RECENT DEVELOPMENTS IN INTERNATIONAL ARBITRATION

Professor Peter B. Rutledge
University of Georgia School of Law
Athens, Georgia 30602

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Professor Peter B. Rutledge[*]

Since last year's Annual Arbitration Institute, exciting developments have been afoot in the field of international arbitration. Among the most important (certainly for our region) is the establishment of the state-of-the-art Georgia International Arbitral Centre, headed up by Shelby Grubbs and supported by the Atlanta International Arbitration Society ("ATLAS"). That development is the subject of another panel, so I will not address it further. Nonetheless, I would be amiss if I did not stress its importance for international arbitration generally and our region specifically.

Accompanying these developments in the infrastructure of arbitration have been equally important developments in the doctrine. This paper highlights some of the most significant developments in the field, including a rare but important Supreme Court intervention. Topics covered in this paper include (a) judicial review of arbitrator determinations about their jurisdiction; (b) enforcement of arbitral awards vacated in another forum; (c) limitations periods; (d) personal jurisdiction and (e) confidentiality. A recurring theme cutting across several of these topics is the role played by sovereigns and sovereign-owned entities in these disputes.

Judicial Review of Arbitrator's Jurisdictional Determinations

BG Group v. Republic of Argentina represents a rare foray by the Supreme Court into the field of international arbitration.[1] The case was a curious candidate for *certiorari*, for it involved a bilateral investment treaty between the United Kingdom and Argentina which, in its relevant respects, differed from the analogous model treaty used by the United States.[2] Under the UK/Argentina treaty, either

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[*] Associate Dean for Faculty Development and Herman E. Talmadge Chair of Law, University of Georgia School of Law. Thanks to Dean Rebecca H. White for her generous support of my research. Thanks also to Maggie Schaufler for first-class research assistance. This paper was presented at the ICLE in Georgia's 8th Annual Arbitration Institute and is protected by copyright.

[1] 134 S. Ct. 1198 (2014). Prior instances include its decisions in *Scherck v. Alberto-Culver Co.,* 417 U.S. 506 (1974), *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

[2] Bilateral investment treaties (or "BITs") are agreements between states designed to encourage investment (particularly from capital-exporting states into capital-importing states). They do so by

party could submit a dispute to the "competent tribunal" of the contracting state in whose territory investment was made; arbitration became an option either after eighteen months elapsed or where a dispute remained between the parties even following the tribunal's decision.

After a dispute arose between a British investor and the Argentinian government, the investor commenced arbitration pursuant to the treaty in Washington, D.C. (the situs of the International Centre for Investment Dispute). Though Argentina alleged that the investor had failed to comply with the provision granting Argentinian courts initial competence over any dispute, the tribunal found that Argentina had waived that argument through conduct effectively excusing the investor from its obligation to comply with that provision. On the merits, the tribunal found that Argentina had failed to accord the investor "fair and equitable" treatment and awarded it $185 million.

The parties filed cross-motions to confirm and to vacate the award in federal court in the District of Columbia. The district court granted the investor's petition to confirm, but the D.C. Circuit reversed. In relevant part, it found that the application of the treaty's local litigation requirement was a matter for the court to decide *de novo* and that, under that standard, the investor failed to comply with that requirement. Accordingly, the D.C. Circuit vacated the award.

In a 7-2 decision, the Supreme Court reversed. Disagreeing with the D.C. Circuit's major premise, the Court reasoned that compliance with the treaty's local litigation requirement was presumptively a matter for the arbitrators, not the court. Critically, the court reasoned, the requirement was not a condition precedent to "consent" but, merely, a condition precedent to the commencement of arbitration. The Court analogized the treaty's local litigation requirement to similar "precondition" requirements in ordinary contracts (such as a requirement that the contracting parties mediate the dispute before commencing arbitration). In the Court's review, compliance with such requirements in commercial contracts was, at least initially, a matter for the arbitrator, and that reviewing courts should defer to the arbitrator's determination. Under this deferential standard, the majority found

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offering investors from signatory states certain guarantees such as protection against expropriation and equitable treatment (compared to domestic investors). To buttress these guarantees, BITs accord investors the right to commence arbitration against signatory states for violation of the treaty's provision (in contrast to the earlier espousal system under which investors had to depend on action by their home state to pursue a claim on their behalf through the International Court of Justice or through diplomatic channels). For a background, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 191-2 (2d ed. 2001).

that the tribunal's jurisdictional determination (based upon Argentina's conduct) was not unreasonable.

