Turkmenistan (345 F.3d 347 (5th Cir.2003)), the court did so because there no longer existed any distinct personality between the related parties and to recognize such a distinction would promote a fraud or injustice.

On the other hand, in England the group of companies doctrine was firmly rejected in the case of Peterson Farms Inc. v. C&M Farming Ltd ([2004] EWHC 121 (Comm)). Despite earlier authority where a non-signatory company claimed “through or under” its parent and the contract signatory (Roussel-Uclaf v. GD Searle & Co Ltd [1978] 1 Lloyd’s Rep. 225), in Peterson Farms the English High Court found that the doctrine “forms no part of English law.”

Decision 4A_128/2008 of the Swiss Federal Supreme Court

In the most recent Swiss decision, the initial dispute concerned a contract between a contractor and a subcontractor for the construction of an industrial complex in Qatar. The contract at the center of the dispute was governed by Swiss law and provided for ICC arbitration. The contractor’s parent company acted as guarantor and supplied a company guarantee letter...
in favor of the subcontractor. It contained no arbitration clause and no choice of law provision. A dispute arose and the subcontractor commenced arbitration against both the contractor and its parent company.

The parent company objected to jurisdiction, claiming that it was not bound by the arbitration agreement in the contract. The arbitral tribunal sustained the jurisdictional objection and issued an award denying jurisdiction in respect of the parent company. The subcontractor applied to the Swiss Federal Supreme Court to set aside the award.

In upholding the tribunal’s award on jurisdiction, the Swiss Federal Supreme Court confirmed that the circumstances in which an arbitration agreement will be applicable to a non-signatory are very limited. In Swiss law, jurisdiction might be extended where the third party has taken over the debt of the signatory, for example, by assignment or novation. This would imply the transfer of all rights and obligations related to the debt, including the arbitration agreement. The Court held that this was not the case where the parent company had acted merely as guarantor.

The Court also rejected the group of companies doctrine as a basis for extending the arbitration agreement to the parent company. The court held that, except under exceptional circumstances, the control of a corporate entity by a parent is not enough to reverse the presumption that only the parties who signed the arbitration clause are bound by it. The parties’ intentions, either expressed in contract or implied by conduct, were the principal factor in determining jurisdiction. Therefore, in order for jurisdiction to be extended to it, the parent company must have expressed an intention to be bound by the main contract and the arbitration agreement contained therein. However, there was no evidence before the Court that the parent company had interfered in the performance of the main contract. Accordingly, an intention to be bound by the contract could not be implied.

**Conclusion**

Of interest to those wishing to debate the group of companies doctrine, this case also underlines the importance of carefully drafted arbitration agreements, especially in multi-party situations. Participants in international commerce typically will interact via a myriad of complex arrangements involving related, yet distinct entities. However, the arbitral process is a creature of consent. Accordingly, disputes arising from complex contractual and non-contractual relationships and involving more than two parties raise difficult issues. Especially in an international setting, particular problems arise in attempting to extend jurisdiction to non-signatories or in attempting to consolidate related proceedings commenced in different fora. It is therefore important that proper consideration be given at the drafting stage to the nature of the parties to a particular transaction, the possibility of future disputes and the desired means of resolving them.
Norwegian company Telenor Mobile Communications AS ("Telenor") and Ukrainian company Storm LLC ("Storm") jointly owned a Ukrainian mobile telecommunications company called Kyivstar G.S.M. ("Kyivstar"). The Shareholder Agreement that defined the parties’ respective rights relating to Kyivstar contained an arbitration clause under which all disputes were to be resolved by arbitration in New York. Telenor claimed that Storm violated the Shareholder Agreement and commenced an ad hoc arbitration under the UNCITRAL Arbitration Rules.

While participating in the arbitral proceedings, Storm and its affiliate companies ("the Altimo Entities") initiated a series of lawsuits in the Ukrainian Commercial Court seeking to invalidate the Shareholder Agreement and prohibit arbitration.

The first hurdle to arbitration arose when a Ukrainian court declared the arbitration clause invalid at the request of Alpren, a company that owned 49.9% of Storm. The Alpren lawsuit suggested collusion with Storm. Alpren brought the suit, but was not a party to the arbitration agreement, neither Telenor nor the arbitrators were informed of the lawsuit and Storm—the supposed defendant—declined to retain counsel or submit any written defense on its own behalf. The Ukrainian court found that Storm's general director lacked the authority to sign the Shareholders Agreement on Storm's behalf—despite clear evidence to the contrary (including a document signed by Storm's chairman giving the director such authority). Storm put forth a weak appeal and the Ukrainian appellate court affirmed the decision.

