REPORTS OF THE CONFERENCE RAPPORTEURS[1]

1.

Opening Session

8:30 a.m. – 9:00 a.m., 16 April 2012

Rapporteur: Xavier A. Cunningham, John Marshall Law School

Glenn Hendrix, Partner at Arnall Golden Gregory LLP and President of the Atlanta International Arbitration Society ("AtlAS"), commenced the Society's inaugural conference by welcoming the approximately 190 participants, representing some eighteen countries. The conference in Atlanta, a global business gateway and a ready and able venue for international arbitration, addressed the current law, the practice and procedures of international arbitration, the development of the international commercial arbitration system, and the role of the United States in it.

Bernard ("Ben") Greer, of International Legal Strategies LLC and a member of the Board of Directors of AtlAS, urged the attendees to use the conference as an opportunity to renew friendships, make new ones, and bring together their various communities. He affirmed the importance of the conference by recognizing that the rule of law is essential to economic development and the creation of stable institutions, vital for the protection of human and property rights, and necessary security for trade. For the law to properly serve its purpose it must make sense, and it needs an institutional framework capable of reaffirming its integrity. A

[1] The following Report was prepared by the following law student volunteers: Janene Browder, Mercer University School of Law; Jo. D. Chitlik, Emory University School of Law; Xavier A. Cunningham, John Marshall Law School; Halley Espy, University of Georgia School of Law; Alicia Mack, Georgia State University College of Law; Tim Murray, John Marshall Law School; Sarah Michelle Phaff, Mercer University Law School; Alex Salzillo, Georgia State University College of Law; Anand Shah, Emory University School of Law; Christopher Smith, University of Georgia School of Law; and Chitua Uzoh, Emory University School of Law. The rapporteur project was organized by Dorothy Toth Beasley (Henning Mediation & Arbitration Service, Inc.), Allen I. Hirsch (Arnall Golden Gregory LLP), and Stephen L. Wright (Taylor English Duma LLP), who also compiled and edited the student submissions. The contents of the Report have not been reviewed or approved by the conference speakers or program chairs. The Report solely reflects the work of the foregoing editors and rapporteurs.

goal of the conference, and of the Society, is to contribute to those ends in terms of international commercial arbitration.

Sam Williams, as President of the Metro Atlanta Chamber of Commerce, spoke for the area's global Atlanta business community. Mr. Williams recognized the conference as an incredible accomplishment, a contribution to the goal set by the Atlanta business community in 1957, i.e., to transform Atlanta into a center for international trade. He likened the process to planting a flag in a field and building a mountain around it. A conduit for achieving the goal is the Hartsfield-Jackson International Airport, which over years has been vital in the building of Atlanta's international presence. The new international terminal will open on May 16.

Dorothy Toth Beasley, Senior Judge, Court of Appeals of Georgia (ret.), Mediator and Arbitrator at Henning Mediation & Arbitration Service, Inc., and member of AtlAS's Board of Directors, introduced the Honorable Carol W. Hunstein, Chief Justice of the Supreme Court of Georgia.

Justice Hunstein's remarks addressed the importance of arbitration as a mechanism for resolving disputes and demonstrated Atlanta's extraordinary potential for becoming a global business dispute resolution center, just as it, as a gateway city, is a premier location for international business. Justice Hunstein stated that she and her colleagues on the Georgia Supreme Court "have an immense respect for the work arbitrators undertake." She pointed out that arbitration relieves the courts of trials, reduces the cost and time commitments associated with litigation, often defuses emotions and allows the parties a more productive way forward, sometimes with solutions beyond the ambit of judge or jury.

Chief Justice Hunstein noted that Georgia was one of the first states, in 1988, to adopt major portions of the Model Law on International Commercial Arbitration, which had been adopted in 1985 by the United Nations Commission on International Trade Law. The State's legal and judicial framework is supportive of arbitration, offering a kind of stability that facilitates business growth as well as convenient opportunities for business dispute resolution. In closing, she quoted Justice Anthony M. Kennedy: "The law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist."

2.

Restating the Law of International Commercial Arbitration in the U.S.: Views from Within and Without

9:00-10:00 a.m., 16 April 2012

Rapporteur: Chitua Uzoh, LLM candidate, Emory University School of Law

Moderator: Glenn P. Hendrix, Arnall Golden Gregory LLP, Atlanta.

Panelists:

George A. Bermann, Professor of Law, Columbia University, New York; Chief Reporter, ALI Restatement Third of the U.S. Law of International Commercial Arbitration.

Charles H. "Chip" Brower II, Professor of Law, University of Mississippi School of Law, Oxford, Mississippi.

Jennifer Kirby, Kirby law firm, Paris.

William W. "Rusty" Park, Professor of Law, Boston University School of Law; President, London Court of International Arbitration.

After introductions by Mr. Hendrix, Professor Bermann gave an overview of the Restatement, the Background Methodology and what has been done thus far. The Restatement will deal primarily with the enforcement of an arbitration agreement, the role of courts in the conduct of an ongoing arbitration (e.g., discovery, provisional relief), post award relief and investment arbitration. Tentative Draft No. 2, which is dates this date of April 16, covers Chapter 1 on "Definitions" and Chapter 4 on "Post-Award Relief." The Restatement is not meant to be a

set of arbitral rules but rather a focus on what courts in the United States can and should do when faced with an arbitration agreement, an arbitral proceeding, or an arbitral award.

Idiosyncratic circumstances affect the task of writing the Restatement effectively. These circumstances include:

1. The Federal Arbitration Act (FAA) and its inadequacy:- Enacted in 1925 before recognition of international arbitration, the Act has not been amended substantially except for incorporating the New York and Panama conventions. The FAA does not deal adequately with two types of international awards, those rendered abroad by parties who are not party to the New York Convention and awards international by nature but not foreign because they are rendered in the United States.

2. Procedural aspects of American law: - Several procedural aspects of American law not intrinsic to international arbitration nevertheless are manifest in arbitration and create inconsistencies with other countries' understanding of the New York Convention, e.g., whether the term "recognition" as defined in the New York Convention incorporates collateral estoppel.

3. Federalism: Few countries other than the United States have given states the power to legislate with the degree of independence (subject to pre-emption) in the field of international commercial arbitration (ICA). In the U.S. a state legislature or court can establish a ground rule on the conduct of ICA (international commercial arbitration) that is original to it. Other countries such as Switzerland regulate ICA exclusively at the national level. In addition there is a debate about whether there is such a thing as *state* public policy within the meaning of public policy as used in the international convention that would justify the non-recognition or non-enforcement of an award even if there was no national prohibiting public policy.

The Restatement project efforts are driven by the need to keep an eye on whether arbitration in the United States is developing in such a way that it retains fidelity to the principles of consent, on which arbitration rests.

The next presenter was Charles Brower II. He spoke about the consequences of the failure to adopt an explicit standard for managing the challenge posed by a United States Restatement on an international topic:

Mr. Brower pointed to American Law Institute (ALI) practice in the context of two restatements on the law of foreign relations and reviewed the current restatement's departure from best practices as well as the likely benefit of adopting a drafting standard at the earliest possible stage. He illustrated how the preparation of the Restatement First and the Restatement Second inordinately consumed several years because no drafting standards were used. He opined that the Restatement on ICA shows signs of weakness with respect to focus and suffers from lack of drafting standards, which are essential because:

1. As an organization dedicated to clarification and improvement of the law, the ALI should be able to adopt an official position on the challenge facing one of its most eagerly awaited projects;
2. Standards can affect the public perception of drafting choices on controversial problems and policies; and
3. Standards can affect how courts ultimately receive the Restatement and how the debates are structured within the ALI.

An example of the effect of not having standards is the issue of interim awards. The ALI has expressed several views in its Council preliminary drafts, from the position that an interim measure may constitute an award, to a position that it does not constitute an award, to a position that it must constitute an award, to the position that it presumptively constitutes a

partial award. This is problematic as consensus has not been reached. Drafting standards force retreat from personal preferences as a starting point for every topic so that debates can reach an equilibrium with fewer twists and turns. Such standards are necessary in order to complete a Restatement expeditiously in the next few years.

The primary issue is whether a drafting standard is feasible for this Restatement. One view is that ALI would not want Reporters to have an *a priori* view as suggested above and that the current non-dogmatic approach in the work on the project is appropriate, allowing the Reporter to navigate, listen and change course but not take mandates or directives from special interests. In an international environment which has created expectations not contemplated by the FAA, it would be unrealistic, compared to the environment for the Restatement of Foreign Relations Law, to expect a fixed philosophy *a priori* as to how every issue will be dealt with.

