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International Commercial Dispute Resolution

WILLIAM W. PARK, ANDREA K. BJORKLUND, AND JACK J. COE*

I. Judicial Review of Awards

A recent Court of Appeals decision¹ has made it more difficult for judges in the United States to second-guess arbitrators in international cases. To understand the significance of the recent decision, one must remember that the Federal Arbitration Act (FAA) has been interpreted to permit vacatur of awards in an international arbitration on the same grounds available in domestic cases.² Thus, a litigant who is unhappy with an arbitrator's decision gets a chance to re-argue the case by alleging "manifest disregard of the law," a ground for judicial review created fifty years ago by Supreme Court dictum.³

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1. *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002), *rev'g* 162 F. Supp. 2d 278 (S.D.N.Y. 2001). For other recent cases rejecting secondhand justice in the form of judicial review of an award's legal merits, see *Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R.*, 2002 WL 31401996 (S.D. Tex. 2002) (confirming in part an award arising from construction of a natural gas pipeline in Peru); *Westinghouse Int'l Serv. Co. v. Merilectrica*, D. Mass. (Sept. 27, 2001), *reprinted in* 16 INT'L ARB. REP. C-1 (Oct. 2001) (confirming an award arising from a power plant construction in Colombia).

2. *Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997).

3. In prohibiting arbitration of broker-customer securities disputes, the U.S. Supreme Court added "manifest disregard" of the law as a basis for award vacatur. See *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000). In declaring securities cases non-arbitrable, the court declared (correctly or not) that "manifest disregard" of the law provided the only avenue for judicial scrutiny of an arbitrator's legal mistake and then declared that this was not adequate to permit protection of public interests. While the holding of *Wilko* has been overruled, the "manifest disregard" dictum has taken on a life of its own. Some interpretations give a restrictive application, building on notions of "excess of authority" that limit "manifest disregard" to awards which ignore the contract or require violation of law. See, e.g., *Advtest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir. 1990). Other courts, however, take a more expansive perspective, effectively including simple mistake as a ground for vacatur. See *Halligan v. Piper Jaffray*, 148 F.3d 197 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999) (vacating an award denying an age discrimination claim).

Thankfully for the health of international arbitration, in *Westerbeke v. Daihatsu Motor Co., Ltd.*⁴ the Court of Appeals reversed a district court vacatur of an award arising from an international arbitration in New York. The case points to at least one aspect of American arbitration law in need of reform if the United States wishes to remain attractive as a situs for international arbitration.

In *Westerbeke v. Daihatsu Motor*, a Japanese manufacturer had given an American distributor the exclusive right to sell certain contractually-defined categories of engines. If the manufacturer wanted to market a new line of products, the sales agreement gave the distributor a right of first refusal for six months. Ultimately the deal went sour over a new product line of engines that the manufacturer began offering through another North American distributor. The parties ended up in arbitration pursuant to provisions of the 1952 Japan-American Trade Arbitration Agreement referenced in their contract.

The arbitrator awarded the distributor more than \$4 million. The sales agreement was found to constitute a binding contract subject to the condition precedent requiring that the distributor be given a right of first refusal to market new products. The manufacturer brought a motion to vacate the award, arguing that the parties had reached only a "preliminary agreement to agree." Without a binding contract, the manufacturer argued, there could be no recovery for expectancy damages (purchase of substitution goods and lost profits), which was exactly what the arbitrator had granted.⁵

To complicate matters, the arbitration had been bifurcated. A liability phase considered whether the new product was indeed an engine within the terms of the contract. A subsequent stage assessed the claimant's damages. Language in the interlocutory award on liability (which arguably would have *res judicata* effect on the final decision) gave rise to an argument over the arbitration decision. The manufacturer asserted that it owed no more than a duty to negotiate in good faith. The district court disagreed and vacated the award on the basis that the arbitrator had misapplied the New York law on damages.

A year later the Second Circuit reversed, upholding the award of lost profits. In deciding whether there had been "manifest disregard,"⁶ the Court of Appeals devised a two-prong test. First, an objective element required inquiry into whether the relevant law was "well defined, explicit and clearly applicable."⁷ Second, a subjective component of the test involved examination of whether the arbitrator intentionally ignored the law.