Storm then asked the arbitral tribunal to dismiss the arbitration proceedings on the basis of the Ukrainian court rulings that the clause was invalid. The tribunal rejected this argument, in part because the Ukrainian ruling was not binding on the arbitrators. Storm quickly obtained a declaration from the Ukrainian court that its ruling binds all parties and non-parties alike and that anyone who ignores the ruling and continues to arbitrate the dispute is in violation of the court ruling.

Storm also filed suit in New York state court to enjoin the arbitration, which Telenor removed to U.S. District Court (S.D.N.Y.), where the court denied relief to Storm and granted Telenor’s petition to compel arbitration and Telenor’s request for an anti-suit injunction against Storm. The court said that the Ukrainian court judgment did not prevent Storm from arbitrating and that the arbitrators were likely correct in their earlier ruling holding Storm to its agreement to arbitrate.

Alpren once again filed suit in the Ukraine, this time against Storm’s general director, Mr. Klymenko. A Ukrainian court issued an injunction specifically preventing Telenor, Storm, and Mr. Klymenko himself from participating in the arbitration. Storm again asked the arbitral tribunal to halt the proceedings because of the ruling and the tribunal again refused.

Telenor, frustrated with the Ukrainian litigation, asked the Southern District of New York to compel arbitration and enjoin Storm and its affiliated entities from further litigation in the Ukraine. The court felt that “the Ukrainian litigation had been conducted in the most vexatious way possible” and consequently granted both of Telenor’s requests.

The arbitration continued and finally went to hearing in December 2006, despite Storm’s refusal to participate. In August 2007, the arbitral tribunal issued an award holding that: (i) it had jurisdiction to hear the dispute notwithstanding the Ukrainian court rulings; (ii) the Shareholders Agreement was valid and binding on the parties; and (iii) Storm had breached and was continuing to breach the Agreement. The tribunal did not award monetary damages, but rather ordered Storm to comply with its contractual obligations under the Shareholders Agreement. Storm once again looked to the Ukrainian Courts for help to invalidate the award.

Meanwhile, Telenor sought to enforce the award in the New York courts and Storm cross-moved to vacate
the award. On November 2, 2007, the Southern District of New York confirmed the arbitral award and ordered Storm to comply with the Shareholders Agreement by either selling its stake in Kyivstar or disposing of over five percent of its competing wireless operators, Turkcell and Ukrainian High Technologies, within 120 days of the date of the arbitration award. The order also required Storm and the Altimo Entities to begin attending Kyivstar board and shareholder meetings, to withdraw their various lawsuits in Ukraine and to cease filing additional lawsuits in Ukraine.

After several attempts to have Storm comply with the award to no avail, on January 23, 2008, Telenor filed a motion in the Southern District of New York seeking contempt sanctions against Storm and its affiliates for failing to comply with the Court’s November 2, 2007 Order. In November 2008, the Court found that Storm had taken absolutely no steps toward complying. See Telenor Mobile Communications AS v. Storm LLC, 587 F.Supp.2d 594 (S.D.N.Y. 2008). Judge Gerard Lynch, who also had made the order confirming the award, was heavily critical. The Court held Storm and all related Altimo Entities in contempt. Judge Lynch was prepared to exercise jurisdiction over the Altimo Entities even though they were not signatories to the arbitration agreement because there was plenty of evidence to suggest that these entities were in fact alter egos of Storm.

The Court imposed escalating fines, and ordered Storm to sell its shares of Kyivstar or sell five percent of its competing wireless operators within 120 days. The fine started at U.S.$100,000 a day for 30 days, then doubled to U.S.$200,000 a day for 30 days, then doubled to U.S.$400,000 a day for 30 days, and continues to double every 30 days until Storm is in full compliance. The Court went a step further by requiring Storm to deposit its Kyivstar shares with the Court along with an executed blank share transfer form, so that the Court could ensure that Storm would comply with its divestiture obligations.

Finally, the Court also ordered Storm to pay for Telenor’s attorneys’ fees and costs incurred in connection with the contempt proceeding.