The third panelist was William Park, who addressed standards for review in award vacatur or annulment actions:

Many countries have adopted a less intrusive standard for international arbitration proceedings than the one applied in U. S. domestic arbitration. In most countries which have this bifurcated approach there would be two standards for vacatur. In the United States the FAA contains one standard, in Chapter 1, Section 10. The Restatement would give the United States a certain form of bifurcation for vacation of arbitral awards. This would be done by the way they interpret certain provisions of Chapter 2 of the FAA. Currently there are separate standards for vacation of international awards. The mechanism for arriving at this separate standard is:

1. Non-domestic awards must be confirmed under Chapter 2 absent a ground for non-recognition under the New York Convention, which is basically a ground for vacatur. These grounds are much narrower than the grounds in Chapter 1, governing arbitrations conducted in the United States.

2. The Restatement imports from Chapter 1 of the FAA a right to vacatur of an award if it is rendered in the United States but only imports the grounds of the relief. The vacatur standards would come from the New York Convention because Section 208 of the FAA provides that Chapter 1 applies to Chapter 2 awards unless inconsistent. Although vacatur as a form of relief can be incorporated since Chapter 2 does not provide for vacatur, the grounds for vacatur cannot be incorporated because it would be inconsistent with the New York Convention. However, the Second, Third, and Sixth Circuits, but not the Eleventh, take the position that Chapter 1, Section 10 applies to all arbitrations in the United States. The ALI Restatement need not take this position, although it is a point to consider.

The final panelist was Jennifer Kirby, who gave comments on the proposed Restatement from the outsider's perspective:

The United States is generally viewed as an arbitration-friendly jurisdiction because, unlike many countries, it has a sophisticated legal community dedicated to international arbitration, it has courts that are supportive of international arbitration and it has an independent and supportive arbitral institution. However, even the United States is not viewed by outsiders as a user-friendly jurisdiction for international arbitration. U.S. laws on international arbitration are often considered difficult to understand or even to find. This is unfavorable because it could discourage foreign parties from seating their arbitration in the U.S. The Restatement project seeks to solve this problem by pulling together the law on arbitration and restating it in a form far more acceptable and easier to understand. France and Switzerland, civil law countries, are the most popular arbitration countries; the arbitration law is set forth in their codes and is easy to access. In addition, simply restating the law on international arbitration will not make the United States as arbitration-friendly as Paris, for instance, because unlike the United States, the French international arbitration regime is very simple, straightforward, well settled and cost effective for the following reasons:

1. An arbitrator has the power to rule on the issue of jurisdiction and the French court will demur;

2. There is a specialized judge with expertise in international arbitration dedicated to help parties in constituting their arbitral tribunal when they need assistance ; and

3. A party is unlikely to incur the cost to set aside, since such applications go before a panel of judges expert in international arbitration and notoriously hostile to such applications.

In contrast, the United States is not as simple and straightforward. Having both federal and state law on international arbitration makes it less than obvious to outsiders what law applies, there are no specialized judges dedicated to deal with international arbitration, and there are varying decisions among the circuits in their interpretation or application of the FAA.

Although the Restatement project cannot solve all these concerns. The Restatement can highlight the areas where U.S. law can potentially evolve to be more user-friendly, and it can point the way forward. This will help guide the future development of international arbitration law and aid both outsiders and insiders.

Issue: Are civil law countries better in international arbitration than common law countries?

Mr. Park addressed this. While conceding that French international arbitration law is great, he stated that other factors, such as the ambience of the city, cause people to select Paris for arbitration. It is not necessarily selected because France is a civil law country as opposed to a common law country. Other factors taken into consideration are logistics, such as availability of visas for arbitrators, stability of the government, predictability of the judicial system, etc.

3.

The Federal Arbitration Act: In Need of a Tune-up

or Better Left Alone?

11:00-12:30 a.m., 15 April 2012

Rapporteur: Sarah Michelle Phaff, 2L, Mercer University Law School

Moderator: Douglas H. Yarn, Professor of Law, Georgia State University College of Law, Atlanta.

Panelists: Jack J. Coe, Jr., Professor of Law, Pepperdine Law School, Malibu, California; Associate Reporter. ALI Restatement Third of the U.S. Law of International Commercial Arbitration; William K. Slate, II, President. American Arbitration Association, Washington, D.C.;

Thomas J. Stipanowich, Professor of Law. Pepperdine Law School, Malibu, California;

Edna R. Sussman, Principal. Sussman ADR LLC. New York.

The purpose of the session was to discuss whether or not changes should be made to the Federal Arbitration Act (FAA). The session addressed, among other issues, whether the FAA should be more specifically fleshed out or left as a broad document supplemented by case law and administrative decisions. Also addressed was recent legislation, in particular the Arbitration Fairness Act and the Dodd Frank Act, and their effects on the United States as a choice of forum in the international context.

Each panelist addressed one of four segments, allowing the others to pose questions and responses. Jack Coe discussed the FAA and how it is supplemented by a complex web of state law, case decisions and administrative practices. Using an example that demonstrated the complexity of the FAA, he opined that the complexity may affect the desirability of the United States as a forum for arbitration. Unlike the United Kingdom and other model acts, the FAA does not specifically define or make clear the standards that should be applied in particular

circumstances. Mr. Coe suggested that the FAA needs a new chapter or should be reformed completely using the model law, restatement, case law, and arbitration practices.

Mr. Slate questioned how all these different kinds of law would be consolidated. Mr. Coe acknowledged that there would have to be some carve-outs, especially for employment and consumer cases. Ms. Sussman posited that it is a poor time to accomplish changes to the FAA and raised a concern about the effects such changes could have on domestic arbitration, particularly in the consumer and employment contexts. Mr. Yarn questioned whether the states would then enact their own forms of the FAA and how those would interplay. Ms. Sussman stated that she hoped that if a federal act was created, states would defer to the federal act and would allow it to be peremptory. Lastly, Mr. Coe suggested that party autonomy should be a consideration when designing any new chapter.

William Slate summarized the FAA and the recent political environment surrounding it. He observed that eighteen years ago, in 1994, there was rarely an arbitration case on the dockets in the court systems. However, the number of arbitration cases has steadily increased and there are currently nineteen bills directly addressing arbitration and twenty that indirectly impact it. All are being monitored by the AAA.

Mr. Slate outlined the FAA history and related legislative efforts. In 2002, auto dealership owners sought changes in arbitration. The FAA was not amended, but Title 15 was amended to accommodate these proposed changes. In 2006, small stockyard dealers wanted to eliminate arbitration with mega conglomerates. Again, instead of amending the FAA, the Department of Agriculture addressed issues and created regulations that facilitated this change. In 2007 through 2011, many proposed changes were offered to deal with consumer, employment and franchise arbitrations. There have also been several legislative changes, including the Dodd Frank Act. Mr. Slate concluded, quoting Thomas Aquinas in stating that the laws can be changed but should not be lightly changed.

Thomas Stipanowich discussed problems inherent in the FAA because it lacks a unitary nature. First, he addressed consumer and employment arbitration in the context of the trilogy of strong enforcement of pre-dispute binding arbitration, a green light for delegation clauses, and a green light for class action clauses. Several concerns that are fundamental to consumers and employees include the lack of basic understanding of the FAA, the lack of applicable rules and procedures, the costs and fees, and the nature of the administrative framework. From this backdrop, we have moved forward into an era that includes the Arbitration Fairness Act (AFA), which has an increasingly more restrained approach; selective agency action; the Dodd Frank Act; and due process protocols. Mr. Stipanowich suggested creating a set of community standards that address some of these complicated issues.

The panel addressed the poor drafting of the FAA in comparison to the statutes used by other countries, such as France and Costa Rica. These drafting mistakes make the Act difficult to implement. Also discussed was whether or not there is real justice and fairness in the court system.

Edna Sussman addressed the question of the impact of the FAA on international arbitration. First was predictability. She pointed out that while United States law is pro-arbitration, there are a lot of moving pieces that make it difficult to predict. Also, Congress is unpredictable and this is a concern for those dealing with United States law. Second, fairness is a big concern. A question persists as to whether there is actually real justice in our court system. Third, she addressed the effort for dispute resolution in UNCITRAL to resolve business-to-business and business-to-consumer disputes, pointing out that this is a great tool to encourage microfinance and development in third world countries. Lastly, Ms. Sussman discussed the effect of the New York Convention and AFA. One of the problems is that the AFA is constantly being changed. She asserted that the best solution to all of the problems is to reach a decision and follow it, making the process a lot simpler. Another solution suggested was to conduct a

survey to help gather information regarding necessary changes. Mr. Stipanowich urged that as many people as possible should contribute to such a survey so as to provide appropriate data on which to base necessary changes.