The doctrinal impact of *BG Group* is deceptive. On its surface, the impact seems quite minimal – the Court simply chided the D.C. Circuit for overstepping its role in reviewing an arbitrator's interpretation of a treaty between two foreign countries. Yet that surface interpretation masks two potentially deeper consequences to the decision. First, the decision forms part of a larger trend of the Court's rejection of the Executive Branch position in foreign relations cases.[3] In *BG Group*, the Solicitor General had urged the Court to resolve the case on the basis of principles unique to investment treaties; the Court declined that invitation. Second, and relatedly, the Court's reasoning carries implications for the allocation of authority between courts and arbitrators in other contexts like commercial arbitration. Its decision signals a greater deference to arbitrators' rulings even on gateway jurisdictional matters (such as a med-arb clause) where the arbitrator's authority is conditioned on some prior interaction between the parties.

Enforcement of Arbitral Awards Vacated in Another Forum

The major commercial arbitration conventions to which the United States is a party (the New York Convention and Panama Convention) both specify that an arbitral award may be refused enforcement when it has been set aside by a competent tribunal of the country in which the award was made.[4] A paradigmatic situation in which these provisions might come into play is when the award is vacated by the courts of the arbitral forum, but the award creditor (i.e., the prevailing party in the arbitration) seeks to enforce the award in a third country where the award debtor has assets.

While commentators have spilled a great deal of ink on the matter, the issue has arisen infrequently in United States Courts.[5] Following an early pro-enforcement decision by a federal court in the District of Columbia, the trend in

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[3] Ingrid Wuerth, *The Bond Case, Statutory Interpretation, and the Executive Branch*, LAWFARE (June 8, 2014, 2:58 PM), http://lawfareblog.com.

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article V(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter "the New York Convention"]; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 248, [hereinafter "the Panama Convention"].

[5] Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, INT'L ARB. REP. 12, no. 4 (1997); Gary H. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards—Chromalloy Revisited*, J. INT'L ARB. 14, no. 3 (1997); Albert Jan van den Berg, *An Overview of the New York Convention of 1958*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (June 6, 2008), *available at*: http://www.arbitration-icca.org.

federal jurisprudence had tilted against enforcing such awards (notwithstanding the more liberal approach taken in other countries, like France).[6]

Against this backdrop, the district court in *Corporcaion Mexicana de Mantenimiento Integral, S. De R.L. de C.V. v. Pemex-Exploracion Y Produccion ("COMMISA"*) enforced an award that had been set aside by the courts of Mexico, where the arbitration had taken place.[7] *COMMISA* involved a joint venture between a subsidiary of Mexico's state-owned petroleum industry and a Mexican subsidiary of KBR, Inc. in the United States, to build and install offshore natural gas platforms in the Gulf of Mexico. After a dispute arose, COMMISA commenced arbitration in Mexico against the Pemex subsidiary, and the tribunal found in its favor. The PeMex subsidiary then successfully persuaded Mexico's own courts to set aside the award on the ground that the actions should have been brought before a state tribunal.

COMMISA then sought to enforce the annulled award in New York, and the district court granted its petition. Distinguishing a prior Second Circuit opinion that had taken a more crabbed view on the enforceability of annulled awards, the district court emphasized two unique facts of the case: first, the Mexican courts annulled the award based on the retroactive application of a Mexican law, which called into doubt whether the KBR subsidiary was receiving due process; second, the effect of the Mexican courts' decision was to leave the KBR subsidiary without a meaningful remedy, since the limitations period before the state tribunal had lapsed.

