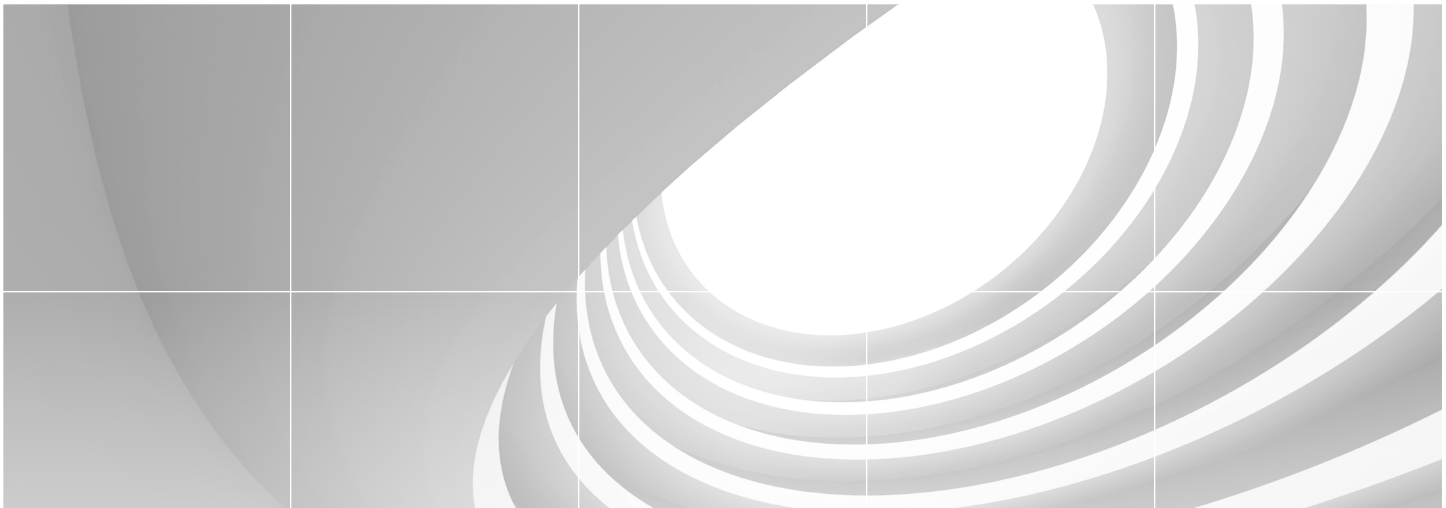
Fall 2013

Weil



World Arbitration Report

Dear Reader:

Welcome to the inaugural edition of Weil's International Arbitration newsletter, the Weil World Arbitration Report.

Our new biannual publication promises to provide you with contemporary, practical, and sector-focussed analysis concerning recent developments and hot topics in both commercial and investor-State arbitration, and to keep you updated on upcoming arbitration events, seminars, conferences, and symposia around the world. Articles in WWAR are written and prepared by Weil attorneys across our wide-ranging global practice, reflecting the strength and depth of Weil's international platform. As the growth and relevance of international arbitration continues unabated in the global economy, we hope that Weil's deep experience and insights will contribute to market-leading commentary and discussion in the arbitration sphere.

We trust you will find WWAR to be interesting and essential reading. We look forward to working with you soon.

Juliet Blanch and Arif Ali
Global Co-Chairs,
Weil International Arbitration Practice

In this Issue:

The Enduring Role of Diplomacy and Other Tools of State-State Dispute Resolution in a Golden Age of Investor-State Arbitration

By Theodore R. Posner and Dániel Dózsa

Among the risks a company faces when it decides to do business outside its home country is that the government in one of the "host States" where it stakes its fortunes will do something that undermines the company's plans and causes it harm. At the extreme, there is the risk that a host government will take the company's investment outright. But even short of an expropriation, there is the risk that the company will be treated unfairly or in a discriminatory manner as compared with domestic competitors. If its home government engaged in such misconduct, the company might seek redress in local courts. But outside its home territory, the company may feel less comfortable with that approach.

How best to resolve disputes between States and individuals and companies that are nationals of other States is a question that has engaged lawyers, diplomats, jurists, and students of international law for decades. There was a time when, absent an adequate remedy in the courts of the host State, the best shot at redress was through the diplomatic efforts of one's own government. In other words, the aggrieved company or individual would prevail upon its government to use the tools of public international law and diplomacy to obtain a satisfactory solution from the host State.

During the latter part of the 20th century, this diplomatic approach to resolving disputes between States and foreign investors was replaced by an approach that gave the investors themselves greater control over their own destiny. States negotiated bilateral investment treaties (BITs) and free trade agreements (FTAs) in which they agreed to provide certain protections to foreign investors and consented to have claims of breach of their obligations submitted to third-party arbitration by the investors themselves (as opposed to the investors' home States). A common explanation for the emergence of investor-State arbitration is that the governments of capital-exporting countries sought to get out of the business of resolving disputes with foreign governments on behalf of individual investors. Such efforts were not only costly and time-consuming but also risked putting governments in the uncomfortable position of having to navigate abetween the interests of particular companies and broader diplomatic goals.

By many accounts, we now are living in a golden age of investor-State arbitration. As of this writing, there are more than 3,100 BITs and FTAs containing investment provisions in force around the world, compared with barely 500 just two decades ago.[1] (In addition to these well-known "instruments of consent," some States have agreed to have foreign nationals submit claims against them to arbitration

We now are living in a golden age of investor-State arbitration.

pursuant to foreign investment statutes and contracts.) The preeminent (though not the only) institution providing support for investor-State arbitration, the International Centre for Settlement of Investment Disputes (ICSID), reports that it registered 50 new cases in 2012 (the most in any one year since ICSID's establishment in 1966), and that as of the end of 2012 it had registered a total of 419 cases.[2] And when one adds other, non-ICSID-administered arbitrations to the mix, the number is even higher. According to the United Nations Conference on Trade and Development (UNCTAD), "host countries have faced claims of up to $114 billion and awards of up to $867 million."[3] And the kinds of arbitrations being initiated have grown more diverse. No longer are investor-State arbitrations confined to cases involving infrastructure projects and similar hard asset investments. Today we also see investor-State cases involving intellectual property rights, financial instruments, and other tangible and intangible investments. Not only has there been a proliferation of legal instruments allowing companies to sue foreign governments, but the willingness to bring such suits also appears to have grown, as has the availability of resources (often provided by third-party funders) to support such suits.

Having reached the point where the means and the will of private parties to take control of the resolution of their disputes with foreign governments is at an all-time high, one might expect that recourse to diplomacy and other forms of State-to-State interaction to resolve investment disputes would be at an all-time low. And yet, the opposite seems to be true. Despite our being in a golden age of investor-State arbitration, several high-profile cases in recent years have shown the continued relevance of State-to-State interaction in the resolution of disputes between States and investors of other States.

What this means for companies and their counsel in resolving disputes with foreign governments is that it pays to be aware of the extent to which policy and diplomacy may affect the dispute resolution process. In some cases, investors may be able to leverage their home State's diplomatic interest in resolving the dispute to their advantage. In other cases, the interests of other States – including States that are not party to the dispute – may affect the way the dispute resolution process unfolds. In this essay, we survey some of the different ways in which, even today, the resolution of a dispute between an investor and a foreign State can include an important State-to-State component that parties to actual or potential investment disputes should be aware of.

1. The Role of the Investor's Home State in the Enforcement of Arbitral Awards

Notwithstanding the advent of investor-State arbitration, an investor's home State may still play an important role in ensuring that the respondent State pays any award rendered against it. Modern BITs and FTAs typically provide that when an arbitral award is rendered, the disputing parties have an obligation to comply promptly with the award. The United States model bilateral investment treaty, for example, provides that "a disputing party shall abide by and comply with an award without delay."[4] A similar obligation is contained in the major investment arbitration rules.[5] And yet, when a State loses an arbitration and is ordered to pay a sum of money as damages to a foreign investor, there may be political impediments to compliance; the debtor State may feel pressure from domestic constituencies not to comply. In such instances, the award holder may be able to look to its home government for help.