4.

Manifest Disregard of the Law:

Truly a Sword of Damocles Hanging Over Arbitration in the U.S.?

2:00 – 3:30 p.m., 16 April 2012

Rapporteur: Tim Murray, John Marshall Law School

Moderator: Shelby R. Grubbs, Miller & Martin PLLC, of Atlanta.

Panelists: Christopher R. Drahozal, Professor of Law, University of Kansas Law School, Lawrence, Kansas; Associate Reporter, ALI Restatement Third of the U.S. Law of International Commercial Arbitration;

Lorraine M. Brennan, Managing Director, JAMS International, London;

The Honorable Stanley F. Birch, JAMS; Judge, 11th Circuit U.S. Court of Appeals (ret.), Atlanta;

Marielle Koppenol-Laforce, Houthoff-Buruma, Rotterdam; Professor of International Commercial Contracting, Leiden University, Leiden.

Shelby Grubbs set the structure of the session by creating a hypothetical situation in which international parties have worked out their contract and are just finalizing the arbitration agreement. One hypothetical party was concerned that an arbitration award could be subject to vacatur if a judge held that the arbitrator "manifestly disregarded the law." Mr. Grubbs sought guidance from the panel on the issue.

Christopher Drahozal responded with, first, a brief history of manifest disregard of the law as a ground to vacate an award, starting with the 1950s decision in *Wilko v. Swan,* in which an award was vacated based on the arbitrator's manifest disregard of what the court deemed the appropriate law. Mr. Drahozal traced the doctrine through the recent Supreme Court's decisions in *Hall St. v. Mattel* and *Stolt Nielson v. Animal Feeds.*

He stressed that the doctrine has been very rarely used by courts since *Wilko v. Swan*. *Hall St.* held that parties cannot expand on the Federal Arbitration Act's (FAA) narrow grounds

for reviewing an arbitration award. He pointed out that manifest disregard of the law is not one of the enumerated grounds for review in the FAA and explained that, although the doctrine is present in the Georgia arbitration statute, preemption of federal law may be an issue. He stressed that nowhere is the manifest disregard doctrine explained, but it may very well be another way of saying that the arbitrator exceeded his/her authority, a ground for vacatur under the FAA. He explained, however, that the limit of the arbitrator's authority would have to be defined in order to demonstrate that the limit was exceeded.

Mr. Drahozal's conclusion was, at least in part, that while the doctrine is ill-defined and may have survived the Supreme Court's decision in *Hall St.,* both the New York Convention and the Restatement agree that manifest disregard of the law is not a reason to vacate an arbitration award.

Lorraine Brennan addressed Mr. Grubbs' hypothetical client's concerns about the doctrine. She explained how the different circuits in the U.S. had interpreted the 2007 decision in *Hall St*. regarding it. Four circuits (Fifth, Seventh, Eighth and notably the Eleventh) hold that manifest disregard of the law is not a reason to vacate the award. Four circuits are undecided on the issue (First, Third, Tenth, and DC) and the remaining four circuits (Second, Fourth, Sixth, and Ninth) still recognize some form of manifest disregard of the law as grounds to vacate an arbitration award. Of the four, the Second and Ninth recognize the doctrine as merely a "judicial gloss" on the enumerated reasons for vacatur under the FAA. See FAA, Sections 10(a)3 and 10(a)4.

Ms. Brennan stated the test for applying the doctrine if it exists: 1) the law must be well defined; 2) the arbitrator must know the law; and 3) the arbitrator must disregard the law. She found this situation to far exceed the narrow exceptions in Sections 10(a)3 and 10(a)4. She explained that the Fourth Circuit acknowledges the doctrine but is not clear whether it is an independent ground or merely a gloss on the enumerated reasons from the FAA. Ms. Brennan

talked about the Sixth Circuit's *Coffee Brewing* case and noted that it was the only circuit to hold that manifest disregard exists in certainty as an independent ground to vacate an award.

Her conclusion was that the doctrine was not a sword of Damocles but acknowledged a lack of clarity or uniformity. Her advice to the hypothetical party was to stay away from the Second, Fourth, Sixth and Ninth Circuits and probably the undecided circuits.

Judge Stanley Birch did the most to put at ease anyone in the hypothetical party's situation. He convincingly expressed that courts (including the undecided circuits) were tending to favor abandoning "manifest disregard of the law."

Judge Birch walked the audience step by step through decisions from the Fifth, Seventh, Eight, and Eleventh Circuits to the effect that after *Hall St.*, only the enumerated grounds under FAA Section 10 could be used to vacate an arbitration award. He made it very clear that these enumerated grounds in the referenced opinions did not include manifest disregard of the law. Judge Birch pointed out that the Third and Tenth Circuits have stated that after *Hall St.*, manifest disregard of the law can no longer be used as a reason to vacate.

Marielle Koppenol-Laforce stated that "manifest disregard" is not a term of art outside the U.S. She explained that internationally there are other ways that arbitration awards may be overturned for irregularities in the arbitrator's behavior. Ms. Koppenol-Laforce pointed out that a public policy defense, rarely used in the U.S., is used in other countries to vacate awards, and could be the functional equivalent of manifest disregard of the law.

She presented various approaches to reviewing arbitration awards by courts around the world, explaining which courts had limited review and which had broader review. The U.S. was in both categories with a question mark, reflecting the lack of clarity of the acceptance of the manifest disregard doctrine. She described specific international cases in which arbitration awards were overturned as contrary to public policy in the same manner as courts in the U.S. had overturned awards based on manifest disregard. This is a strong argument that in other countries "public policy" is the functional equivalent of the U.S. manifest disregard doctrine.

Whether parties can contract to limit grounds for review of arbitration awards is a hotly debated issue worldwide. Ms. Koppenol-Laforce said that in many European countries, parties may exclude judicial review of rewards.

In response to questions from Mr. Grubbs and the audience, Mr. Drahozal explained that much of the confusion regarding the issue was based on the shift in application of the FAA from just commercial transactions to consumer and employment disputes. He cited *Gilmer v. Johnson Lane*, a case that allowed for arbitration of a statutorily protected right; the court suggested that the forum was acceptable because the award could be reviewed. He felt it was possible the Court was thinking about manifest disregard and its availability for review of any award.

A question was raised whether one could contract around manifest disregard of the law as a ground to review an award. *Hall St.* held that a party could not expand grounds for judicial review. This question was whether parties could further limit grounds for judicial review. The response generally was that grounds to vacate an award are a floor and the right to review belongs to the court. Judge Birch commented that a judge would disfavor an effort to contract around a judge's right to review a case.

The session closed with more comfort for potential arbitrators in Atlanta as the panel responded to a question regarding frivolous claims of manifest disregard of the law by parties trying to get awards reviewed. The panel stated that there was no review of the facts of the cases in these situations and that courts, in particular the Eleventh Circuit, have warned people against bringing these issues frivolously.

The session left the listeners feeling that the manifest disregard of the law doctrine is far from a sword of Damocles hanging over the head of arbitrations in the U.S. The panel expressed how rarely and how narrowly the doctrine is successfully applied but that there are similar doctrines used to the same effect throughout the world.

5.

Changing the Cost and Time Dynamic in International Arbitration: The View From the User Community

4:00 – 5:00 p.m., 16 April 2012

Rapporteur: Alicia Mack, 2L, Georgia State University College of Law

Moderator: Philip "Whit" Engle, Vice President, General Counsel & Secretary, Prenova, Inc., Atlanta.

Panelists: F. Ramsey Coates, Senior Vice-President and General Counsel (ret.), Westinghouse, Monroeville, Pennsylvania.

Jeffrey P. Elkinson, President, Chartered Institute of Arbitrators; Conyers Dill & Pearman, Bermuda.

John W. Hinchey, JAMS, Atlanta.

Anthony C. "Tony" Walsh, Senior Litigation Counsel, GE Energy, Atlanta.

The user community refers to the businesses that engage in arbitration. The panel discussed the negatives of arbitration from the perspective of business and identified the 'control areas' where users have the ability to minimize those negatives.