The district court's decision in *COMMISA* has sparked a great deal of interest in the arbitration community because it represents a potential turning of the tide in American jurisprudence over the enforcement of an annulled arbitration award. Yet a subsequent decision by another federal judge in the same district – refusing to enforce an annulled award – leaves open questions about just how far the tide is turning.[8] To be sure, the two decisions can be reconciled, and oral argument is expected in the *COMMISA* case later this year. The Second Circuit's decision is bound to offer an important signal about whether the trend set by the district court in *COMMISA* will take firmer root and, if so, how far that trend will sweep.

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[6] *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907 (1996); *Baker Marine, Ltd. v. Chevron, Ltd.,* 191 F.3d 194 (1999); *Spier v. Calzaturificio Tecnica*, 71 F.Supp.2d 279 (1999); and *TMR Energy Ltd v. State Property Fund of Ukraine*, 411 F.3d 296 (2005).

[7] 962 F.Supp.2d 642 (S.D.N.Y. 2013). Here, I should disclose that I advised a third-party as *amicus curiae* in this matter.

[8] *See Thai-Lao Lignite (Thailand) Co., Ltd. & Hongsa Lignite (Lao Pdr) Co., Ltd., v. Government of the Lao People's Democratic Republic*, 2014 WL 476239 (S.D.N.Y. Feb. 9, 2014).

Limitations Period

Like most actions, an action to enforce an arbitral award is subject to a limitations period. Where the arbitral award falls under an international convention, that period is three years.[9] Yet lawyers are well familiar with the fact that obtaining satisfaction of a judgment can take far longer, particularly if the judgment debtor is located abroad. So what happens when the award creditor seeks to satisfy the award in the United States after the limitations period has run?

That was the central issue in *Commissions Import S.A. v. Republic of Congo*.[10] The underlying facts were simple. Commissions entered into a contract with the Republic of Congo to perform public works and to supply materials. When Congo did not pay, Commissions commenced arbitration before an ICC panel in Paris pursuant to the arbitration clause in the contract. The tribunal found in favor of Commissions, which then sought, unsuccessfully, to enforce the award in various countries, including Belgium, Sweden, and England, where Congo was believed to have assets.

By the time Commissions sought satisfaction in the United States, more than three years had passed since the award had been rendered. Thus, Congo had a plausible argument that the enforcement action was untimely. But Commissions did not rely on the award; instead, it sought enforcement of the English judgment enforcing the award. According to Commissions, the applicable limitations period was not three years (under the New York Convention) but, instead, fifteen years (the limitations period under the District of Columbia statute governing the enforcement of foreign judgments).

The D.C. Circuit agreed. Reversing an adverse ruling by the district court (and endorsing the position of the United States, which had appeared as an *amicus curiae*), it held that the longer limitations period governed even though the underlying judgment that Commissions sought to enforce was a confirmed arbitral award. The court rejected Congo's argument that the three-year limitations period set forth in the New York Convention's implementing legislation preempted the

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[9] 9 U.S.C. §207 (2012). For international arbitral awards not falling under a convention (as well as for domestic arbitral award), the analogous limitations period is one year. *See* 9 U.S.C. §9 (2012).

[10] No. 13-7004, 2014 WL 3377337 (D.C. Cir. July 11, 2014).

limitations period set forth in state judgment enforcement statutes (at least where the underlying judgment concerned an arbitration award). In so holding, the D.C. Circuit aligned itself with the Second Circuit, the only other federal court of appeals to have considered the issue.[11]

The D.C. Circuit's decision provides an important arrow in the quiver of award creditors. It reduces the need to seek immediate enforcement in the United States if strategic considerations favor first seeking enforcement elsewhere. Moreover, it tolerates a degree of forum shopping within the United States, allowing award creditors to exploit different limitations period among state foreign judgment enforcement statutes to the extent particular states might provide especially favorable forums for enforcement.

Personal Jurisdiction

Lawyers familiar with the multilateral conventions governing the enforcement of foreign arbitral awards will know that Article V sets forth seven defenses against enforcement such as an invalid agreement, lack of notice, a non-arbitrable dispute and an award contrary to public policy. Noticeably lacking from this seemingly "exclusive" list of defenses are more common ones found in most civil actions such as lack of personal jurisdiction or improper venue.