Take the case of Blue Ridge Investments (Blue Ridge) and Azurix Corp., two US companies with arbitration awards against Argentina. The awards, in the amounts of $133 million and $165 million, respectively, resulted from arbitrations before ICSID tribunals and survived ICSID's post-award review process (pursuant to an application for "annulment").[6] The awards became enforceable in 2007 and 2009, respectively. But Argentina declined to pay voluntarily, and the award creditors were unable to find assets of Argentina that were not protected by sovereign immunity and therefore eligible for attachment.

Faced with this dilemma, the award creditors invoked a little-used provision of US trade law in an effort to enlist the assistance of the US government in enforcing their awards. As a developing country, Argentina participates in the US trade preference program known as the Generalized System of Preferences (GSP).[7] Under GSP, most Argentine goods exported to the United States are able to enter the country on a duty-free basis even though similar exports from developed countries would be subject to import duties.

However, participation in GSP is subject to certain conditions, including the requirement that the country in good faith recognize and enforce awards rendered by international arbitral tribunals.[8] As Argentina's refusal to pay the awards held by Blue Ridge and Azurix was inconsistent with that condition, the companies petitioned the Office of the United States Trade Representative (USTR) to recommend that the President suspend Argentina's GSP eligibility.[9] After briefing and a hearing, USTR made that recommendation, and on March 26, 2012, the President proclaimed that Argentina's GSP eligibility would be suspended, resulting in Argentine exports to the United States losing their preferential duty-free treatment.[10] This was the first time in the more than 35-year history of the GSP statute that a country's eligibility had been suspended on this basis. The dispute remains ongoing, but the increasing diplomatic pressure on Argentina may help resolve it.

Apparently inspired by the US response to Argentina's non-enforcement of arbitral awards in favor of US companies, Spanish oil company Repsol recently prevailed upon the government of Spain and the European Union to take punitive action in response to Argentina's expropriation of Repsol's investment in YPF. At Repsol's behest, the European Parliament called for a "partial suspension" of the preferential tariff treatment Argentina receives from the European Union.[11] In response, the EU's Trade Commissioner stated that the EU will "soon [be] moving forward with a response to Argentina's action in the Repsol case."[12] At the same time, the Spanish government introduced restrictions on imports of biofuels from Argentina.[13] It is hoped that these diplomatic measures will encourage Argentina to resolve its dispute with Repsol.

An award creditor's home State may have other tools at its disposal for exerting pressure on the debtor State to comply with its obligations under the award. The creditor's home State may be able to withhold (or threaten to withhold) other valuable benefits, including export credits, political risk insurance, foreign aid, or support for lending from multilateral development banks.[14]

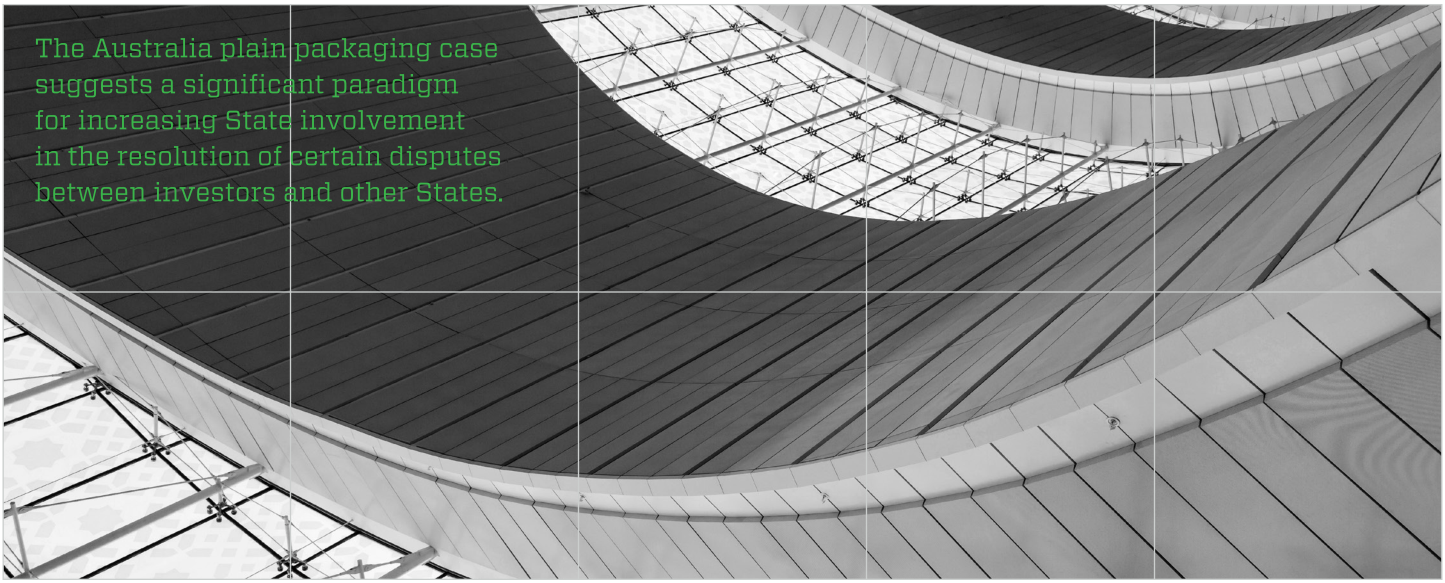
2. State-State Dispute Settlement in Parallel with Investor-State Dispute Settlement

It is also possible that the interests of an investor's home State or third States that are not party to an investment dispute could coincide with those of the claimant, leading those States to undertake diplomatic action that reinforces the investor's position in its dispute.

One recent example is the arbitration between Philip Morris Asia Limited (PMA) and Australia over that State's adoption of a law requiring cigarettes and other tobacco products to be sold in "plain packaging" – *i.e.*, packaging that excludes a company's logo, trade dress, or other intellectual property distinguishing its product from those of its competitors. In November 2011, PMA initiated arbitration under the BIT between Hong Kong and Australia. PMA alleges expropriation, denial of fair and equitable treatment, impairment by unreasonable measures, denial of full protection and security, and failure to observe obligations entered into with regard to PMA's investments – all as a result of the plain packaging legislation.[15]

Although PMA is asserting rights under the Hong Kong-Australia BIT, its Notice of Arbitration (NOA) also refers extensively to the legislation's inconsistency with Australia's obligations under World Trade Organization (WTO) agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).[16] According to the NOA, "PM Asia made its investments with the legitimate expectation that Australia would comply with its international trade treaty obligations."[17] Australia's alleged breach of international trade treaty obligations disturbed that legitimate expectation, PMA contends, and denied PMA the treatment it was entitled to under the BIT.[18]

At the time that PMA filed its NOA, there had as yet been no challenge before the WTO to the plain packaging legislation. However, in March 2012, about four months after PMA filed its Notice of Arbitration, the government of Ukraine initiated a challenge to Australia's plain packaging law at the WTO. It took the first step in WTO dispute settlement by asking for formal consultations with Australia.



When consultations failed to resolve the dispute, Ukraine followed up, in August 2012, with a request that the WTO Dispute Settlement Body (DSB) establish a dispute settlement panel to hear its claims.[19]

Following Ukraine's lead, a few months later the Dominican Republic and Honduras both requested the establishment of dispute settlement panels on Australia's plain packaging law (although as of this writing the DSB has not yet established those panels).[20] And, on May 3, 2013, Cuba requested consultations with Australia on the same measure.[21]

Not surprisingly, the allegations of WTO breaches by the Ukraine, the Dominican Republic, Honduras, and Cuba are similar to the allegations in PMA's complaint. The interplay between the WTO proceeding and the BIT proceeding are somewhat difficult to predict, because they are both at a relatively early stage, and the pace at which each will proceed is uncertain. The most direct interplay would be a finding by a WTO panel (or the Appellate Body) that is picked up by the BIT tribunal as the basis for a finding that Australia has breached investment-related obligations, such as the commitment to accord fair and equitable treatment to an investment of a Hong Kong investor or to "observe any obligation it may have entered into with regard to investments of investors of [Hong Kong]."[22]

But even if such a direct link is not made in this instance, the Australia plain packaging case suggests a significant paradigm for increasing State involvement in the resolution of certain disputes between investors and other States. The prevalence of BIT references to obligations under international law, taken together with the growth of both BIT dispute settlement and WTO dispute settlement, increases the likelihood that these two strands will come together and that the actions of States as WTO claimants will bear on the actions of investors as BIT claimants.