NEGATIVES OF ARBITRATION

A recurring topic was the cost and length of arbitration proceedings. What is desired in arbitration is a resolution that is quicker and less costly than litigation. In exchange for these benefits, users lose the security of a decision based on the law and appellate review available in traditional litigation. As cost and time increase, arbitration becomes a less attractive option, especially in light of the finality of the procedure.

Costs

There are issues with both the predictability and the amount of costs. First, upfront costs are high, including travel, living expenses, arbitrator and organization fees and discovery and other evidence-based costs, such as witnesses. While costs vary greatly from one dispute to another, a huge contributor to cost is the extent of discovery allowed. As such, one would

expect arbitrations rendered in common law jurisdictions to be more expensive than in civil law states. One study, however, suggested the opposite, at least when comparing the United Kingdom to continental Europe. The study featured over 250 arbitrations from November of 2010 to June of 2011. The costs in continental Europe were higher by at least 10% with respect to fees for arbitrators, fees for the commencement of arbitration and the overall costs of the proceeding. The panel was skeptical, citing experience in British arbitration as well as the general logic that common law states allow broader discovery.

Time

The panel noted the great difficulty with managing the length of arbitrations for several reasons. First, while a speedy process is ideal at the outset, one party usually stands to gain from delays. That party will pursue all means available to delay or prevent the issuance of a huge, narrowly reviewable award against it. Second, arbitrators are not always skilled at time management. Some arbitrators are hesitant to quash disputes between parties regarding time. One panel member noted an experience in which the arbitration proceedings lasted several weeks and included substantial discovery and debate, only to result in an award stating that the arbitral panel was convinced early in the process by the motion to dismiss and declaring all the factual points made during those weeks moot. Arbitrators who allow the parties to "have their say" on matters, when the panel has essentially made its decision, waste time and money of the parties. Finally, the expedited procedure is not always desirable. While attractive on the front end, disputes cannot be predicted. The nature of the eventual conflict may be such that a quick procedure hurts the client.

Expedited procedures inherently favor the complaining party, who has unlimited time to build its position, while the defendant is subject to strict deadlines. A panelist suggested using expedited procedures only where mediation or senior level negotiations have occurred, so that defendants are not caught off guard.

Predictability

Predictability is important in the international business context where huge amounts of money are on the table and review is quite limited. The predictability of arbitration is difficult as arbitrators are allowed broad discretion in their decision-making.

CONTROL POINTS

The Arbitration Agreement

The arbitration agreement is a place where business can exercise control over the time, cost and predictability of arbitral proceedings. For example, costs can be lowered by explicitly stating that each side bears its own costs and by choosing an economically smart venue. Time concerns may be addressed by providing for expedited procedures. Another way to address these problems is via an escalating conflict resolution clause. One panelist advocated a multi-tiered approach to conflict resolution, especially where time is of the essence.

Using the construction of a Hong Kong airport as the model situation because the underlying business deal involved several contractors, several contracts, and several deadlines, a multi-tiered system consisting of mediation, then a temporary resolution by a neutral, followed by arbitration if needed was suggested. The temporary resolution enabled the parties to resume their contractual commitments, allowing the overall business deal to move forward, while leaving open the option of arbitration *after* the job was done.

Even in simpler dealings, developing deliberate arbitration clauses tailored to the client and to the transaction are desirable. While the panel viewed such detailed conflict resolution clauses positively, some had concerns about the feasibility in practice of creating such provisions. After spending considerable negotiation hours on major details of the underlying agreement, lengthy negotiations over a complex arbitration clause are not practicable. In practice, the risk of actually needing to arbitrate a dispute is so low (one panelist estimated 10%) that counsel and their clients don't see the value in protracted arbitration discussions. Time is better served by putting those negotiation hours into other parts of the contract.

Venue/Choice of Law

While venue may be fixed in the contract or post-dispute, it is always an important area of control. As mentioned above, venue has an effect on the costs of the proceedings. Both parties have an interest in avoiding "home cooking," so a neutral venue is necessary. In addition, venue determines the court system parties will deal with in the event court assistance is sought. The court practices of a given location, both written and unwritten, should be analyzed before fixing venue. The choice of law is important for obvious reasons. One panelist suggested how nice it would be if there was a standard law provision for international proceedings, as there is for domestic matters.

Venue/choice of law will have a profound effect on discovery, as common law states allow much broader discovery. The venue should also be judged with an eye toward confirmation of the eventual award. Again, both written and customary law should be examined. In some countries, it may be easier to get an arbitration award confirmed than a foreign judicial award. At times, the nature of and parties to the contract dictate these decisions. For example, when contracting with a government, the sovereign entity is not amenable to alternative locations. The venue in such contracts will be that country, period.

Choosing the Arbitrator

The selection of arbitrators is another area where the user can exert some control over common issues, especially predictability. Arbitrators affect the pace of the proceedings and often the depth of discovery, thereby having an immense impact on costs. In addition, the ruling of an arbitral panel is final in almost all cases, even where facts and/or law are misstated. Therefore, the selection of a competent arbitrator is arguably the most important control point. Factors to consider included the relative expertise in a given area, reputation, weakness with respect to subject matter or procedure and whether a given arbitrator will get along well with the arbitrator picked by the other side. It was suggested that surveying fellow attorneys at your place of business to get information about your top 5 choices is desirable.

Choosing Outside Counsel

The user also exerts control in the selection of outside litigation counsel. Like the choice of the arbitrator(s), a number of factors are relevant to the choice of outside counsel. Many businesses maintain consistent relationships with outside counsel, so that the decision is often made more quickly than the choice of arbitrator. At some fundamental level outside counsel's interests may be adverse to the client. As the panel noted, litigators in pursuit of winning may desire more time and/or discovery than one more business minded. Where the business may be willing to have an issue settled with only 90% of the relevant information, a litigation trained attorney will want 100%.

6.

Keynote Address

8:30 – 9:00 a.m., 17 April 2012

Rapporteur: Alex Salzillo, 2L, Georgia State University College of Law

Judith Gill, an experienced and accomplished advocate and neutral, leader of Allen & Overy's international arbitration group, Director of the LCIA, Member of the ICC UK arbitration group, Director of the AAA, and a Director of the Singapore International Arbitration Centre, was the keynote speaker for the conference.

Ms. Gill took the theme of the conference (Is the US a trendsetter? Outlier? One in the Crowd?) and the questions it posed as the guide for her address. Noting that comment on the role of the United States in international arbitration was a presumptuous undertaking for a UK lawyer, she related her extensive experience dealing with US lawyers and arbitrators throughout her career. Ms. Gill both challenged and praised the role of the US by providing "development points" rather than criticisms in her address.

She first acknowledged that the United States is one among a handful of jurisdictions perceived as a global center, noting that US courts' attitudes as well as legislation towards arbitration is seen as generally positive, particularly in light of the FAA. With most financial disputes going to New York, oil and gas disputes going to Houston, Latin disputes going to

Miami, and investment disputes (ICSID) going to Washington, D.C., the US is a major international site for arbitration and continues to be a viable option as the seat for any number of international arbitration proceedings.

Some of the advantages that international practitioners perceive the United States as possessing are that its judicial system is seen as being free from corruption, the arbitration regime permits little to no interference in the proceedings, it is a party to the New York Convention, there is a strong presumption in the courts favoring enforcement of awards, and the US is not seen as a jurisdiction where enforcement is likely to be subject to extreme local vagaries. In addition to these advantages, the United States is easily accessible from across the world as Atlanta has the world's busiest airport, and the United States already boasts strong facilities and infrastructure, i.e., hotels, restaurants, translation services, etc.

Addressing the threats to the United States' image in the international community, Ms. Gill referenced the Arbitration Fairness Act as well as the issue of inaccessibility of arbitration. However, she cautioned the audience from placing too much weight on the opinions of certain leading practitioners from other jurisdictions who have predicted that these developments will sound the death toll for the United States.

Ms. Gill then addressed the "export business" of American arbitration, which she identified as a hotly debated topic in the international arbitration community. From a broad standpoint, Ms. Gill spoke to how US practices have and will continue to influence international arbitration, as well as how these practices have raised standards and enhanced how arbitrations are conducted. However, arbitration's key attraction is its flexibility; there is no norm from which to diverge or conform. Recognition of different approaches from different jurisdictions can help one get the most out of the system in true international arbitration, where parties, counsel, and members of the tribunal are from several different legal backgrounds.