Applying this test, the Court of Appeals looked at the New York law on damages, which it considered to be consistent with the arbitrator's award on the facts of the case. The court then proceeded to examine the arbitrator's intent and found no evidence of willful refusal to apply the governing law. Finally, the court addressed the alleged inconsistency between the interlocutory and final awards. Giving the arbitrator the benefit of the doubt, the court interpreted ambiguous language in the interlocutory award in light of what the court called a "clarification" in the final award, which had found the sales agreement to constitute a contract with conditions precedent rather than simply an "agreement to agree."⁸

4. *Westerbeke*, 304 F.3d 200.

5. *Id.* By contrast, "reliance damages" would have been limited to amounts actually expended by reason of depending on the seller's promise, rather than the "benefit of the bargain" of expected profits. *Id.* at 210.

6. *Id.* at 209.

7. *Id.*

8. The Second Circuit also rejected related arguments that the arbitrator exceeded his authority and that the award did not "draw its essence" from the contract, both of which would have justified vacatur under FAA Section 10(a)(4).

Although the case itself had a happy ending for the arbitration's prevailing party, the distributor, the process involved costly appellate briefing and argument. The Court of Appeals had to examine the New York law on calculation of damages and the difference between a "preliminary agreement," on the one hand, and a binding contract with conditions precedent, on the other. The court also had to examine the standard of "manifest disregard" and had to investigate the arbitrator's state of mind.

The availability of a right to attack awards for "manifest disregard" gives losing parties an opportunity to disrupt the arbitral process. Hanging like a sword of Damocles over the arbitration, "manifest disregard" serves as a vehicle to renege on the bargain to arbitrate. The result gives the United States a competitive disadvantage compared to arbitral venues where judicial intervention is limited to matters related to fundamental procedural integrity. In response, some observers have proposed that, for international arbitration, the FAA should be modified to provide a more *laissez-faire* vacatur regime, removing the temptation of aggressive litigation tactics in the arbitration end game.

II. Contractual Choice of Arbitral Situs

In international arbitration, the traditional assumption has been that judges will hold the parties to their bargain on arbitral situs, both for the place for the proceedings and for the forum for any annulment action. A recent line of cases, however, has called this principle into question. American courts have not only compelled arbitration outside the contractually-selected venue⁹ but have suggested that awards may be vacated other than where made,¹⁰ thus encouraging a race to the courthouse to gain precedence with a "first-filed" motion.¹¹

The reasoning of these cases (likely to delight those wishing to portray the United States as an unfriendly place to arbitrate) rests upon the U.S. Supreme Court decision in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, allowing vacatur in any district proper under the general federal venue statute, including the place of defendant's residence.¹² The Court

9. See *Indian Harbor Ins. Co. v. Global Transp. Sys. Inc.*, 197 F. Supp. 2d 1 (S.D.N.Y. 2002). In a dispute involving insurance, the district court under FAA § 4 compelled arbitration in New York notwithstanding the parties' agreement to arbitrate in Puerto Rico. See also *Textile Unlimited, Inc. v. A. BMH and Co.*, 240 F.3d 781 (9th Cir. 2001) (permitting an action in California to enjoin arbitration at the contractually-designated situs in Georgia).

10. See *Vulcan Chem. Techs., Inc. v. Barker*, 297 F.3d 332 (4th Cir. 2002) (in which the federal district court for the Western District of Virginia vacated an award made in California and attempted to enjoin confirmation proceedings in California state court). The Fourth Circuit declared that the Virginia court had jurisdiction to hear the action to vacate the California award, although in the instant case the Court of Appeals held that the court in Virginia should have exercised its discretion to abstain from exercising jurisdiction in light of the California action under principles announced in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). See also *Smart v. Sunshine Potato Flakes*, 2002 WL 31235498 (8th Cir. 2002) (North Dakota confirmation of an award granted in New Mexico); *Theis Research, Inc. v. Brown & Bain*, 240 F.3d 795 (9th Cir. 2001) (in the context of motion to vacate, Ninth Circuit directs California district court to assess the validity of award made in District of Columbia).

11. On the "first to file" rule, see, e.g., *Orthmann v. Apple River Campground Inc.*, 765 F.2d 119, 121 (8th Cir. 1985) (stating that, in cases of concurrent federal jurisdiction, "the first court in which jurisdiction attaches has priority to consider the case."). For international transactions, this and related questions are often addressed under the rubric of *lis pendens*, *lis alibi pendens* or *litispence*. See, e.g., Laurent Lévy & Elliot Geisinger, *Applying the Principle of Litispence*, [2000] 4 INT. A.L.R. at n.28.

12. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000) (applying the general venue provisions of 28 U.S.C. § 1391). The Contractor moved to confirm an award in Alabama, after the project

interpreted, as merely permissive, FAA language stating that an award may be vacated by the federal court “in and for the district wherein the award was made.”¹³

Such a free-for-all might not matter in situations similar to *Cortez*, which involved sister state actions in Alabama (the arbitral situs) and Mississippi (the losing party’s residence). However, in a case involving cross-border business, a practice of vacating foreign awards could disrupt the reliability of international arbitration established over almost half a century under the New York Arbitration Convention.¹⁴ For example, if a Massachusetts seller and a French buyer agree to arbitrate in London, they normally expect proceedings in England, subject to judicial review by English courts. Their ex ante assumptions would not normally include the prospect of having one side’s hometown judges disregard the contractually-selected venue to compel arbitration or to vacate an award in Boston or Paris.

III. U.S. Federal Court Jurisdiction

Federal court decisions in 2002 sent conflicting signals regarding the courts’ role in international arbitration.

A. REMOVAL

Section 205 of the FAA permits defendants before trial to remove to federal court “an action or proceeding pending in a State court [that] relates to an arbitration agreement or award falling under the [New York] Convention. . . .”¹⁵ The removal provision’s purpose was to encourage the development of a uniform body of law under the Convention.¹⁶ Section 205 confers a right on defendants in arbitrations relating to the New York Convention a right they would not enjoy under domestic U.S. practice because “it permits removal on the basis of a federal defense.”¹⁷ Removal is only permissible, however, when the subject matter of a case “relates to” an agreement falling under the Convention.¹⁸ An agreement

owner a few days earlier had filed a motion to vacate in Mississippi. Reversing a decision in the Northern District of Alabama that had been upheld by the Eleventh Circuit, the U.S. Supreme Court gave priority to the first-filed motion in Mississippi. Ironically, the Supreme Court supported its holding by stating that a restrictive reading (limiting vacatur to the award situs) would “preclude any action . . . in courts of the United States to confirm, modify or vacate awards rendered in foreign arbitrations not covered by [the New York or Panama Conventions].” *Id.* at 203.

13. 9 U.S.C. § 10 (2003). Moreover, the New York Arbitration Convention emphasizes the primacy of the place of arbitration by providing that Convention states need not recognize an award “set aside or suspended by a competent authority of the country in which . . . that award was made.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted on* June 10, 1958, art. V(1)(e), 21 U.S.T. 2517 [hereinafter New York Convention].

14. Vacatur of foreign awards would also be contrary to sound prior case law. See *Int’l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Indus. y Comercial*, 745 F. Supp. 172 (S.D.N.Y. 1990) (holding that the FAA did not allow vacatur of a Mexican award even if the merits of the dispute were to be decided under New York law).

15. 9 U.S.C. § 205 (2003); see also New York Convention, *supra* note 13.

16. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (“the goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was . . . to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”).

17. *Beiser v. Weyler*, 284 F.3d 665, 671 (5th Cir. 2002).

18. *Id.*

“falls under” the Convention when it arises from a legal relationship; it is commercial in nature; it is not entirely between U.S. citizens or, if it is between U.S. citizens, it “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”¹⁹ Once a court has determined that the agreement falls under the Convention,²⁰ it still must determine whether the subject matter of a particular case “relates to” that agreement.

In *Beiser v. Weyler*, the Fifth Circuit construed “relates to” extremely broadly.²¹ At issue was a suit initially brought in state court in Texas that alleged only state law tort claims relating to production rights in a Hungarian oil field. The plaintiff, Fred Beiser, was the director and sole employee of a consulting firm that had entered into two agreements, both of which included an arbitration clause, with Roy M. Huffington, Inc. and other entities. One was a consulting agreement relating to the acquisition of development rights to an oil and gas field in Hungary, and the other was a line-of-credit agreement with Hungarian Horizon Energy Ltd. When the business arrangement deteriorated, Beiser filed tort claims against Roy Huffington, Inc., Roy Huffington, and Horizon (“Huffington” or the “defendants”). The defendants removed the case to federal district court under 9 U.S.C. § 205 and also moved to compel arbitration. Beiser moved to remand the case to state court on the grounds that he was not a party to those agreements (he had signed them as the officer of the company, not in his individual capacity) and that those agreements therefore did not “relate to” the subject matter of his suit.²²