3. State-State Dispute Settlement *Following* Investor-State Dispute Settlement

Yet another way for a State that is not a party to an investor-State dispute to become entangled in that dispute is through a post-award proceeding initiated by the State that is a party to the dispute. This is illustrated by a recent arbitration between Chevron Corporation and the Republic of Ecuador, which gave rise to a separate, post-award arbitration between Ecuador and the United States.

In March 2010, Chevron obtained a partial award against Ecuador for extensive delays in the litigation of claims brought by Chevron in Ecuadoran courts, which the tribunal found were a breach of the obligation in the US-Ecuador BIT to provide an effective means of enforcing rights with respect to investments.[23] Following further proceedings, in August 2011, the tribunal determined Chevron's damages from the breach to be about $77.7 million plus interest.[24] In the meantime, however, Ecuador initiated proceedings in a court in the Netherlands (the seat of the arbitration) seeking to have the partial award set aside.[25] That action in itself was not surprising, as unsuccessful respondents frequently seek set-asides of awards against them.

What Ecuador did next, though, *was* surprising: It initiated arbitration with the United States pursuant to Article VII of the BIT, which provides a mechanism for resolving "[a]ny dispute between the [State] Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels."[26] In its request for arbitration, Ecuador sought an interpretation of the "effective means" clause of the BIT as requiring no more of Ecuador than what is required by customary international law.[27] In other words, Ecuador sought to re-litigate through State-State dispute settlement the key point it had lost in investor-State dispute settlement. Presumably its hope was that this follow-on proceeding would influence the set-aside proceeding in the Dutch court or, at a minimum, make it more difficult for Chevron to enforce its arbitral award in the courts of another jurisdiction.

Ecuador's effort ultimately failed. In September 2012, the tribunal in the *Ecuador v. United States* arbitration reportedly issued an award dismissing Ecuador's claims for lack of jurisdiction (though that award is not yet public).[28] It is possible that Ecuador's failure will deter BIT award debtors from pursuing similar tactics in future cases. On the other hand, it is also possible that Ecuador's attempt will be seen by other States as an important new page in the playbook for collateral challenges to BIT awards in favor of foreign investors.

It is also possible that Ecuador's attempt will be seen by other States as an important new page in the playbook for collateral challenges to BIT awards in favor of foreign investors.

4. The State as Investor-Claimant

The discussion up to this point has focused on the ways in which a State may play an increasingly important role in the resolution of investment disputes even though it is not a disputing party. But another instance of the convergence between investor-State dispute settlement and State-State dispute settlement may result from the growing importance of States, through the vehicle of State-owned enterprises (SOEs), as investors.

When we think of investor-State arbitration, we usually think of a private corporation or individual bringing claims against a foreign sovereign. But it is not uncommon for BITs to define the term "investor" broadly, so as to encompass anyone who makes (or seeks to make) an investment, and not just private parties. Under the US model BIT, for example, "investor of a Party" is defined

It is not uncommon for BITs to define the term "investor" broadly.

to mean "*a Party or state enterprise thereof*, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party." (Emphasis added.)

Where a BIT party or SOE of a BIT party is an investor in the territory of the other party and finds itself aggrieved by a measure of the host party, it may submit claims to arbitration just like any other investor (absent restrictions on such claims under the terms of the BIT). Such cases have been rare to date. But cross-border investment by SOEs is growing. With that growth comes a greater likelihood that arbitrations initiated by SOEs will become more common.[29]

Although an SOE would be initiating investor-State arbitration in its capacity as an investor, and not in the State's capacity as party to the underlying BIT, the significance of the claimant's status as a State (or at least an alter ego thereof) cannot be ignored. A dispute between two States unquestionably is different from a dispute between a private party and a State. A State/SOE claimant has a relationship to the BIT that a private party does not have. Unlike a private person, the State/SOE claimant is a party to the treaty as well as a party to the dispute. It necessarily must consider its interests as respondent in a future case as well as its interests as claimant in the case at hand and the interests of its co-nationals in particular interpretations of the treaty. In this sense, investor-State dispute settlement involving a State/SOE claimant may be more like an extension of diplomacy – and, in that sense, more like State-State dispute settlement – than investor-State dispute settlement involving a private party claimant.

5. The State as Claimant

This then leads to a fifth and final way in which we may start to see States playing a more important role in investment dispute settlement. Even where the State itself (either directly or through an SOE) is *not* an investor in the territory of another State, there may be circumstances in which it is desirable for the first State – rather than investors who are nationals of that State – to bring claims against the host State under a BIT. That is, State-State dispute settlement under a BIT may be desirable, even where investor-State dispute settlement is an option.

This fifth way in which we may start to see States play a more prominent role in investment disputes in some sense brings us full circle. A key rationale for creating investor-State arbitration was to give investors greater control over the resolution of their disputes with foreign States. Yet as investment arbitration has become more prevalent, the enduring role of States in the resolution of investment disputes with other States has become apparent; the ultimate manifestation of that enduring role may be, in appropriate circumstances, for States to pursue treaty claims against other States for the overall benefit of their nationals, even where their involvement does not rise to the level of adopting the claims of specific investors as their own.

As already mentioned, modern BITs typically contain State-State arbitration provisions as well as investor-State arbitration provisions. It is the investor-State provisions that are more commonly used and through which the investment treaty jurisprudence has developed. But, as we saw with the *Ecuador v. United States* arbitration, the State-State provisions may prove useful in certain circumstances. In that case, it was the award debtor in an investor-State arbitration that used the State-State provisions as an indirect way to challenge (unsuccessfully) the award collaterally. The more direct way to use the State-State provisions would be for the home State of an aggrieved investor or investors to bring claims under those provisions in the first place.

At first blush, this might seem to defeat the very purpose of having investor-State arbitration in BITs. But here it must be borne in mind that just because an investor has the option to sue a host State in investment arbitration does not mean the option will be attractive to the investor. Although the barriers to suing States may not be as daunting today as they were several decades ago, they are not insignificant. Especially for a company that hopes to continue doing business in the territory of the State at issue, or for a company that faces insurmountable obstacles in making an investment in the first place, an investor-State case just may not be in the cards, even if the complaint is legitimate and the damages real.

Just because an investor has the option to sue a host State in investment arbitration does not mean the option will be attractive to the investor.

In that situation, the possibility of the investor's home State bringing claims in State-State dispute settlement might be quite attractive, not only to the investor, but the home State itself – particularly where there is a possibility that the host State's treaty breaches may affect a significant number of the claimant State's nationals. This would be so if, for example, individual investors' claims are small, fear of retaliation against individual investors is high, or monetary damages as a form of relief are less valuable than removal of the measure at issue (as, for example, where the measure is a barrier to entry).

However, as with the more traditional and direct forms of diplomatic protection that preceded the advent of the investor-State model of dispute resolution, the intervention of an investor's State in the dispute through the initiation of dispute settlement procedures pursuant to a treaty would be subject to the existence of a distinct and compelling diplomatic interest on the part of the home State. Absent such an interest, the home State may wish to remain at a remove from the dispute.

* * *

In sum, even in this golden age of investor-State arbitration, State-State interaction in the resolution of investment disputes remains relevant. As we have seen, it may be even more relevant now given the diverse ways in which proceedings between two States can bear on the resolution of disputes between an investor and a State. It behooves investors and their advisors, therefore, to recognize that the path to resolution of a dispute with a host State may well be a game of multidimensional chess, requiring the deployment of different kinds of tools to achieve a satisfactory result.