The United States, acting as a trendsetter, has contributed to a convergence of norms in international arbitration—also known as the Americanization of arbitration—in several ways:

arbitrator profiling; witness cross-examination; witness preparation; techniques in presenting evidence; and class arbitration.

American lawyers pioneered the practice of profiling arbitrators, something that was previously unheard of in international arbitration. Conducting due diligence on arbitrators by researching the arguments they've advanced in the past, going through their academic writings, and studying previous rulings has since become standard practice in the international community.

The cross-examination of witnesses is another contribution of the Americanization of international arbitration. This feature, now common in international arbitration, was not readily encountered in civil law countries. Concerns about the over-aggressiveness of cross-examination have largely given way to its usefulness in arbitration proceedings. Some arbitrators, in an effort to limit its aggressiveness, will place time limits on cross examination of witnesses, for instance.. By and large, cross-examination has become common practice.

American practices in witness preparation, though not universally well-received because of the risks of unduly influencing the substance of the testimony, have also begun to creep into international arbitration practices. Exceptions are now being made regarding contact with witnesses before giving testimony. These exceptions still do not necessarily apply to direct testimony, which is still usually submitted in writing.

American lawyers have also introduced techniques for presenting evidence that have now become common practice. The use of demonstrative exhibits, which Ms. Gill noted were completely foreign to her early in her career, are now widely adopted in all manner of proceedings. PowerPoint presentations and other sophisticated computer demonstratives are now being used extensively in arbitration proceedings, though Ms. Gill noted that this practice can sometimes get out of control, as with a graphic of a broom sweeping dirt under a rug.

Regarding class arbitration, the United States has really led the way. The rulings in *Stolt-Nielsen* and *Concepcion* may have limited this to an extent, though progress in this area

continues internationally. Also, as a recent ICSID case involving Argentine bonds shows, the relevance of the availability of class arbitration is not limited solely to consumer arbitration.

One of the key features of arbitration is that it is considered to be an efficient manner of resolving disputes. Efficiency, however, is in the eye of the beholder.

In the United States, discovery is both a right and a matter of due process. However, some international practitioners view discovery as unnecessary. Of course, neither view is right or wrong, and the practice of international arbitration continues to be divided on this issue. Ms. Gill noted the importance of US practitioners recognizing that US-style discovery, particularly with documents, is often lamented as at best inefficient and at worst an invasion of privacy. As an example, Ms. Gill recounted a case where an arbitrator rejected all three hundred requests for documents submitted by the American counsel, regarding these requests as an unwarranted fishing expedition. While this example was admittedly extreme, it shows the general notion that the scope of discovery—or "disclosure" as it is called in the UK—should be limited; indeed, the nuance in practice is the tendency towards restrained discovery.

While depositions and interrogatories are common practice in America, these are rarely found in international arbitration. Realistically, the ordering of depositions is very unlikely in an arbitration proceeding with no American parties.

Another area in which the United States is an outlier is in the practice of notice pleading. The balancing act here is the protection of fundamental due process versus the sufficiency of pleading a claim in general terms. The problems encountered by the American practice of notice pleading come into play particularly at the end stages of arbitration; notice pleading raises questions about whether a particular line of argument is even open to discussion if it has not been explicitly submitted to the arbitrators in the initial pleadings. This problem has been addressed by the development of the practice of submitting pleadings with full statements of fact and law accompanied by all relevant documents. Ms. Gill noted that this doesn't entirely remove the problem.

Finally, Ms. Gill addressed the contentious attitude towards the practice and approach of US lawyers regarding expert witnesses. The notion of bringing in a "hired gun" is a generalization, but the criticism of the US approach is that it is overly focused on having an expert support a party's case rather than supporting a particular point of view. The accepted view of experts in the international community is that expert evidence should be left up to the expert to articulate independently; experts should not advocate a particular legal position. This approach gives arbitrators confidence that it is an informed point of view rather than a paid-for opinion. Allowing an expert to testify in a manner more detached from the legal arguments of the case lends the testimony more credibility and allows the arbitrators to make more informed decisions on the evidence.

Ms. Gill notes that while the United States can be considered both a trendsetter and an outlier in international arbitration, much the same could be said about any other jurisdiction. Switzerland, for example, has achieved many developments in the treatment of witnesses, yet many of their civil law techniques, such as the inquisitorial decision-maker, are outliers in the international community.

The nature of the international arbitration mechanism has a Darwinian, evolutionary effect. Practitioners are constantly exposed to a broad range of practices beyond their domestic experience. This exposure leads to broader knowledge and experience of the elements that best lend themselves to the unique needs of international arbitration. Effective advocacy becomes a matter of applying or not applying particular techniques in any given case. This has different implications for tribunals and advocates, but the point is that international arbitration is not "one size fits all."

Wrapping up, Ms. Gill offered three suggestions.

First, "**know your audience**." Applying diligence and thoroughness to understand the background of one's opponents and tribunal reduces the risks of miscommunication and can greatly increase effectiveness. In approaching an attack on a witness's credibility, for instance, a

little bit of due diligence will indicate whether one should employ a sneak attack or simply produce a document beforehand. Additionally, recognizing that the tribunal is not a jury can lead to more professional, focused proceedings. Most tribunals are sophisticated, and the excessive repetition of even one's strongest arguments can detract from the overall strength of the representation.

Second, "**take advantage of arbitration's benefits**." This means adopting techniques that may not be familiar. Looking to sources such as the UNCITRAL Notes and Case reports in international arbitration yearbooks can be invaluable in shaping one's advocacy in any given case. As illustration to this point, Ms. Gill related an example where neither party would submit documents to the other side. The tribunal, however, appointed its own expert, who was granted total access to both parties' documents, which he used to come to a comprehensive opinion that the tribunal eventually adopted. Even though the parties were uncooperative with document requests, the tribunal's technique moved the case to an efficient resolution.

Ms. Gill concluded by remarking that no handbook or code can tell you what will happen in your arbitration. No matter how experienced you are, or how many arbitrations you've been involved in, **always expect the unexpected**.

7.

Lawyer Ethics in International Arbitration: Prospects for a Level Playing Field

9:00-10:30 a.m., 17 April 2012

Rapporteur: Christopher Smith, 2L, University of Georgia School of Law

Moderator: Brian A. White, King & Spalding LLP, Atlanta.

Panelists:

Richard H. Sinkfield, Rogers & Hardin LLP, Atlanta.

Cyrus Benson, Gibson, Dunn & Crutcher, London.

Nikolaus Pitkowitz, Graf & Pitkowitz, Vienna.

Matthew D. Richardson, Alston & Bird LLP, Atlanta.

The panel addressed the uncertainties associated with ethical duties and obligations in international arbitration. Lawyers in this area operate across international borders, which can cause issues to arise among differing sets of potentially applicable rules of ethics and codes of conduct. A simple illustration involves a Georgia lawyer representing a client in an arbitration seated in Switzerland. Is the attorney bound only by the Georgia Rules of Professional Conduct, only by the equivalent Swiss rules, or by both? Perhaps the best way to confront this problem would be by complying with each set of rules, but what does the lawyer do when these rules conflict?

Examining ethical duties may raise more questions than answers since there is little authoritative guidance in this area. Nonetheless, the concerns are extremely important not only because the attorney does not want to face the risk of sanctions or professional misconduct, but also because not properly evaluating their legal duties and obligations may risk prejudicing their

client. Award enforceability issues may arise in this context. For example, enforcement could be challenged for lack of party capacity under New York Convention Art. 5(1)(a) with the argument that ethics rules were wrongly applied to hinder a party. It is always important to bear ethics rules in mind where enforcement is likely to be sought and how that jurisdiction will address challenges to conduct in lawyering. In this context, the IBA adopted on May 28, 2011 its "International Principles on Conduct for the Legal Profession."

Each of the panelists discussed a different case study that illustrated a general principle or unique problem in this arena.

The field of document production often raises unique concerns. Broadly differing approaches are taken in countries using an adversarial model – generally common law countries – than in those using an inquisitorial model, which is characteristic of most civil law countries. These differing models often raise conflicts with respect to issues of privilege and confidentiality. Confidentiality is probably the less controversial of these two issues. It is recognized by the IBA as having a place in international arbitration. Indeed, confidentiality is one of the reasons many parties choose arbitration over litigation in the first place. Differing approaches to confidentiality may be taken in arbitral proceedings where a prior agreement between the parties does not guide the tribunal.