Despite the lack of reference in the treaty, a number of federal courts, especially the Second Circuit, have held that enforcement actions are subject to certain such defenses.[12] While commentators have criticized this jurisprudential trend, the Second Circuit, with rare exception, has shown little interest in retreating from this trend.[13]

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[11] *See Seetransport Wking Trader Schiffahrtsgesellschaft mbH & Co. Kommanditgesellschaft v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994); *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973).

[12] *In the Matter of the Arbitration between Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002); *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) *Telecordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172 (3d Cir. 2006); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208 (4th Cir. 2002); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002).

[13] *Figueiredo*, 665 F.3d at 397 (Lynch dissenting).

Its recent decision in *Sonera Holdings B.V. v. Cukurova Holding* reflects this view.[14] *Sonera* involved a dispute between a Dutch holding company (Sonera) and a Turkish joint stock corporation (Cukurova). An arbitral tribunal sitting in Switzerland rendered a $932 million award in favor of Sonera, which sought enforcement throughout the world, including in New York. Cukurova moved to dismiss Sonera's enforcement action on the ground, among others, that the federal court lacked personal jurisdiction. In response, Sonera predicated its claim of general jurisdiction (that is jurisdiction unrelated to its underlying claims) on various contacts, including (1) negotiations by Cukurova (or its affiliates) to sell an interest in a television broadcaster; (2) Cukurova's sale of American Depository Shares; (3) provision of television content by a Cukurova affiliate, (4) use of a New York office by two other Cukurova affiliates and (5) statements on a website by a Cukurova affiliate.

While the district court held that it had personal jurisdiction over Cukurova, the Second Circuit reversed. Central to its holding was the Supreme Court's recent decision in *DaimlerChrysler AG v. Bauman*.[15] Rendered after the district court's decision in this case, *Bauman* continued the Supreme Court's trend of sharply limiting those forums where general jurisdiction would lie. In the Court's terms, such forums included only places where the corporation was "essentially at home" – the quintessential forums being the state of incorporation and the state of the principal place of business. Consequently, even assuming that its affiliates' New York contacts could be attributed to Cukurova, the company nonetheless was not "essentially at home" in New York and, thus, not subject to general jurisdiction there. Accordingly, Sonera's enforcement action should be dismissed.[16]

Sonera was likely a correct decision under settled Second Circuit precedent, particularly in light of the intervening decision in *Bauman*. Nonetheless, it cannot be doubted that this continuing trend of non-Convention defenses, particularly in light of *Bauman*, complicates the enforcement of foreign arbitral awards in the United States and damages, to some degree, the United States' reputation as a forum hospitable to international arbitration. (By contrast, most other nations are not as receptive to these sorts of defenses). At least some defenses (like lack of

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14 750 F.3d 221 (2d Cir. 2014) (per curiam).

15 134 S. Ct. 746 (2014).

16 The Court also rejected Sonera's claim that an entry of judgment provision in a separate letter agreement between Cukurova and Sonera constituted a waiver of any personal jurisdiction defense. 750 F.3d at 226-27.

personal jurisdiction) must coexist along Article V of the New York Convention, but it is critical that the bar and bench develop a coherent framework for evaluating these defenses in the context of an international enforcement action so as not to inflict undue damage on that reputation.[17]

Confidentiality

Apologists for international arbitration routinely stress confidentiality as one of its great advantages over civil litigation.[18] For some parties, this advantage undoubtedly is salient. Yet the legal framework actually conferring confidentiality (and defining its scope) is far more complex than simple advocacy pieces would suggest. This is certainly the case in the United States, where the Federal Arbitration Act (and many analogous state laws) are devoid of any express grant of confidentiality.

Against this backdrop, the recent decision in *Veleron Holdings B.V. v. Morgan Stanley* serves as a sobering reminder that arbitration proceedings may not be as confidential as the parties think.[19] The facts and procedural history are rather complex, so here it may be helpful to begin by cutting to the chase: documents produced in an arbitration and an arbitration award may not enjoy the benefit of confidentiality – even where the arbitral rules so specify – when they are required to be produced pursuant to seasonable discovery in a separate civil litigation in the United States.