---

1 *See* United Nations Conference on Trade and Development, International Investment Agreements Research and Policy Analysis, available at http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/Research-and-Policy-Analysis.aspx. According to UNCTAD, the 3,100 mark was reached in 2011.

2 ICSID, The ICSID Caseload – Statistics, Issue 2013-1 at 7, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41.

3 *See* United Nations Conference on Trade and Development, International Investment Agreements Research and Policy Analysis, available at http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/Research-and-Policy-Analysis.aspx.

4 U.S. Model BIT, Art. 34(5).

5 *See, e.g.*, ICSID Convention, Art. 53(1) ("Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."); UNCITRAL Arbitration Rules, Art. 34(2) ("The parties shall carry out all awards without delay.").

6 *See CMS Gas Transmission Co. v. Argentina*, Award, ICSID Case No. ARB/01/8 (May 12, 2005), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4; *CMS Gas Transmission Co. v. Argentina*, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8, (Annulment Proceeding) (Sep. 25, 2007), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4; *Azurix Corp. v. Argentina*, Award, ICSID Case No. ARB/01/12, (July 14, 2006), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5; *Azurix Corp. v. Argentina*, Decision on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/12 (Sep. 1, 2009), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171_En&caseId=C5. Blue Ridge acquired the *CMS* award from CMS following the arbitration.

7 19 U.S.C. § 2461 *et seq.*; *see also* Harmonized Tariff Schedule of the United States, General Note 4 (identifying countries that President has proclaimed to be eligible for GSP), available at http://www.usitc.gov/publications/docs/tata/hts/bychapter/1300gn.pdf#page=11.

8 19 U.S.C. § 2462(b)(2)(E).

9 One of the authors, Theodore Posner, represented Blue Ridge in the GSP suspension proceeding.

10 Proc. No. 8788 at paras. (1)-(2), 77 Fed. Reg. 18,899, 18900-01 (Mar. 29, 2012).

11 *On the Legal Security of European Investments Outside the European Union*, Eur. Parl. Doc. 2012/2619(RSP) at para. 8 (Apr. 19, 2012) (urging European Commission and Council "to explore and adopt any measures required to safeguard European interests in order to avoid such situations arising again, including the possible partial suspension of the unilateral tariff preferences under the GSP scheme").

12 Karel De Ducht, *Brazil and the European Union: Allies in a Changing World*, SPEECH/12/333 at 3 (May 7, 2012), available at http://europa.eu/rapid/press-release_SPEECH-12-333_en.htm.

13 Raphael Minder, *Spain Stings Argentina Over Oil Company Nationalization*, N.Y. Times (Apr. 20, 2012), available at http://www.nytimes.com/2012/04/21/business/global/spain-stings-argentina-over-nationalization-of-repsol-ypf.html?_r=0.

14 For example, Assistant Secretary of the Treasury for International Markets and Development Marisa Lago stated in 2011 that, as a result of Argentina's failure to pay outstanding arbitral awards and respect other international obligations, the United States would vote against loans to Argentina from the World Bank and other multilateral lending institutions. Sandrine Rastello & Eric Martin, *U.S. Opposes Loans to Argentina in Bid to Step Up Pressure for Debt Accord*, Bloomberg News (Sep. 28, 2011), available at http://www.bloomberg.com/news/2011-09-28/u-s-opposes-loans-to-argentina-in-bid-to-boost-pressure-for-debt-accord.html.

In addition, Repsol has called on EU Member States to form a bloc in international financial institutions to vote against development projects in countries that are not complying with arbitral awards or are delinquent on debts owed to sovereign lenders (such as Argentina). *See* Sebastian Perry, *Repsol's Perspective on EU Investment Policy*, Global Arbitration Review (Mar. 18, 2013), available at: http://www.globalarbitrationreview.com/news/article/31416/.

15 *See Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12, Notice of Arbitration, para. 7.2 (Nov. 21, 2011).

16 PMA Notice of Arbitration, paras. 6.6-6.12.

17 PMA Notice of Arbitration, para. 6.6.

18 *See, e.g.*, PMA Notice of Arbitration, para. 7.7 ("[W]here a regulation has no demonstrable utility to improve public health, *violates international law*, and effective alternative measures are available (all of which is the case here), then the State cannot justify the imposition of the regulation on the investor." (Emphasis added.)); *id.*, para. 7.17 (breaches of WTO obligations alleged to constitute breach of "umbrella clause" obligation under BIT).

19 *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Establishment of a Panel by Ukraine, WT/DS434/11 (Aug. 17, 2012). On September 28, 2012, the DSB established a panel, although as of this writing the members of the panel have not yet been appointed.

20 *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Establishment of a Panel by Dominican Republic, WT/DS441/15 (Nov. 12, 2012); *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Establishment of a Panel by Honduras, WT/DS435/16 (Oct. 17, 2012).

21 *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Consultations by Cuba, WT/DS458/1 (May 7, 2013).

22 *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, Art. 2.2 (Sep. 15, 1993).

23 *Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, Partial Award on the Merits, *ad hoc* arbitration under UNCITRAL Arbitration Rules (Mar. 30, 2010), available at http://www.investmentclaims.com/subscriber_article?script=yes&id=/ic/Awards/law-iic-421-2010&recno=3&searchType=Awards&investor=Chevron.

24 *Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, Final Award, *ad hoc* arbitration under UNCITRAL Arbitration Rules, (Aug. 31, 2011).

25 *See Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, Judgment, Joined cases 386934/HA ZA 11-402 and 408948/HA ZA 11-2813, District Court of the Hague, Netherlands (May 2, 2012), available at http://www.investmentclaims.com/subscriber_article?script=yes&id=/ic/Awards/law-iic-539-2012&recno=4&searchType=Awards&investor=Chevron.

26 *Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment*, Art. VII(1) (Aug. 27, 1993).

27 *See Ecuador v. United States*, PCA Case No. 2012-5, Request for Arbitration (June 28, 2011).

28 *U.S.-Ecuador BIT: Ecuador v. United States*, U.S. Department of State Website, available at http://www.state.gov/s/l/c53491.htm.

29 *See generally* Vale Columbia Center, Roundtable on States and State-Controlled Entities as Claimants in International Investment Arbitration, Report by Michael D. Nolan (Mar. 19, 2010), available at http://www.vcc.columbia.edu/files/vale/content/Roundtable_Report.pdf.

The Extension of an Arbitration Clause to Non-Signatory Respondents

By Konstantin Hoppe and Hermann Bröcker (Weil Munich/Germany)

I. Introduction

Given that international arbitration is a method of dispute resolution based on consent, a key issue in any arbitration is whether the tribunal has jurisdiction to hear the claims asserted. This issue is particularly difficult where the respondent is not a signatory to the arbitration agreement. In some scenarios, it is possible that non-signatories to an arbitration agreement may nevertheless be considered to have consented to arbitration due to their nexus to the contract containing the arbitration clause.

Some of the circumstances in which this issue may arise include:

- extension of the clause to the affiliates or subsidiaries of the signatory, or by agreements between groups of companies;
- legal succession (e.g. in merger cases or through the assignment, novation or other transfer of underlying contracts);
- extension of the clause to the individual shareholders or controlling partners of a joint venture.

This article will highlight the core principles to be taken into account in such scenarios, by particular reference to a recent International Chamber of Commerce ("ICC") case where the arbitral tribunal ultimately declined jurisdiction over a purported respondent who was not a signatory to the arbitration clause.

II. Parties' Consent as a Fundamental Principle for Arbitral Jurisdiction

Unlike litigation before state courts, arbitration is a private dispute resolution mechanism agreed upon by the relevant parties. The consent of the parties is thus the cornerstone of arbitration; as the U.S. Supreme Court put it, arbitration is "*a matter of consent, not coercion.*"[1] The agreement to arbitrate is therefore the key to determining whether or not a party has provided that consent.[2]

As a general principle, only the signatories to a written agreement are bound to it. For example, according to German arbitration law, which to a large extent derives from the UNCITRAL Model Law, a written signature is a prior requirement for the existence of a valid and binding arbitration agreement. According to the jurisprudence of the German Federal Supreme Court

Confusion and disagreement over the scope of the group of companies doctrine remains.