More serious issues arise regarding privilege. Privilege as recognized in the adversarial system does not exist in countries using the inquisitorial model. Consequently, what evidentiary rules are applied by a tribunal can have an important impact on what evidence is admitted to the tribunal's consideration, scope and timing of evidence shared with the opposing side, and impacts of application of attorney-client privilege as recognized in common law jurisdictions.

Additional issues emerge where attorneys from different jurisdictions interact with one another. One party's attorney may make a decision that relies on their local understanding of

their ethical duties, but the opposing party's counsel may respond in a manner contrary to those legal duties. This situation may arise where the opposing attorney perceives their own legal obligations and ethical duties to differ from those of the first attorney. This can result in serious disagreement since one party may have an actual or perceived advantage due to this disparity.

The principal issue that emerged was the necessity of some sort of uniform guidance in this field. Where guidance has been offered, it has often come from local bar associations and can occasionally produce conflicting standards. An illustration of this is the current differing approaches taken in the United States and Europe. The general understanding in continental Europe, as evidenced by two EU directives is that the rules of conduct of the arbitral forum apply. While there is some support for this approach in the United States, there has been a general move toward the application of the attorney's home forum rules. This is illustrated by Georgia Rule of Professional Conduct 8.5, which governs disciplinary authority and choice of law which, in effect, projects application of Georgia ethics rules into other fora. The International Center for Dispute Resolution (ICDR) guidelines approach the problem by suggesting the attorney apply the most restrictive of potentially conflicting rules. Yet this approach could itself cause an attorney to violate rules applicable to him or her.

Several different resolutions were offered. The best solution would be for the IBA to create a set of ethical rules that would apply to attorneys practicing in the field of international arbitration. While it is unlikely that any binding rules will be established in the near future, the IBA has responded and will no doubt continue to provide ongoing guidance in this area. The IBA International Principles on Conduct for the Legal Profession represent a first step in this direction. As is evident from the title, the IBA has been careful to use the term "conduct" rather than "ethics" since the latter term, often used to discuss the topic, carries a strong moral connotation of right and wrong. The IBA's use of "conduct" sidesteps this problem since the existence of conflicting rules in different jurisdictions does not mean one set of rules is "right"

and the other ”wrong.” Rather, each set of rules has been molded to the particular legal system in which they operate, so the subjective implications of a term such as “ethics” are unnecessary.

There are several different approaches attorneys can take to help address problems in this area. First, when considering whether or not their actions may risk prejudicing their client, attorneys need to consider how the tribunal will view their conduct. Attorneys will also need to look to the jurisdictions where enforcement may be sought so as to avoid jeopardizing their client’s subsequent enforcement actions.

Evidence is a field where there already may be particular guidance. First, adverse inference as applied in the United States is almost never applied in international arbitral proceedings. Attorneys will have to consider the importance of the evidence being admitted by the tribunal. The panel suggested that when determining whether or not to permit evidence/discovery in certain circumstances, the tribunal and attorneys need to focus on the burden of proof rules. In cases where a party presents a defense or makes a claim, the party should have to produce documents supporting that position. If the party refuses to do so, it should have to withdraw these claims or defenses. Confidentiality in these circumstances can be resolved in the original arbitration clause or subsequent agreements.

It was also stated that it is better for attorneys to ask a tribunal for permission rather than forgiveness. This can go toward issues of prejudicing a client where the tribunal may disapprove the tactics of the attorney. Attorneys must reflect upon how members of the tribunal may consider their actions, taking into account the different legal systems from which each arbitrator hails and, to the extent possible, considering each arbitrator’s particular views.

The panel also discussed the importance of engaging local counsel at the *situs* of the arbitration. Local counsel will be able to guide foreign attorneys through the relevant rules of professional conduct, which could help avoid any issues. Where attorneys find one set of rules to

be stricter, better practice may well be to abide by the stricter rule, thus avoiding any challenge to the conduct. The panel also discussed the possibility of requesting a judicial advisory opinion in the local forum rather than or in addition to engaging counsel, since this opinion is much more likely to reflect how the local courts will actually apply the rules.

As would be expected due to the subject matter, the panel raised more questions than answers. Awareness of ethics and conduct questions is important for attorneys practicing in international arbitration and itself presents a step toward addressing uncertainties in ethics compliance.

8.

Judicial Assistance in International Arbitration:

Striking a Balance Between Help and Hindrance

11:00 a.m.-12:30 p.m., 17 April 2012

Rapporteur: Jo D. Chitlik, LLM candidate, Emory University School of Law

Moderator: Professor Peter B. Rutledge, University of Georgia School of Law

Panelists: José I. Astigarraga, Astigarraga Davis, Miami, Florida
John H. Fleming, Sutherland Asbill & Brennan LLP, Atlanta
Richard N. Sheinis, Hall Booth Smith & Slover, P.C, Atlanta
John L. Watkins, Barnes & Thornburg LLP, Atlanta

The arbitration process is viewed as a *procedural contract*, with one purpose being avoidance of judicial intervention. Nonetheless, courts have traditionally had a role in determining the enforceability of the arbitration agreement and of the arbitration award.

Recent decades witnessed an expanded role of the courts with parties seeking judicial assistance to; (a) freeze assets, (b) compel discovery (disclosure), (c) enforce awards and (d) grant anti-suit injunctions. The panel analyzed these developments and their impact on international arbitral proceedings in the United States.

(a) ASSET FREEZES: (John Watkins)

An example of an asset freeze is given in the recent case of Sojitz v. Prithvi Information Solutions, Ltd., 82 A.D.3d 89 (2011). Applying New York CPLR § 7502(c), parties may seek judicial injunctive relief to freeze assets regardless of whether the arbitration is subject to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The party seeking relief must demonstrate a likelihood that if a future award

were to be granted, it could be *rendered ineffective* because assets once available for satisfaction of an award would no longer be available. Sojitz represents an expansive view as the appellate court affirmed injunctive relief despite respondent's lack of transacting business in New York, except for holding assets in New York unrelated to the dispute at issue. The case represents an outlier and doubt about its precedential effect arises in view of the U.S. Supreme Court's increasingly restrictive view of the exercise of personal jurisdiction.

Additional resources: *Barclays Bank, S.A. v. Tsakos*, 543 A.2d 802 (D.D.C. 1988); *Carolina Power & Light v. Uranex*, 451 F.Supp. 1044 (N.D.Cal. 1977).

(b) DISCOVERY ORDERS (Disclosure): (John Fleming)

United States federal law in 28 U.S.C. § 1782 provides that U.S. courts will aid "international tribunals" in compelling testimony or document production by persons subject to a court's jurisdiction. This relief is available to the tribunals and other "interested persons." Prior to 2004, the consensus view in the U.S. legal community was that § 1782 did not apply to arbitral tribunals. That year, however, the Supreme Court in *Intel Corp. v Advanced Micro Devices, Inc.* changed the dynamic and questioned the validity of existing Supreme Court decisions on the issue. The Court examined the legislative history and opined that "tribunal" did not exclude foreign administrative and quasi-judicial entities

After Intel, the application of § 1782 by courts has been mixed. Courts in the 1st, 3rd, 8th and 11th Circuits have held that foreign arbitral tribunals are "foreign or international tribunals", while district courts in the 5th, 7th, 10th and 11th Circuits have held that foreign arbitral tribunals do not come within the ambit of § 1782. Notice there is a split in the 11th Circuit.

One thing Intel did clarify were the factors for considering exercise of discretion under Section 1782. These factors include asking:

1. Is the requesting person a participant in the foreign proceeding?
2. What is the nature of the foreign tribunal and the character of its proceedings?

3. What is the receptivity of the foreign tribunal to the assistance of a U.S. court?

4. Does the request seek to circumvent foreign evidentiary restrictions?

5. Is the request unduly burdensome or harassing?

Another important issue remains unresolved. Does §1782 authorize extraterritorial discovery of documents belonging to persons "residing" or "found" within a court's jurisdiction? Most courts encountering this issue have, at least in dicta, denied such a reach. See Kestrel Coal Pty Ltd. v. Joy Global Inc., 362 F.3d 401, 404 (7th Cir. 2004). However, the influential Southern District of New York reached the opposite conclusion in In re Gemeinschaftspraxis Dr. Med. Schottdorf, 2006 WL 3844464 at *5 (S.D.N.Y. 2006) and authorized production abroad. In a recent article, Tyler B. Robinson agreed with the expansive approach to §1782. The Extraterritorial Reach of 28 U.S.C. § 1782 In Aid of Foreign and International Litigation and Arbitration, 22 Am Rev Intl Arb 135 (2011).