At bottom, *Veleron* concerns an investment deal that went sour during the financial meltdown in the Fall of 2008. Initially, that soured investment led to an arbitration between a Russian entity and a French bank pursuant to the rules of the London Court of International Arbitration (which has one of the toughest confidentiality provisions among the international arbitral rules of the major institutions). During that arbitration, the French bank disclosed certain documents to its Russian opponent, which promptly passed those documents onto its corporate

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17 *See* Peter B. Rutledge, *Forum Shopping in International Arbitration: Forum Non Conveniens and Lack of Personal Jurisdiction*, in Forum Shopping in the International Arbitration Context, Franco Ferrari (ed.), (Seiler 2013)

18 ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 27 (4th ed., Sweet & Maxwell 2004) (1986) (citing Expert Report of Stephen Bond, *Esso/BHP v. Plowman*, (1995) 11 Arb. Int'l No. 8, at 273).

19 No. 12 Civ. 5966 (CM), 2014 WL 1569610 (S.D.N.Y. Apr. 2, 2014).

affiliate (Veleron), which was not a party to the arbitration. The arbitrator later rendered a partial award in the case.

In the meantime, Veleron filed a securities fraud action (arising from the same botched investment) against various Morgan Stanley entities (hereinafter "Morgan Stanley") in federal district court. During that litigation, the French bank was forced to produce documents from the London arbitration, including the partial award. Those documents, especially the partial award, formed the basis for a collateral estoppel motion filed by Morgan Stanley (essentially, Morgan Stanley argued that findings in the award from the London Arbitration precluded Veleron from prevailing on its securities fraud lawsuit in federal court). Meanwhile, Veleron sought to unseal specific portions of the record in the case, including portions of the partial award. Morgan Stanley opposed this motion to unseal, arguing that both the partial award and the other documents disclosed by the French bank in the arbitration, were protected by the LCIA's confidentiality rules. (Though it is not entirely clear from the opinion, it appears that Morgan Stanley feared that disclosures from the arbitration might lead to some unspecified embarrassing revelations about its conduct during the financial meltdown).

It was in the context of Morgan Stanley's opposition to Veleron's motion that the district judge opined on the scope of confidentiality in arbitration, and he showed little sympathy for Morgan Stanley's position. The court began with a resounding reminder about the constitutional interest in public disputes and citation to the recent *Strine* decision, finding unconstitutional the scheme by Delaware's Chancery Court to create private arbitral tribunals consisting of chancellors.[20] The decision is replete with dicta cabining the ability of parties, through private arbitration, from shielding information from the public: "Private agreements cannot be used to circumvent United States' court policy in favor of open litigation, and private parties cannot keep information that is relevant to a lawsuit properly before a United States court out of public view, even that same information is material to a private dispute resolution that is subject to confidentiality."[21] Indeed, the court chided the parties for not going far enough and exclaiming that the case's entire file should be unsealed: "This court, not the LCIA, will decide what stays secret and what is disclosed to the public in a securities fraud litigation in New York."[22]

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20 *Delaware Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 521 (3d Cir. 2013).

21 2014 WL 1569610, at *1.

22 *Id.* at *2.

Despite its blustery rhetoric, though, the decision in *Veleron* is potentially quite narrow. For one thing, the judge *did* keep portions of the partial award under seal and even redacted portions of his opinion out of deference to the LCIA. For another thing, the posture of the case was unusual – one party had benefited from its corporate affiliate's breach of its confidentiality obligation in the London arbitration, and the other party was seeking to preserve the seal on documents from the London arbitration even though it was not even a party to that arbitration. Finally, the LCIA rules make clear that the confidentiality obligation attendant to arbitration can be overridden by a legal duty, such as a duty to disclose in response to a subpoena.[23]

Nonetheless, *Veleron* serves as an important and sobering reminder about international arbitration – namely, despite the general promise of confidentiality and despite the robust confidentiality provisions contained in international arbitration rules, documents from the arbitration (ranging from the award to underlying organic documents produced therein) do not automatically become immune from process in the United States. Reminding clients of this reality is especially important when they hale from countries with less robust discovery systems and, therefore, are more accustomed to preserving the privacy (if not the confidentiality) of their documents.

[23] The London Court of International Arbitration Rules Art. 30.