(*Bundesgerichtshof*), the fundamental principle under German law is that only those parties that have been involved in the negotiation and conclusion of the arbitration agreement can be bound by its provisions.[3]

III. The Group of Companies Doctrine

Only in a few exceptional situations has the extension of an arbitration clause to third-party non-signatories been permitted. One such situation arises under the so-called "group of companies" doctrine, according to which, under certain circumstances, a tribunal may extend the scope and effects of its jurisdiction to non-signatory companies within a corporate group to which a signatory company belongs. The origin of this doctrine is found in an ICC interim award from France in the case of *Dow Chemicals v. Isover Saint Gobain* in 1983, in which the tribunal held that the scope of the arbitration clause insofar as it affects non-signatories can be determined, as with any other aspect of the substantive contract, by reference to the common intention of the parties.[4]

In *Dow Chemical*, the Tribunal found on the facts of that case that a necessary intention of the relevant contracting parties was that, where performance of one party's side of that bargain could be effected by certain corporate subsidiaries of that party, the arbitration clause contained in that contract could be extended beyond merely the signatories and found jurisdiction over additional group companies. The Tribunal in Dow Chemical expanding the arbitral jurisdiction in this manner expressly relied on the facts that the various Dow group companies constituted part of the same singular "economic reality" and were subject to the absolute ultimate control of a common parent.

The tribunal's award was later upheld by the Paris Court of Appeal.[5] Subsequent arbitral awards that have followed the *Dow Chemical* tribunal's approach have given rise to what has come to be called the group of companies doctrine, which seeks to ascertain the common intention of the parties regarding the application of the arbitration clause to non-signatories. This intention may be established by the circumstances that surrounded the conclusion and performance of the contracts in which an arbitration clause appeared. Accordingly, the arbitrator may take into account the parties' (and any non-signatory's) performance under or in accordance with the contract. Although some commentators have questioned the utility of the group of companies doctrine as an analytical tool,[6] there is broad acceptance across jurisdictions of the basic concept that the consent of a non-signatory to an arbitration clause must be established by means of an examination of the relevant facts, including such factors as the participation of the non-signatory in the negotiation, performance and/or termination of the contract. Nevertheless, confusion and disagreement over the scope of the group of companies doctrine remains.

IV. Criteria for Extending an Arbitration Clause

In a recent ICC arbitration, Weil, Gotshal & Manges LLP represented a non-signatory respondent (the "Second Respondent") in a contractual dispute involving three parties. The Claimant and the First Respondent had entered into a contract concerning the provision of certain broadcasting rights and facilities. The issues in dispute concerned the term of the agreement and the meaning and construction of certain other clauses. The contract was governed by French law and contained an arbitration clause providing for ICC arbitration in Paris.

After entering into the agreement, the First Respondent transferred certain operations to its subsidiary, the Second Respondent, and ultimately sold its interests in the Second Respondent to a third party. However, the Claimant repeatedly (prior to the sale and thereafter) refused to consent to a formal transfer of the agreement by the First Respondent to the Second Respondent.

The jurisdictional analysis should consider the principle of good faith, and in particular, the identification of any prior positions taken by the claimant that may contradict its contention that the respondent consented to arbitration.

In the arbitration, the Claimant argued that the tribunal had jurisdiction over the Second Respondent as the Claimant believed that the Second Respondent had been directly involved in the performance of the agreement with the consent of all parties to it. The Claimant accordingly relied upon certain provisions of French procedural law, which in appropriate cases provides that "*an arbitration clause inserted in an international contract [should] be applied to the parties directly involved in the performance of the contract.*"[7] A necessary element of the Claimant's argument was therefore that the Second Respondent was bound by the arbitration clause because both respondents had acknowledged the Second Respondent's direct involvement in the performance of the contract, and the existence of the arbitration clause was known to the Second Respondent.

The Second Respondent successfully contested the jurisdiction of the arbitral tribunal because it was not a signatory to the arbitration clause and was not bound by it for any other reason, as it did not form part of a wider group of companies with the other respondents and also on the facts of the case was not directly involved in the performance of the contract, contrary to the position taken by the Claimant. In reaching this decision, the arbitral tribunal in particular emphasized that the Claimant had repeatedly rejected a formal transfer of the contract to the Second Respondent, holding that it would violate the principle of good faith to extend the arbitration agreement to the non-signatory despite that rejection.

In so doing, the arbitral tribunal also *de facto* rejected the Claimant's contention that French law was generally supportive of extending the application of arbitration agreements to non-signatory third parties. The origin and development of the group of companies doctrine in French law has perhaps fostered the view that, where French law applies to the contract, it will be relatively easy for a claimant to establish that the arbitration clause extends to non-signatories. The tribunal in this matter made clear that this is not the case. Rather, the tribunal must look to the facts concerning the common intention of the parties. Where the facts do not establish the parties' intention that a non-signatory be bound by the arbitration agreement, there is no consent or at least implied consent to arbitration on the part of the non-signatory and the tribunal has no jurisdiction over claims against it.

As the award in this case demonstrates, although the arbitration clause may extend beyond the signatories where there is a group of companies, it nevertheless remains a requirement that all parties to arbitration proceedings have consented to the arbitration clause through their contractual agreement or subsequent performance. Moreover, the parties – including non-signatories – must have been fully aware of the existence and extent of the clause in order to be bound by it. Thus, under French law, consent – expressed or implied – is required, including with respect to the application of the group of companies doctrine.

Another noteworthy element of this case is the importance of the principle of good faith.

Another noteworthy element of this case is the importance of the principle of good faith. Here, the tribunal found that this principle prohibited the claimant in arbitration proceedings from advancing inconsistent positions (*venire contra factum proprium*). The good faith principle may well come into play in other circumstances where consent of a non-signatory is at issue. If, for example, the claimant has refused to contract directly with the non-signatory; to discuss the performance of the agreement with the non-signatory; or has refused to consent to the transfer of the agreement that contains the arbitration clause to the non-signatory, the claimant may be prevented from relying on the arbitration clause for claims against the non-signatory at a later date.

V. Practical Consequences

Whenever a non-signatory to an arbitration clause is named as a respondent to international arbitration proceedings, a full legal analysis of facts that may be relevant to the respondent's alleged consent to arbitration should be undertaken as soon as possible in order to identify potential defenses to the tribunal's jurisdiction. The application of French law to the contract should not be assumed to predispose the tribunal to find that a non-signatory has consented to arbitration. In addition, the jurisdictional analysis should consider the principle of good faith, and in particular, the identification of any prior positions taken by the claimant that may contradict its contention that the respondent consented to arbitration.

1 Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 469 (1989).

2 As for German law see: MüKo-Münch, ZPO, third edition, sec. 1031 marg. 17; as for US law see: AT&T Technologies, Inc. vs. Communications Workers, 475 US 643, 648, 106 S.Ct. 1415, 89 L.Ed. 2d 648 (1986).

3 German Federal Supreme Court (BGH), Dec. of 12 November 1990, II ZR 249/89.

4 ICC Case No. 4131, *Dow Chemical et al. v. Isover Saint Gobain*, Interim Award of 23 September 1982. Published in: 110 Journal du Droit International (Clunet) 1983, pp. 899/905, with note Y.Derains, pp. 905/907.

5 *Dow Chemical et al. v. Isover Saint Gobain*, Paris Court of Appeal (Judgment of 21 October 1983), published in *Revue de l'arbitrage* 98 (1984).

6 *See, e.g.*, Bernard Hanotiau, "Consent to Arbitration: Do We Share A Common Vision?" *Arbitration International* (Kluwer Law International 2011, vol. 27 issue 4, pp. 539-54).

7 CA Paris, 30 November 1988, nº88/10719.

Interview: India Johnson

By Arif Hyder Ali
and Samaa A. Haridi

India Johnson became President and CEO of the American Arbitration Association on January 1, 2013. She is the first woman to hold the position of AAA President in the 86 years of the organization's existence. Ms. Johnson's career at the AAA spans 38 years.