The Fifth Circuit rejected that argument, noting that “[e]ven if Beiser is right on the merits that he cannot ultimately be forced into arbitration, his suit at least has a ‘connection with’ the contracts governing the transaction out of which his claims arise.”²³ Noting that under a plain-language reading “relates to” sweeps broadly and analogizing to bankruptcy law (under which 28 U.S.C. § 1334 is read expansively to permit federal removal jurisdiction whenever a state law “proceeding could *conceivably* have any effect on the estate being administered in bankruptcy”), the court held that, “whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff’s case, the agreement ‘relates to’ the plaintiff’s suit.”²⁴

The *Beiser* court further based its determination on practical grounds, noting that Beiser’s suggested approach would require a court to front-load a merits inquiry into an examination of jurisdiction. In Beiser’s case, such an inquiry would require the district court to determine whether to pierce the corporate veil in order to bind Beiser to the arbitration agreement before reaching the case on the merits, which would require taking evidence. Furthermore,

19. See 9 U.S.C. § 202; *New Avex, Inc. v. Socata Aircraft Inc.*, 2002 U.S. Dist. LEXIS 16093 (S.D.N.Y. Aug. 30, 2002). The Socata court emphasized that 9 U.S.C. § 202 “‘envisages’ performance abroad, not whether performance actually occurs abroad.” *Id.* at *8.

20. *Beiser*, 284 F.3d at 669. Determining whether an agreement falls under the Convention may require a court to examine evidence aside from the removal petition, but the inquiry should be limited. *Id.* at 672 n.7.

21. *Id.* at 669.

22. Beiser did not contest the motion to compel arbitration, notwithstanding the relevance of his arguments to that aspect of the case. See *id.* at 667–69 & n.5.

23. *Id.* at 669.

24. *Id.* (emphasis in original) (internal citation omitted). See also *In re Baker & McKenzie*, 2002 U.S. Dist. LEXIS 17212 (N.D. Ill. Sept. 13, 2002) (in a case falling under the Convention, a U.S. district court will only remand if it lacks subject-matter jurisdiction; even if state law is applied or if state court would have been a better choice of forum).

the court would have to determine whether Beiser could be bound to the agreements under any other theory.²⁵

Besides the danger of conflating jurisdiction and the merits, the Fifth Circuit offered another practical reason for its determination: because a district court's remand for lack of subject matter jurisdiction cannot be reviewed by an appellate court under 28 U.S.C. § 1447(d), remanding the case to state court would effectively remove the matter from the federal court system for good.²⁶ The court stated two justifications for effectively permitting an end-run around 28 U.S.C. § 1447(d): (1) because rights under the Convention are reciprocal, denying defendants in the United States the right to enforce the arbitration clause might adversely affect enforcement under the Convention in sixty-five nations, thereby "jeopardizing the United States's treaty obligations"; and (2) failing to permit appellate review would be contrary to the solicitude with which U.S. law generally treats arbitration.²⁷ The *Beiser* court acknowledged but downplayed the federalism concerns inherent in its interpretation by positing the likelihood of early decisions on arbitrability leading to frequent early remands to state court.²⁸ Furthermore, the court expressed concern that insulating refusals of Convention-related defenses from appellate review could have an adverse effect on federal-state court relations by permitting the state court to relitigate the applicability of the defenses, and even the arbitrability of the dispute itself, because a federal court's decision that it lacks subject-matter jurisdiction is not issue-preclusive.²⁹

This broad interpretation of "relat[ing] to"³⁰ will likely sweep many cases into the federal courts. The aggressive reach of the federal courts in international arbitration cases is interesting when juxtaposed with the pro-state law, pro-federalism trends the courts have recently exhibited. Further, the decisions become more intriguing when compared to the Second Circuit's decision not to exercise jurisdiction in a Convention case, as described below.

B. FORUM NON CONVENIENS

In a ruling that seems to fundamentally misapprehend the rationale of the New York Convention, the Second Circuit held that the doctrine of forum non conveniens applied in a proceeding to confirm an arbitral award, pursuant to the provisions of the Convention.³¹ The case involved International Commercial Court arbitration in Moscow between the reinsurer of a Russian company, Monde Re, and a Ukrainian company engaged in a contract to transfer natural gas via pipeline across Ukraine to various destinations in Europe. The arbitral tribunal issued an award in favor of the reinsurer, and both the Moscow City Court and the Supreme Court of the Russian Federation declined to cancel the award.³² When Monde Re filed its petition for confirmation of the award in the Southern District of New

25. *Beiser*, 284 F.3d 665, 670 (5th Cir. 2002).

26. *Id.* at 672.

27. *Id.* at 672-73.

28. *Id.* at 674-75.