Storm attempted to excuse its failure to comply with the award with two injunction decisions obtained in the Ukrainian courts. Storm argued that these injunctions prevented it from complying with the award. Judge Lynch was not persuaded and went on to state that: “these opinions appear to be nothing more than a sham, a pseudo-legal excuse for Storm and the Altimo Entities to refuse to do what they have all along refused to do. It is outrageous, though not surprising given their prior conduct in this matter, that Storm and the Altimo Entities would construct such a sham.”

The Court also noted that Second Circuit jurisprudence further allowed the parties’ willfulness to be taken into account. According to Judge Lynch, this and the harm caused by Storm’s failure to comply with the award fully justified the penalties awarded. The 47-page decision went on to state that “Kyivstar, a multi-billion dollar enterprise, [was] paralyzed from taking important corporate action, including disbursement of hundreds of millions of dollars in potential dividends.” Moreover, according to Judge Lynch, the efforts of Storm to comply had been “narrow and technical.” Therefore, the Court concluded that “[u]nder these circumstances, a substantial daily fine [was] required to compel compliance.”

**Conclusion and Practice Considerations**

The *Telenor* decision suggests that U.S. district courts are willing to impose severe penalties on parties who fail to comply with international arbitration awards and otherwise engage in improper litigation tactics to derail the arbitral process generally. Where, as in *Telenor*, the conduct is exceptionally vexatious or otherwise frivolous, at least one court has shown a willingness to impose sanctions consistent with the level of misconduct.
HONORS AND APPOINTMENTS

- Global Arbitration Review’s “GAR 100 – The Guide to Specialist Arbitration Firms” named Fulbright to its prestigious GAR 30 for 2009, recognizing it as one of the top arbitration law firms in the world for a second year in a row.
- Fulbright’s representation in the Duke Energy & Electroquil Partners & Electroquil v. Ecuador arbitration was named one of LatinLawyer Magazine’s top three “Deals of the Year: Disputes Category,” for 2008. This marks the second year in a row that Fulbright has been recognized in this category.
- In the first annual ACQ Finance Magazine Country Law Awards, Fulbright was named Commercial Arbitration Law Firm of the Year in the United States. The awards recognize law firms’ outstanding work in various areas of the law and in 35 geographic regions of the world.
- Chambers Global 2009 ranked Fulbright as a leading law firm for international arbitration in two categories: Global and Latin America.
- Fulbright’s international arbitration practice was ranked as a leading practice in Chambers UK 2009.
- Fulbright’s international arbitration practice was ranked among the top five firms by Chambers Latin America 2009 for International Arbitration: Latin America-wide.
- Mark Baker and Kevin O’Gorman were chosen by Legal Media Group’s the Guide to the World’s Leading Lawyers - Best of the Best USA 2009 as two of America’s top 25 pre-eminent Commercial Arbitration practitioners. Nominations were made by clients, in-house counsel and professional peers.
- Mark Baker and Kevin O’Gorman were included in the 2009 Super Lawyers Corporate Counsel Edition.
- David Howell and Jonathan Sutcliffe have been selected for inclusion in the inaugural Best Lawyers list of solicitors for the United Kingdom for the category of Arbitration and Mediation. Selection is based on an exhaustive and rigorous peer-review survey.
- David Howell and Jonathan Sutcliffe were listed in the 2009 Legal Experts Directory, put out by one of the U.K.’s largest legal publishing houses, Legal Business (Legalease), for their work in arbitration.
- Mark Baker and Richard Hill have been listed in the 2009 edition of Who’s Who Legal for Commercial Arbitration.
- Kevin O’Gorman, Jonathan Sutcliffe and Aníbal Sabater have been appointed by the Houston Maritime Arbitrators Association to its Roster of Arbitrators.
- Mark Baker was ranked among the top five leading lawyers by Chambers Latin America 2009 for International Arbitration: Latin America-wide.
- Mark Baker has been appointed to the Advisory Board of the University of Texas Law School’s Center for Global Energy, International Arbitration and Environment.
- David Howell is recommended as an arbitration lawyer in the 2009 PLC Which Lawyer?
- Cecilia Ibarra was appointed a Council Member of the Houston Bar Association’s International Law Section.
- Chambers UK 2009 ranked Jonathan Sutcliffe as a leading individual for Dispute Resolution: International Arbitration.
**SCRIVENERS AND SPEAKERS**


Efren Olivares conducted the Houston Maritime Arbitrators Association: Arbitrator Training Seminar, Houston, Texas, March 5 – 6, 2009.


Kinan Romman co-authored “The Unequal Playing Field: Companies Subject to Section 1782 in International Arbitration,” Benchmark Litigation, 2009.


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