What are your goals for the American Arbitration Association in general, and also specifically for the International Centre for Dispute Resolution (ICDR)[1]?

The ICDR is constantly growing and busy bringing out new things – currently the ICDR is working on rules for expedited arbitration.

More generally, I would like the AAA and the ICDR to figure out how to contribute to solutions or at least inform the discussion for the current challenges facing arbitration, such as the growing concern about time and cost in both the domestic and international arenas. Surveys of corporate counsel and litigators reveal frustrations that arbitration takes too long, costs too much, or that arbitrators are splitting the difference between two positions in a dispute or won't make hard decisions. For instance, on the question of splitting the difference, if we have data that would help people understand that we don't actually see that arbitrators are doing that, then maybe we can make some progress. I've even spoken to the Rand Corporation about helping us study and evaluate the data we have on awards. We need to help arbitrators and advocates learn from success stories of cases that were not excessively long or expensive – because we do have these kinds of success stories.

What trends is the ICDR seeing in its caseload?

The cases are getting larger, which makes sense. There have been a lot of infrastructure projects that gave rise to energy and construction disputes involving American and foreign firms. On the other hand, we also have a lot of franchise cases that can actually be relatively small. For those cases, it is actually getting less difficult to encourage parties to mediate a case. Right now we are handling over 100 international mediations a year, but we can all remember when we could barely suggest mediation to any international practitioner.

In what context do these mediations arise? Do they spin out of an arbitration process, or are they completely independent?

Typically they are what we call "conversion to a mediation" arbitrations although recently there have been a number of matters filed directly as mediation, including some very big cases. In the U.S. almost every lawsuit is mediated before it gets tried. A lot of domestic arbitrations go through a mediation step, so I'm hoping more international disputes get there, and I think that they will. Cost settles more cases than rights necessarily do, and that is what ultimately convinces a lot of parties to mediate.

Speaking of costs, what do you recommend to corporate counsel to control costs in arbitration and to avoid delays in reaching an award?

A holistic approach. You've got to really start at the arbitration clause[2] and be holistically attuned to the idea of leveraging and exploiting the benefits of arbitration all the way through. You can't wait until the first day of a hearing to start being cost effective. It really has to be in your DNA and in the DNA of your contract, and it has to be in the DNA of the lawyers you hire to represent you. If you really want good process management, you have to pick someone who can do process management. You've got to make sure your upper management is thinking about it, too. And I think the recession has probably helped people become more efficient and cost-sensitive.

You can't wait until the first day of a hearing to start being cost effective. It really has to be in your DNA and in the DNA of your contract, and it has to be in the DNA of the lawyers you hire to represent you.

And then I think parties have to be willing to express to the arbitrator that cost matters. Many times, an arbitrator wishes that one of the two sides would specifically request efficiency so that he or she could be empowered to apply efficiency.

One of the things that often seems to work well is for the tribunal to set out in a procedural order, at the very outset of the arbitration proceeding, as much detail as possible about the conduct of the proceeding all the way through the hearing. What are your thoughts on this practice?

I would encourage that all the time. Sometimes, the arbitrators don't take those steps, because they do not want to seem imperious. One of the sad things I see is that arbitrators are trying to negotiate between opposing procedural needs in a cordial, collegial way that can be perceived as weakness.

What about the perception that arbitrators can be too risk averse and overly concerned about their awards being vacated?

I think we and other providers may be at fault. In our trainings, we may have overemphasized risk, and made arbitrators more risk averse, because parties have spent a lot of money to get to that point, and it does feel awfully bad when an award gets vacated. So an award that stands up is very important to an arbitral institution. But I think we can find evidence that the grounds for vacating arbitration awards really are limited, and awards aren't typically set aside because of page limits on briefs or limitations on the number of briefs or hearing days. Awards are much more apt to be set aside because the arbitrators exceeded their authority, did something outside their jurisdiction, or did not make a disclosure.

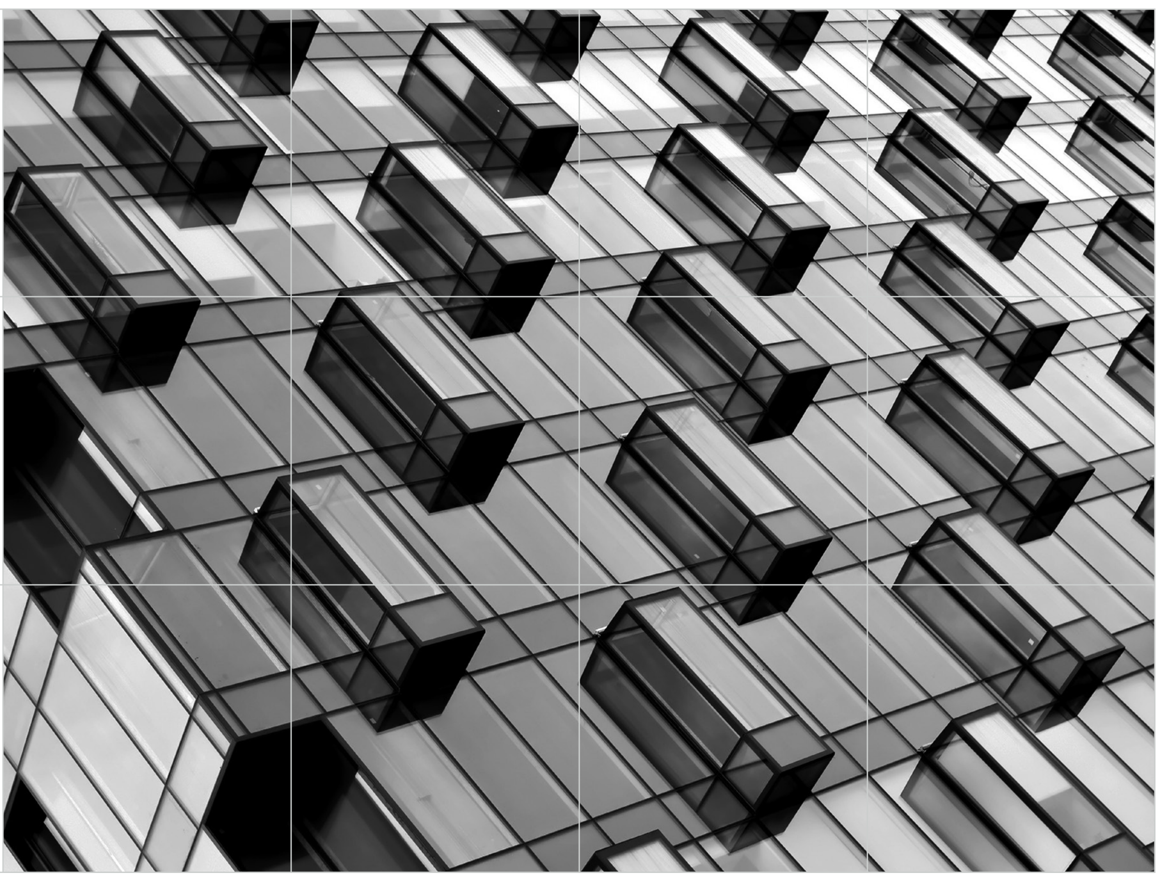
Why do you think conflict disclosures are becoming increasingly relevant?

Arbitrators really have to work hard to get disclosures right. In international arbitration, there was a group of international arbitrators who sat on many of the cases and expected that everybody knew them. As international arbitration became more litigious, the disclosures became much more important. To make thorough disclosures, arbitrators will need to challenge themselves to change their past practices. I don't like the term disqualification. I wish we could just say "we're rotating you off of this case." Arbitrators don't like to go around saying "I was disqualified," because it sounds like the arbitrator did not have the qualifications to understand a case and make an intelligent ruling. In fact, disqualification is about distance and arm's length. And the disqualification stigma is worse in the international context. This may be something where providers can help to educate international arbitrators on the different concepts of conflict in the U.S. and the West.