29. *Id.* at 673-74. In order for issue preclusion to attach, a party must have had a "full and fair" opportunity to litigate, including the right to seek appellate review. *See id.* at 673.

30. *Id.* at 669.

31. *In re Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukr.*, 311 F.3d 488 (2d Cir. 2002).

32. *Id.* at 491-92.

York, it sought confirmation and judgment against Ukraine, which it alleged to be the alter ego of the Ukrainian company. Ukraine moved for dismissal on the grounds of *inter alia* foreign sovereignty immunity and forum non conveniens. The district court dismissed the case on forum non conveniens grounds, reasoning that because the doctrine of forum non conveniens applies to the Foreign Sovereign Immunities Act (FSIA) and because the FSIA specifically includes an arbitration exception for enforcement measures brought under a convention, such as the New York Convention, not applying forum non conveniens in the context of the Convention would “alter the apparently comparable harmony between the FSIA and the forum non conveniens doctrine.”³³

The Second Circuit upheld the district court on the grounds that enforcement under the Convention is subject to the rules of procedure applied in the courts where enforcement is sought and that forum non conveniens is generally held to be a procedural rule.³⁴ It further endorsed the district court’s view that this conclusion would actually enhance foreign trade. “Forcing the recognition and enforcement in Mexico, for example, in a case of an arbitral award made in Indonesia, where the parties, the underlying events and the award have no connection to Mexico, may be highly inconvenient overall and might chill international trade if the parties had no recourse but to litigate, at any cost, enforcement of arbitral awards in a petitioner’s chosen forum. The Convention was intended to promote the enforcement of international arbitration so that businesses would not be wary of entering into international contracts.”³⁵ While this holding is presumably limited to cases involving sovereigns, it is troubling that the court, in refusing to rule on the arbitration award, could have interpreted the Convention in a way so manifestly at odds with its purpose.

IV. Arbitrator Bias

Two cases from different circuits discussed issues related to arbitrator bias. The Seventh Circuit reversed a district court decision that had vacated an award due to the “evident partiality” of one of the party-appointed arbitrators, who had failed to disclose information about a previous lawyer-client relationship with the party that had selected him.³⁶ The court held that only evident partiality, not the appearance or risk of partiality, could spoil an award.³⁷ Since disclosure was not a requirement of 9 U.S.C. § 10(a)(2) (“disclosure, though often prudent, is not thought *essential* to impartial judicial service. . .”) and because the withheld information would not have indicated any evident partiality on the part of the arbitrator, the district court erred in setting aside the award.³⁸

The Seventh Circuit firmly distinguished between party-appointed arbitrators and neutrals, making clear that party-appointed arbitrators are supposed to be advocates and that “party-appointed arbitrators are [not] governed by the norms under which neutrals operate.”³⁹ The alleged inappropriate activity in which the Sphere Drake investor had engaged

33. *In re Monegasque de Reassurance S.A.M. (Monde Re) v. Nak Naftogaz of Ukr.*, 158 F. Supp. 2d 377, 383 (S.D.N.Y. 2001).

34. *Monegasque*, 311 F.3d at 495–96.

35. *Id.* at 496–97 (quoting *Monegasque*, 158 F. Supp. 2d at 383).

36. *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617 (7th Cir. 2002).

37. *Id.* at 621.

38. *Id.* at 622.

39. *Id.* at 620, 623. The court interpreted *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), as not requiring disclosure for its own sake and read its holding as limited to neutral arbitrators.

was fairly innocuous. Several years earlier, the law firm in which he had been a partner had been retained by a Bermuda subsidiary of Sphere Drake in an unrelated matter, and the arbitrator himself had been substantially engaged in the matter.⁴⁰

An Eighth Circuit case in late 2001 dealt with party-appointed arbitrator activity that had a much greater partisan potential, but resolved it in a similar way. In that case, *Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, Delta Mine's party-appointed arbitrator participated in the pre-hearing preparation of party witnesses and questioned witnesses during the hearing.⁴¹ AFC, however, knew that he was providing this assistance and knew from the arbitration agreement that the party-appointed arbitrators could be drawn from the ranks of the party's own employees (Delta Mine's arbitrator was a consultant to the company).