(c) Vacatur of Arbitration Awards For "*Manifest Disregard of the Law*. (Richard Sheinis and Christina Hadley, Hall Booth Smith & Slover)

The Federal Arbitration Act (FAA), 9 U.S.C § 9, provides for expedited judicial review to confirm an award, whereas vacatur or modification of awards is limited to those grounds stated in 9 U.S.C. § 10–11. Vacatur is to occur only where:

1. The award was granted through corruption or fraud.
2. There was corruption of arbitrators.
3. Arbitrators guilty of procedural misconduct.
4. The arbitrators exceeded or wrongly exercised their authority such that no decision was made on the subject matter of the proceedings.

Correction or modification of an award may occur when:

1. There is evident material miscalculation of figures.
2. An award was granted on a matter not submitted to arbitration.
3. The award is imperfect in form not affecting the merits of the dispute.

U.S courts have supplemented the above standards with non-statutory grounds, supporting vacatur of awards that are "are arbitrary and capricious," "are completely irrational," fail to reflect the "essence of the underlying contract" and awards in "manifest disregard of the law." The last standard is the most commonly used.

The standard for finding "manifest disregard of the law" is extremely high. A party seeking vacatur must show that the law was clear and that the arbitrator(s) knew the law, but chose to ignore the law in reaching an award. It was originally believed manifest disregard of the law could only apply to domestic arbitration awards. However, in Yusuf Ahmed Alghanim & Sond, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997), the court upended this notion and found that this defense was available as a means of vacatur in non-domestic cases under the New York Convention. Id. at 19-20.

Yet the viability of manifest disregard as grounds for vacatur came into question in 2008 in the case of Hall Street Associates, LLC v. Mattel Inc., 128 S. Ct. 1396 (2008) . The Supreme Court addressed the split among the circuits and held that parties may not agree to expand the grounds for judicial review of awards and were limited to those grounds enumerated in §§ 10 and 11. The Court, however, did not address the split over the judicial expansion of the grounds for review, leaving in essence the door open for future use of manifest disregard. A survey of the circuit courts shows differing positions on whether manifest disregard is still available. The 11th Circuit (Alabama, Florida and Georgia) has rejected the standard's continued existence.

(d) FOREIGN ANTI-SUIT INJUNCTIONS: (Extract from a forthcoming article by Jose Astigarraga and Christopher C. Kokoruda)

Parties to international disputes often initiate parallel proceedings in more than one jurisdiction. Doing this may have some strategic value:

1. A parallel proceeding that results in a judgment between United States and a foreign jurisdiction may be given *res judicata* effect in a U.S federal court.

2. The foreign proceeding may also bolster arguments for dismissal of the U.S case for *forum*

non conveniens.

3. Parallel proceedings can also serve as a disincentive to litigation as they increase the cost and stress, perhaps motivating the parties to settle the claims.

As a general rule, U.S federal courts allow both domestic and foreign proceedings to continue their course until there is a judgment. Parties may attempt to halt a foreign action by filing an anti-suit injunction. On the flip side, a party can seek a stay of a U.S action in favor of a pending foreign proceeding.

In U.S. practice, a foreign anti-suit injunction takes the form of an order restraining a party subject to its jurisdiction from pursuing litigation in a foreign court. The injunction is derived from a combination of the courts' equitable powers and the common law writ of prohibition. Failure to comply with an anti-suit injunction may result in the party being held in contempt of court.

There is no uniform standard on which courts base their decisions to grant anti-suit injunctions. There are, however, two components that U.S federal courts commonly require:

1. Identity of the parties or sufficient identity of interests. How this is interpreted depends on the specific court, with some being more restrictive than others;

2. That resolution of the U.S case will be dispositive of the foreign proceeding enjoined. This component is met when the substance of the disputed matter is the same.

Beyond these two elements, courts diverge on additional factors for consideration. These factors can be generally categorized between those courts more concerned about international comity and those concerned with time and expense. Extra factors can include: frustration of policy in the enjoining forum; whether a foreign action is vexatious; threat to issuing court's *in rem* jurisdiction; duplication of expenses, waste of judicial resources, delay, and the race to commence the action.

A recent example is Oracle v Myriad, 2012 WL 146364 (N.D.Cal. Jan. 17, 2012). The

court enjoined foreign arbitral proceedings because efforts to proceed with arbitration would frustrate and contravene policy against inconsistent judgments, permit forum shopping, and would permit duplicative, vexatious litigation.

Additional case resources: China Trade and Development Corp. v. M.V. Choon Yon, 837 *F.2d 33, 36 (2d Cir.1987);* Canon *Latin America., Inc v. Lantech (CR), S.A 508 F.3d 597, 602; Kaepa, Inc. v. Achilles Corp. 76 F.3d 624, 626 (5th Circuit 1996); Paramedics Electromedicina,Ltda. V. GE Medical Systems Information Technologies, Inc., 369 F.3d 645, 650 (2d Cir. 2004*).

9.

Luncheon Speaker

12:30-2:00 p.m., 17 April 2012

Rapporteur: Anand Shah, 3L, Emory University School of Law

Address by Dr. Li Hu, Deputy Secretary General, China International Economic and Trade Arbitration Commission (CIETAC), Beijing.

- Panel Member (Arbitrator) at CIETAC, Hong Kong International Arbitration Centre, National Arbitration Forum (United States), International Arbitration Court (Kazakhstan), Kuala Lumpur Regional Centre for Arbitration (Malaysia); has presided as arbitrator over 80 domestic and international cases.
- Panel Member (Conciliator) at Conciliation Center of the China Council for the Promotion of International Trade (CCPIT).
- Author and co-author of numerous arbitration books, including *Arbitration in China – A Practical Guide* (2004); also arbitration articles published in journals in the United States, United Kingdom, China, and Switzerland.
- Frequent speaker at international and domestic arbitration conferences.

Dr. Li spoke on how arbitration is handled by CIETAC and specifically addressed the implications of CIETAC's new rules, which take effect on May, 1 2012.

- About CIETAC:
    - Given China's role in global trade and the boom in foreign direct investment, arbitration has become increasingly popular as a way of resolving disputes in China.
    - CIETAC was established in 1956 as part of China's Chamber of International Commerce. It is the largest arbitral institution in China, and has emerged as the most popular.

- While CIETAC's headquarters are in Beijing, CIETAC has three sub-commission offices in Shanghai, Shenzhen, and Tianjin. Additionally, liaison offices have been set up in 21 different regions.
- The caseload at CIETAC has grown rapidly in the past 10 years, from only 731 cases accepted in 2001, to 1,435 in 2011. A majority of matters are seated in Beijing, but an increasing number take place in the Shanghai Sub-Commission.
- CIETAC has been successful at resolving these disputes, from 712 cases resolved in 2001 to 1,282 in 2011.
- CIETAC maintains its own panel of arbitrators: 996 in total, of which 220 are foreign.
- CIETAC formed its own procedural rules, the latest iteration of which will take effect on May 1, 2012 ("2012 Rules").

- Features of CIETAC rules:
  - Parties may freely modify CIETAC rules or use them in combination with other rules.
  - Parties are free to adopt either an inquisitorial approach or an adversarial approach.
  - A precondition for a valid proceeding requires that independence is not broken.
  - With respect to efficiency, once a case is accepted, CIETAC will appoint a case manager to assist the tribunal for the purpose of streamlining the parties' interactions.
  - CIETAC is committed to maintaining cost-effective proceedings.

- Conciliation may be combined with arbitration: If conciliation is successful, the claimant may withdraw the case from arbitration. If conciliation fails, then arbitration proceedings can continue.
- CIETAC is operated by a professional staff composed of law school graduates capable of managing cases effectively.
- Three main areas of subject matter competency:
    1. Financial Dispute Resolution
    2. Construction Dispute Resolution
    3. Online Dispute Resolution

- Highlighted Changes in the New 2012 Rules:
    - Party Autonomy: Where parties in a "foreign-related" proceeding have not agreed on the seat of arbitration, CIETAC can decide that the seat be either located in China or at a city outside China. In terms of agreement on language, CIETAC may designate that the proceedings operate under a language other than Chinese, based on the particular circumstances of the case. Parties may also choose whether to exchange arbitration documents.
    - Administration: Where parties have not specified a particular sub-commission, CIETAC in Beijing will be the default administrator of the proceeding.
    - Consolidation: The 2012 Rules provide a mechanism for consolidation of separate proceedings upon the consent of all parties, similar to the recent revision of ICC Rules.