How do you intend to diversify the pool of arbitrators during your presidency of the AAA?

I think one of the challenges is that people give lip service to things but then when it is time to pick an arbitrator for a case they fall back to some kind of tradition. They will say they want more diverse lists of people but, if you go back and look at whom they are picking, they are pretty predictable. So I think we have to just keep putting more and more people in front of them, and hopefully the clients will pressure the attorneys who are doing the selection. We have just launched a new arbitrator search tool and are currently testing it for very large domestic commercial cases. The tool allows you to explore all of the potential arbitrators in a given category, so you can make a more informed decision. For example, if you wanted a retired judge, you could filter for that. The tool also allows parties to be creative: we can create a pool of 15 arbitrators using selections of five from each party plus five from the AAA, and nobody really knows who picked whom on the list. Also, many of the neutrals in our roster already have photos uploaded to the tool, and I'm hoping to get photos for everyone. I think

They will say they want more diverse lists of people but, if you go back and look at whom they are picking, they are pretty predictable.



if you were to scroll through these photos you'd see a lot of diversity. We haven't put the international panel into the arbitrator search tool yet, but I hope to broaden it to international soon.

Why do you think there are so few women today who are well-known, prominent international arbitrators, such as Brigitte Stern and Gabrielle Kaufmann-Kohler?

You know, maybe we're really just on the brink. I have seen a lot of change in the last ten years as women practitioners became seasoned and experienced enough in whatever they were doing – law or business or construction or engineering or architecture. So, this could be something that time is going to solve.

I also think in international arbitration you are talking about a male "club" that seemed very locked in and buttoned-up. So maybe we should be thinking about how amazing it is that there are women as prominent as Gabrielle Kaufmann-Kohler or Brigitte Stern in the field.

But when the people selecting arbitrators are increasingly women themselves, then you're going to have more women selected, I feel sure. And we are seeing more women in in-house positions today as well. Still, we need to be constantly reminded of the need for diversity, because we can easily get into a robotic mode of looking for expertise without noticing that you just selected ten white males for an arbitrator pool.

What are the AAA and the ICDR doing to promote ethnic diversity in arbitrator panels?

We actually have started collecting ethnicity information from our neutrals, and we are building into our software the ability to notice if a list is put together without women or without any ethnic diversity. And we are making progress. The AAA's Higginbotham Fellows Program, for instance, is diverse in terms of gender and ethnicity, and four or five of the Fellows have already worked their way to serve on panels for actual cases. And that program is not very old, and the Fellows are frequently very young.

What do you think is the most valuable contribution of the AAA or the ICDR in the arbitration world?

The sense that there is safety in working through an institution, because of the ethical underpinnings. The AAA has been around a very long time and works hard to remain transparent – and as approachable, accessible, honest, and open as possible. And then we are a forum for people to explore and discuss the current problems in arbitration. A lot of our vice presidents spend time with arbitrators who may be dealing with difficult disputes and need another neutral party to bounce ideas off of.

It ultimately is the parties' process: whatever they want and however we can help them get there. And we have to accept that we don't know enough about a given matter to impose contrary procedures on it. So we always have to defer to what the parties want and what they have chosen.

---

1 The ICDR was established as the international division of the AAA in 1996 and is a preeminent provider of international dispute resolution services.

2 See the AAA's ClauseBuilder tool, available at www.clausebuilder.org, which is designed to assist in development of clear and effective arbitration and mediation agreements.

Recent and Upcoming Weil Events

February 2013

					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	**21**	22	23
24	25	26	27	28		

February 21, 2013

16th Annual International Arbitration Day – Making the award: need we rethink the process?

Arif Ali participated in a symposium regarding the differences, overlaps, and interplay between domestic and international arbitration. The symposium, titled "The Interplay between Domestic and International Arbitration," was part of the IBA's 16th Annual IBA International Arbitration Day, two-day conference.

March 2013

...	4	**5**	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	...

March 5, 2013

OECD International Business Dialogue 2013: Barriers to 21st Century Commerce

Ted Posner participated in a panel discussion entitled "Obtaining Inputs: Sourcing raw materials, labour, skills and information." Mr. Posner discussed competing with state-owned enterprises and explored whether new trade and investments rules will help pave the way for competition.

April 2013

	1	2	3	4	5	6
7	8	**9**	10	11	12	13
14	15	**16**	17	18	19	20
21	**22**	23	**24**	25	26	27
28	29	30				

April 9, 2013

ICC Houston Conference on International Arbitration

Arif Ali and Samaa Haridi spoke at the two-day ICC Houston Conference on International Arbitration titled "Houston as the Crossroads between the Middle East and the America."

Arif Ali participated in the panel discussion titled "Regional Focus: Hot Topics in International Arbitration in the Middle East." The panelists examined changes in arbitration laws as well as how the implementation of these changes will affect cross-border disputes.

Samaa Haridi participated on the panel discussion titled "Regional Focus: Latin America – Enforcement of Awards," regarding important issues to consider when seeking to enforce or vacate arbitration awards in Latin America.

April 16, 2013

ICC's First Annual Conference on International Arbitration in the Middle East and North Africa

Samaa Haridi participated in a panel discussion regarding arbitrating construction disputes in the Middle East and North Africa (MENA) region titled, "Arbitrating construction disputes in the MENA region." The speakers discussed construction-related ICC arbitration, and explored other dispute resolution mechanisms, including standing panels as provided under the ICC Dispute Board Rules.

April 22, 2013

7th Annual Treaty Arbitration Conference:
Investor-State Dispute Resolution in the Energy Sector

Alexandre de Gramont participated in a panel discussion titled, "Multiparty Investor Disputes in the Energy Sector – Preclusion, Consolidation, or Free-for-All?" regarding multiparty investor-state arbitrations in the energy sector.

April 24, 2013

ABA Section of International Law 2013 Spring Meeting

Associate Erica Franzetti participated in a panel discussion titled, "Budgeting and Managing An International Arbitration: How to Keep Arbitration Cost-Efficient and Effective," regarding how to manage international arbitration expenses. The speakers discussed fee arrangements and negotiating arbitration costs, among other topics.

May 2013

1 2 3 4
5 6 7 **8** 9 10 11
12 13 14 15 16 17 18
19 20 21 22 23 24 25
26 27 28 29 30 31

May 8, 2013

Mexican Bar Association

Arif Ali spoke on "The (Over-)Regulating of International Arbitration: What Happened to Party Autonomy?" at the University Club in Mexico City. The talk was sponsored by the Arbitration Committee of the Mexican Bar Association (Barra Mexicana Colegio de Abogados). Mr. Ali's presentation focused on the issue of whether the international arbitration community is developing too many guidelines and rules that contribute to delays in decision-making.

August 2013

... 5 6 7 8 9 10
11 12 13 14 15 16 17
18 19 20 21 22 23 **24**
25 26 27 28 29 30 31

August 24, 2013

ABA Section of International Law, Perspectives for Infrastructure Projects in Latin America

Erica Franzetti participated in a debate regarding doing business in Latin America. Ms. Franzetti discussed the energy sector, focusing on Brazil's newly adopted energy rates policy and the renewal of its generation and transmission concessions.

September 2013

1 2 3 4 5 6 7
8 9 10 **11** 12 13 14
15 16 17 18 19 20 21
22 23 24 25 **26** 27 28
29 30

September 11, 2013

11th Annual ICDR Miami International Arbitration Conference

Samaa Haridi moderated a roundtable discussion, "Tertulias on International Arbitration: Arbitrator Disclosures, Deliberations & Dissents" concerning arbitrator disclosures, deliberations, and dissents.

September 26, 2013

International Centre for Dispute Resolution

Samaa Haridi spoke on the topics of "Forging the Way Towards a Career in International Arbitration" and "Cross Cultural Issues in the Practice of International Arbitration" at the American Arbitration Association/ICDR and ICDR Y&I event titled "21st Century Arbitration."

She also presented a session, "Forging the Way Towards a Career in International Arbitration: Where Many Roads Lead to Rome, New York, London, Paris, and Hong Kong too" which discussed the differences between arbitration and litigation, the daily responsibilities and skill-set of an international arbitration practitioner, and how to best market oneself in the field.