The *Delta Mine* court dismissed the "evident partiality" aspect of the case on three grounds. First, it held that procedurally AFC was barred from raising the issue because it had not raised the issue before the tribunal itself.⁴² Second, that request would in any event have been denied because it would have conflicted with the arbitration agreement, which "expressly contemplated the selection of partial arbitrators—persons with substantial financial interests in and duties of loyalty to one party."⁴³ Finally, AFC had failed to show that Stagg's alleged evident partiality had any prejudicial impact on the arbitration awards—the neutral arbitrators were not deceived about the role that the party-appointed arbitrators were filling.⁴⁴

Neither of these decisions is particularly surprising, but they emphasize the different perceptions and practices of the role of the party-appointed arbitrator in the United States. Under the 1977 American Bar Association (ABA) Code of Ethics for Arbitrators, party-appointed arbitrators are presumed to be non-neutral; in international arbitration, the reverse presumption holds.

V. Investment Arbitration

A. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

1. *Convention Membership*

Over 135 states have ratified the ICSID Convention. Complementing this widening participation has been an increasing number of bilateral investment treaties (BITs) that contain the specific consent necessary to jurisdiction under the Convention. Many of the more than 2,000 BITs in force have ICSID arbitration provisions.⁴⁵ NAFTA also gives

40. *Id.* at 620–21.

41. *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001).

42. *Id.* at 821.

43. *Id.*

44. *Id.* at 822. AFC also challenged the award under 9 U.S.C. §§ 10(a)(1) and (3), which permit set-aside if the award is gained by "undue means" or if the arbitrators are guilty of misconduct by which the rights of a party are prejudiced. The court noted that both of these provisions required a showing that the challenged conduct had influenced the outcome of the arbitration. The court found that AFC had failed to prove any causal connection, noting that the neutral arbitrators' draft opinions were consistent with the final awards. *Id.* at 822–23. The arbitrators' deliberations were apparently made part of the record in the set-aside proceeding.

45. See generally Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV.—FOREIGN INV. L.J. 287 (1997). See also *Mondev Int'l, Ltd. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/99/2, Award of Oct. 11, 2002, at para. 117 n.48 (citing UNCTAD World Investment Report 2002 for existence of 2099 BITs and regional investment treaties by end of 2001).

Chapter Eleven investors an ICSID option, which has resulted in several ICSID Addition Facility filings.

2. *The Docket*

During 2002, approximately eighteen new filings were lodged with the Centre, and at least five cases were concluded by award, with another four ending by administrative or disputant discontinuance. At least two requests for annulment were decided by ad hoc Committees during the year; one resulting in partial annulment,⁴⁶ the other in a complete rejection of the request.⁴⁷ As of the close of 2002, the Centre's list of current and concluded proceedings comprised approximately 113 cases. Of those, forty-four were pending at the end of 2002 (including four NAFTA Chapter Eleven proceedings).⁴⁸

3. *Revised Fee Schedule and Rules*

ICSID has revised its fee schedule effective July 1, 2002.⁴⁹ In September 2002, ICSID also adopted revised Administrative and Financial Regulations and revised versions of the rules governing arbitrations under the ICSID Convention and Additional Facility, all of which took effect on January 1, 2003.

4. *Subject Matter Jurisdiction*

ICSID tribunals have not frequently found a deficiency in subject matter jurisdiction. A filing made under the Sri Lanka-U.S. BIT, however, generated an award dismissing an investor's claim based upon the limitation found in Convention Article 25 that the claim requires comprise a "legal dispute arising directly out of an investment."⁵⁰ In *Mihaly International Corp. v. Sri Lanka*,⁵¹ the claimant established only expenditures in furtherance of a prospective venture, activities which alone did not establish an investment. The case examined other issues of interest and engendered an illuminating concurrence.

5. *Public Access to Hearings*

In a departure from the normal practice of excluding the public from hearings, in July 2002, the Centre granted limited access to a live broadcast of the hearing on jurisdiction in *UPS v. Canada*, a NAFTA Chapter Eleven proceeding. The accommodation was made with the disputants' consent and reflects in part a general search for ways to add transparency to NAFTA arbitration.⁵²

46. *Compania de Aguas de Aconquija and Vivendi v. Argentina*, Decision on Request for Annulment, Case No. ARB/97/3, 41 I.L.M. 1135 (2002) (tribunal exceeded its powers).

47. *Wena Hotels v. Egypt*, Case No. ARB/98/4, Decision on Request for Annulment, 41 I.L.M. 933 (2002).

48. ICSID Cases, available at <http://www.worldbank.org/icsid/cases/conclude.htm> and <http://worldbank.org/icsid/cases/pending.htm> (last visited May 26, 2003).

49. The World Bank Group, *Schedule of Fees*, available at <http://www.worldbank.org/icsid/schedule/main.htm> (last visited May 26, 2003).

50. ICSID (W. Bank), Convention art. 25.

51. ICSID (W. Bank) Case No. ARB/00/2, available at <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited May 26, 2003).

52. See Press Release, ICSID (W. Bank), *United Parcel Serv. of Am., Inc. v. Gov't of Canada*, NAFTA/UNCITRAL Arbitration Rules Proceeding (May 28, 2001), available at <http://www.worldbank.org/icsid/ups.htm> (last visited May 26, 2003). The *UPS* proceeding is also distinctive in that ICSID administered the hearing although the proceeding was governed by the UNCITRAL Arbitration Rules and not by those of the Additional Facility.

6. *Supplemental Decisions Under the ICSID Rules*

Article 49 of the ICSID Arbitration Rules permits a party to request an ICSID tribunal to decide a question it “omitted to decide in the award. . . .”⁵³ In *Genin v. Estonia*,⁵⁴ the claimant made such a request, arguing that the Tribunal had failed to take account of certain BIT provisions (including those treating expropriation). Noting that the claimants had “neither adduced evidence nor made arguments concerning the . . . provisions that they now suggest were ‘omitted,’” the tribunal ruled that no supplemental decision was required.⁵⁵ It awarded the costs of the post-award proceedings to the respondent.⁵⁶

B. NAFTA CHAPTER ELEVEN

1. *The Docket*

During 2002, the Chapter Eleven docket advanced swiftly. At least four new claims were initiated, including three against the United States. Final awards involving each NAFTA party were made, and at least one case settled. At year end, there were roughly sixteen pending cases, comprising both UNCITRAL Rules and Additional Facility proceedings, distributed among three respondent states. As in 2001, the substantive provisions more often relied upon were those contained in articles 1102 (national treatment), 1105 (minimum standard), and 1110 (expropriation).

2. *Chapter Eleven’s Temporal Parameters*

Two awards shed light on NAFTA’s jurisdictional delimitations *ratione temporis*. Addressing the question of retroactivity, the tribunals in *Mondev v. United States*⁵⁷ and *Feldman v. Mexico*⁵⁸ were in accord in ruling that state actions that might have been breaches of NAFTA, if occurring after NAFTA took effect, were not actionable if occurring before its effective date, January 1, 1994. The general presumption of non-retroactivity of treaties was influential in both cases.

The tribunals in *Mondev* and *Feldman* each construed the three-year time bar found in NAFTA articles 1116(2) and 1117(2). *Feldman* was distinctive, however, in confronting questions of tolling and estoppel and in devising corresponding tests.⁵⁹ The claimant had argued for a relaxed application of the time bar, stressing that certain Mexican authorities had assured that export would be permitted and that the contested tax rebates would be paid. The narrow test elaborated by the tribunal nonetheless contemplates tolling only when a competent organ of the state has acknowledged the claim in a form prescribed by law. Similarly, estoppel would require either the foregoing acknowledgment or a “long,

53. ICSID (W. Bank), Convention art. 49.

54. ICSID (W. Bank) Case No. ARB/99/2, available at <http://www.worldbank.org/icsid/cases/awards.htm> (last visited May 26, 2003).

55. *Id.* at para. 11.

56. *Id.* at paras. 11, 20–21.

57. *Mondev Int’l, Ltd. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/99/2, Award of Oct. 11, 2002.

58. *Feldman v. Mexico*, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of Dec. 16, 2002, at para. 51 (reiterating decision of Dec. 6, 2000).

59. *Id.* at paras. 58–63.

uniform, consistent and effective behavior . . . recogniz[ing] the existence, and possibly also the amount, of the claim.”⁶⁰ Neither formula was satisfied under the facts presented.

3. Exhaustion and Standing-Related Issues

The *Feldman* tribunal added to the wide consensus that exhaustion of local remedies is not required under Chapter Eleven.⁶¹ Though the customary international law rule requiring exhaustion is not specifically and expressly supplanted, by negative inference NAFTA’s express provisions leave little doubt. They require that the claimant waive (subject to certain exceptions) local remedies.⁶²

Does the investment necessary for a valid Chapter Eleven claim evaporate once the investment has failed, such as when a lender’s rights are enforced by foreclosure? According to the *Mondev* tribunal, “once an investment exists, it remains protected by NAFTA even after the enterprise in question . . . fail[s].”⁶³