Recent and Upcoming Weil Events

October 2013

		1	2	3	4	**5**
6	**7**	**8**	**9**	**10**	**11**	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

October 5, 2013

Young International Arbitration Group (YIAG) Workshop

Samaa Haridi presented at a Young International Arbitration Group (YIAG) Workshop discussing issues relevant to young members of the arbitration community, including a session discussing tips from experts in the field and another regarding international arbitration and the courts.

October 5-6

North American User's Council Symposium

LCIA

Symposium based around current issues of key interest in the field of international commercial arbitration and ADR – topics to be submitted in advance by delegates.

The symposium was sponsored by Weil.

October 6-11

Annual Conference 2013

IBA

Arbitration focussed working sessions include abuse and use of antitrust issues, resolving international business disputes using the tools of WTO, BIT and commercial arbitration, assessment of costs, fee arrangements and third-party funding, and arbitrators' conflicts and party representation.

Arif Ali (co-chair of Weil's International Arbitration practice) speaking on 10 October 2013 – Resolving disputes in the natural resources industry: expert arbitration needed!

November 2013

					1	2
3	4	**5**	6	7	**8**	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

November 1, 2013

American Society of International Law Midyear Meeting and Research Forum

ASIL

Samaa Haridi will participate in a panel discussion regarding recent trends in the recognition and enforcement of foreign judgments and arbitration awards in US courts. Among other topics, the speakers will address the potential implications of the US Supreme Court case, *BG Group PLC v. Argentina*, concerning Argentina's petition to vacate a Bilateral Investment Treaty award, and case law concerning the availability of discovery in aid of the enforcement of judgments and arbitral awards.

November 5, 2013

New York State Bar Association

Samaa Haridi will participate in a panel discussion regarding the new IBA Guidelines on Party Representation in International Arbitration. The panel is part of the New York State Bar Association Dispute Resolution Section's Fall Meeting.

November 8, 2013

Asia Pacific User's Council Symposium

LCIA

Symposium based around current issues of key interest in the field of international commercial arbitration and ADR – topics to be submitted in advance by delegates.

Juliet Blanch (co-chair of Weil's International Arbitration practice) co-chairing one of the three discussions sessions.

Case Studies

Polskie Górnictwo Naftowe i Gazownictwo S.A. (PGNiG)

A cross-border Weil team successfully resolved a very significant dispute over natural gas prices between long-standing client PGNiG and Gazprom on November 5, 2012. The dispute was scheduled to go to arbitration in Stockholm in January 2013.

In April 2011, PGNiG, Poland's largest natural gas supplier, served notice to revise the price of the gas it buys under its 27-year gas supply contract with Gazprom, which currently has ten years to run. Negotiations were unsuccessful, and in October 2011, arbitration proceedings were commenced seeking revision to the pricing formula with retrospective effect from the date the notice was served; namely for 12 years to the end of the contract.

In addition to averting the arbitration, the settlement agreement is expected to achieve savings for PGNiG of approximately $1 billion for each of the 12 years the revised formula is effective – with total savings for PGNiG of approximately $12 billion. This is a highly significant victory for PGNiG, and one that also has an important role to play in Poland and Western Europe more generally, in that the settlement also brings natural gas prices in Poland in line with prices in other Western European countries.

MVM Zrt.

Weil achieved a major win for MVM Zrt. in an €8.5 million-plus arbitration concerning a decades-old dispute with Serbian electricity companies Elektromreza Srbije Belgrade (EMS) and Elektroprivreda Srbije (EPS). The dispute related to compensation claims for an electricity transfer line built in 1988, before the fall of the Berlin Wall. At the time, barter contracts between state-owned companies from socialist countries were typical, and the one between the claimants and MVM provided for compensation for the transfer line in electricity transit-fee discounts over a period of 15 years. The tribunal considered, amongst other things, the effects of UN sanctions against Yugoslavia during the Balkan wars in the period during which discounts were available for the claimants and the possibility of converting compensation in kind into a monetary claim. Swiss substantive law applied to the case. Set-aside proceedings were initiated by EMS and EPS against the award dismissing their claims. We were successful in defending those claims, and the High Court of Appeal, the Supreme Court, and the Constitutional Court decided in our favor.

CEZ, the Czech Energy Group

Weil recently achieved a full victory for CEZ, the Czech Energy Group, in a €6.1 million arbitration relating to electricity supply agreements against the state-owned Vértesi Power Plant. This dispute was significant as the Court of Arbitration of the Hungarian Economic Chamber confirmed the enforceability of one of the most important principles of trading with energy commodities, i.e., the Mark-to-Market settlement (which is a cornerstone of the EFET sample agreement) and ordered Vértesi Power Plant to pay CEZ's losses in full. This matter set an important legal precedent in Hungary and in the region.

H&H Enterprises

Weil represented H&H Enterprises Investments, Inc., a California-based firm, in connection with a pending bilateral investment treaty dispute before the International Centre for Settlement of Investment Disputes (ICSID) arising out of H&H's multimillion-dollar investment in the Egyptian tourism industry. H&H brought claims under the US-Egypt Bilateral Investment Treaty (BIT). These were based on the Egyptian government's failure, among other things, to grant an official license for the operation of a resort after H&H had already invested a sizable sum in the development of the hotel and surrounding land and entered into a long-term contract to manage and develop the resort with the Egyptian government. H&H claimed that the Egyptian government's refusal to issue the license violated a treaty clause prohibiting expropriation of investments. H&H also asserted that Egypt had wrongfully expropriated its option to buy the resort and had denied its investment fair and equitable treatment, in breach of its obligations under the BIT.

In an effort to halt the arbitration, the Egyptian government filed preliminary objections arguing that the tribunal did not have jurisdiction over the dispute. It argued that H&H did not have a valid option to buy the resort, which in any event could not qualify as an investment so as to provide a basis for the tribunal's jurisdiction; that the treaty did not apply, because the investment was made prior to its enactment and was not registered under Egypt's investment law; that H&H failed to exercise control over the investment during the relevant period due to a failure to observe California corporate formalities later rectified; and that H&H had waived its right to assert claims under the BIT because it had been involved in litigation in Egyptian courts. It also argued that H&H had waited too long to bring its claims and that the case was therefore time-barred.

In its June 2012 jurisdictional ruling, the ICSID tribunal unanimously rejected the majority of Egypt's jurisdictional objections. It joined the question of whether H&H had a valid option to buy the resort, and whether it had waived its right to arbitration by pursuing litigation in Egyptian courts, to the merits phase of the proceedings. Egypt now must respond in full to the merits of all of H&H's claims as well as address more fully the two remaining jurisdictional issues. The case will be heard by the tribunal in late 2013.

Editors

Theodore R. Posner
Litigation Partner
Washington, DC
ted.posner@weil.com
+1 202 682 7064

Jamie Maples
Litigation Partner
London
jamie.maples@weil.com
+44 20 7903 1179

Contributing Authors

Arif Ali
Litigation Partner
Washington, DC
arif.ali@weil.com
+1 202 682 7004

Juliet Blanch
Litigation Partner
London
juliet.blanch@weil.com
+44 20 7903 1233

Samaa Haridi
Litigation Partner
New York
samaa.haridi@weil.com
+1 212 310 8998

Theodore R. Posner
Litigation Partner
Washington, DC
ted.posner@weil.com
+1 202 682 7064

Hermann Bröcker
Litigation Associate
Munich
hermann-matthias.broecker@weil.com
+49 89 24243 145

Daniel Dozsa
Litigation Associate
Washington, DC
daniel.dozsa@weil.com
+1 202 682 7129

Konstantin Hoppe
Litigation Associate
Munich
konstantin.hoppe@weil.com
+49 89 24243 115

World Arbitration Report is published by the Arbitration Practice Groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com

If you have questions concerning the contents of this issue, or would like more information about Weil's Arbitration practices, please speak to your regular contact at Weil, or to the editors or practice group members listed in this report.