4. Article 1105 Damages for Post-Claim Acts

In the merits phase of *Pope & Talbot v. Canada*,⁶⁴ the tribunal ruled that the state’s obligation to accord fair and equitable treatment under article 1105 continues after the investor has initiated a claim and that, during a particular post-filing episode, an agency of government had failed to meet that standard.⁶⁵ During 2002, the subsequent damages phase resulted in an award which confirmed the tribunal’s earlier conclusions⁶⁶ and awarded the investor U.S. \$461,666.⁶⁷ A subsequent award granted the claimant some of its costs.⁶⁸

5. Cost Allocations

Chapter Eleven awards rendered during 2002 continued the general, but not universal, pattern in which each disputant bears its own costs. The factors considered in not disturbing each side’s burden have included: (1) the lack of uniform NAFTA practice to the contrary; (2) the failure of either side to fully prevail; (3) the mutual use of wasteful arguments and tactics; (4) the embryonic character of NAFTA jurisprudence; and (5) the good faith and plausibility of the losing party’s claim.⁶⁹

60. *Id.* at para. 63.

61. See William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT’L & COMP. L. REV. 357 (2000).

62. *Feldman v. Mexico*, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of Dec. 16, 2002, at paras. 66–78.

63. *Mondev Int’l, Ltd. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/99/2, Award of Oct. 11, 2002, at para. 80 (relying in part on article 1139’s breadth in defining “investment” and “investor”).

64. *Pope & Talbot, Inc. v. Canada* (Chapter 11, UNCITRAL Rules), Award on the Merits of Phase 2, Apr. 10, 2001, available at <http://www.naftalaw.org> (last visited May 26, 2003).

65. *Id.* at para. 68. According to the tribunal: “[W]hen the Investor instituted [its] claim . . . Canada’s Softwood Lumber Division changed its previous relationship with the Investor from one of cooperation . . . to one of threats and misrepresentation.” Specific instances were cited by the award.

66. The breach of article 1105 was revisited because, after the merits phase, NAFTA’s Free Trade Commission had issued an Interpretive Note (in principle binding on tribunals under article 1131), which stated that article 1105 conferred only those protections contained in customary international law.

67. *Pope & Talbot* (Chapter 11, UNCITRAL Rules), Award on Damages, May 31, 2002, available at <http://www.naftalaw.org> (last visited May 26, 2003).

68. *Pope & Talbot* (Chapter 11, UNCITRAL Rules), Award on Costs, Nov. 26, 2002, available at <http://www.naftalaw.org> (last visited May 26, 2003).

69. See *Mondev Int’l, Ltd. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/99/2, Award of Oct. 11, 2002 at para. 159; *Feldman v. Mexico*, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of Dec. 16, 2002,

Acting under the UNCITRAL Rules, the *Pope & Talbot* tribunal followed the common practice as to legal and related fees⁷⁰ but awarded the investor certain non-legal costs, specifically a fraction of those enumerated in UNCITRAL Rules, article 38(a)(b)(c).⁷¹ The costs granted and their proration was linked to the episode giving rise to Canada's liability.⁷²

6. Interest Carried By Chapter Eleven Awards

Interest formulae governing Chapter Eleven awards made during 2002 were diverse. The not-unprecedented practice of awarding compounding interest was followed in *Pope & Talbot*, where the tribunal in both its damages and costs awards affixed "5% per annum compounded quarterly and pro rata within a quarter."⁷³ The *Feldman* award of nearly seventeen million pesos, by contrast, carried simple interest "to be calculated . . . for each month of the period of calculation at a rate equivalent to the yield for the month, of the Federal Treasury Certificates, issued by the Mexican Government, with a maturity of 28 days."⁷⁴

at para. 208; *Pope & Talbot* (Chapter 11, UNCITRAL Rules), Award on Costs, Nov. 26, 2002, available at <http://www.naftalaw.org> (last visited May 26, 2003).

70. *Pope & Talbot* (Chapter 11, UNCITRAL Rules), Award on Costs, at paras. 17-18.

71. These include principally, the tribunal's fees and expenses.

72. *Pope & Talbot* (Chapter 11, UNCITRAL Rules), Award on the Merits of Phase 2, Apr. 10, 2001, available at <http://www.naftalaw.org> (last visited May 26, 2003). Regarding Canada's breach, see *supra* note 16 and accompanying text.

73. *Pope & Talbot* (Chapter 11, UNCITRAL Rules), Award on Damages, May 31, 2002, para. 90; Award on Costs, Nov. 26, 2002, para. 18, available at <http://www.naftalaw.org> (last visited May 26, 2003).

74. *Feldman v. Mexico*, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of Dec. 16, 2002, para. 211.