Issues / Questions:

- How are arbitral awards enforced in China?
    - There are different provisions for different types of awards:

1. For domestic awards, courts may review the merits and procedural aspects of a case.
2. For awards relating to foreign commerce, courts cannot review merits, but only procedural aspects in accordance with the New York Convention.

- China's four-level judicial system provides a system for award enforcement:
    1. Supreme People's Court (SPC), seated at the top, has the power to issue judicial interpretations that are binding on the lower courts.
    2. High People's Courts (HPCs) operate at the province, autonomous regions, and special municipalities level.
    3. Intermediate People's Courts (IPCs) operate at the level of municipalities, prefectures, and autonomous prefectures.
    4. Local People's Courts (LPCs) serve as trial courts handling criminal and civil cases
- IPCs are typically the ones to which parties resort for enforcement of foreign awards.
- If an IPC refuses enforcement, then the case must be reported to an HPC. If the HPC rejects an award, the case must be reported to the SPC for final review..
- Therefore, in China it is not easy to refuse enforcement of foreign awards.

- Under the 2012 Rules, CIETAC can administer proceedings brought under the rules of other arbitral institutions. Specifically, will CIETAC respect provisions of the ICC Rules that stipulate that only the International Court of Arbitration is authorized to administer proceedings under ICC rules?

- CIETAC will help to determine the extent to which a case may be supplemented by CIETAC rules and seek consent from the parties.
- If the parties cannot agree, CIETAC would suggest a claim be dismissed, and direct the parties to the ICC.

- How is Conciliation handled under CIETAC under the 2012 Rules?
  - CIETAC allows a combination of conciliation with arbitration.
  - Under the 2012 Rules, if the parties agree or request the case be conciliated, then conciliation can be conducted either by the arbitrator or by a separate conciliator. Prior rules provided for a dual conciliator/arbitrator role.
- Are there any major changes for challenging or removing arbitrators under the 2012 Rules?
  - No major changes are expected.

10.

The Changing Face of Investment Treaty Arbitration

2:00-3:30 p.m., 17 April 2012

Rapporteur: Janene Browder, 3L, Mercer University School of Law

Moderator: Barton Legum, Salans, Paris.

Panelists:

Meg Kinnear, Secretary-General, International Centre for Settlement of Investment Disputes, Washington.

Carolyn B. Lamm, White & Case, Washington

Bayo Ojo, SAN, Bayo Ojo & Co., Lagos, Nigeria.

Margrete Stevens, King & Spalding, Washington office.

Eduardo Zuleta, Gomez-Pinzon-Zuleta, Bogota, Colombia.

Barton Legum began the session with a brief introduction to investment treaties. Investment treaties are a prepackaged solution providing basic protections of foreign investments against circumstances like expropriation without compensation or discriminatory treatment, and for enforcement of fair and equitable treatment. Investment treaties also provide legislative packages and an alternative in international arbitration for foreign investors against respondent states for failure to live up to agreements under the treaty. Today almost 3,000 investment treaties are enforced around the world, with an increasing number of investment treaty arbitrations being brought by foreign investors against respondent states.

Meg Kinnear presented data on the growth in the number of cases, pointing to ICSID seating 60% to 70% of cases which have involved 85 – 90 different sovereigns. Ms. Kinnear explained that there are three main contributors to the increase in investor cases: 1) Increase in foreign direct investment (not a one-to-one ratio but a proportionate growth); 2) This is a new discipline (the first award issued in 1987); 3) Increase in bilateral investment treaties (between 2,700 and 3,000 currently). Other more controversial possible causes for the rise include more transparency, increases in third party funding, and a trend toward a broader scope of the treaties.

Margrete Stevens added that many privatizations, including the privatized utilities in some countries, may be a reason for case increases. Eduardo Zuleta added that sovereign appropriations seen in the 1950s are not being seen now, and there is an increased awareness among counsel about such treaties as a means for relief for their clients. Carolyn Lamm stated

that an ICSID provision would be helpful and give greater assurance in terms of enforceability of awards.

Ms. Lamm spoke about the trend to use alleged violations of law as a defense to international treaty or international contract claims. She provided three recent examples to illustrate different scenarios: 1) in order to challenge a claim under a bilateral investment treaty, the investment must be in accordance with the law, known as "accord with law clause." See *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (holding fraudulent misrepresentation in a bidding process for a government contract was a violation of a principle of international public policy) and *World Duty Free Co. Ltd. v. Republic of Kenya*; 2) challenging contract arbitration on the basis of fraud in the procurement, sometimes stemming from misrepresentation of investor ability or the misidentification of the entity receiving the investment. See *PIATCO v. Philippines (ICC)* and *World Duty Free Co. Ltd. v. Republic of Kenya* (ICSID) (bribing public official to obtain contract), and 3) where the treaty has no "in accord with law" clause. See *Plama Consortium Limited v. Republic of Bulgaria* (ICSID) (finding that transnational public policy is part of the applicable rules and principles of international law underlying the Energy Charter Treaty). Often, the arbitral tribunal will be obliged to conduct its own investigation when the integrity of foreign institutional operation is itself subject to challenge.

Ms. Stevens added that ICSID, being one of the organizations of the World Bank, has devoted a great deal to promoting the rule of law and can sometimes point to awards in investor state cases that demonstrate better government. Mr. Zuleta asked about claims where the awarding contract did not comply with local law: what is the limit to enforcing the contract? Ms. Lamm responded that the answer turns on the facts of each case because there really is no *stare decisis* as an American attorney would understand it. Moderator Legum asked what the term "illegality" means, does it mean contrary to criminal law? Ms. Lamm responded that not only

criminal law, which includes burdens and standards, but also situations where there will not be criminal prosecutions to support the tribunal and focus will be on the making of investments.

In response to an audience request for a description of what gives rise to a claim before ICSID, Ms. Lamm referenced the *Plama* case and stated that if there is not consent to ICSID jurisdiction in a treaty, a most favored nation clause ("MFN") cannot be used to support consent. There are, however, also awards going the other way. Legum explained that one effect of MFNs is prevention of discrimination by a state in favor of its country's nationals. MFNs also serve as a form of substantive law that brings in rules of other treaties entered into by the state.

Bayo spoke on investment treaty arbitration tribunals devising a new area of law. Arbitration clauses in typical commercial contracts are afterthought clauses in the sense that one gets into contracts and hammers out terms and conditions and at the end of the night thinks of the arbitration clause. Conversely, investment arbitration clauses are completely different; these are "mid-morning clauses." One must think of resolving the dispute when trying to invest in an emerging market, as investors want to protect their investments. An increase in the use of international arbitration is expected, as well as potentially a new body of law.

Ms. Lamm disagreed with the thought that a large amount of international investment law is emerging. She pointed to the lack of congruency because of the diversity of language in the various clauses. Ms. Kinnear proposed that similarities and a fair amount of clarity are present in the cases, but as seen in MFN cases, the details of the exact nature of the provision are important.

Ms. Stevens addressed new decisions that take us into a different era of investor-state arbitration in which treaties find application to commercial arbitration. Awards have enforced contract provisions calling for "fair and equitable treatment" of the investor. In a recent investment treaty claim between India and Australia, *White Industries v. India*, at issue was an

"effective means" bilateral treaty provision intended to ensure an effective means for an investor to protect its investment under host country law. Indian courts refused to enforce the contract terms, prompting the investor to invoke ICSID jurisdiction to challenge the refusal on the basis of lack of effective means. A private commercial contract may become the basis for an investment treaty claim because, although the arbitration process and award is not a treaty "investment" per se, it arises out of a contract that a treaty tribunal may recognize as having been an investment under the treaty.

Mr. Zuleta asked about the situation where a state refuses to acknowledge the award and ignores the New York Convention. Lamm responded that making a case solely on the national law would be difficult, but it could possibly be done with BIT and ICSID provisions. Lamm elaborated that there are decisions stating that investors must apprise themselves of the risks associated with investments in a foreign state. These decisions approach analysis of effective means by asking what the investor should have known with eyes wide open at the time of making the investment. However, a regime change in the state could lead to a claim for denial of fair and equitable treatment of laws. Prompted by an audience hypothetical, Legum added that *White Industries* also deals with a delay in the judicial system. Lamm noted that *PSEG Global Inc. v. Republic of Turkey* found denial of fair and equitable treatment by the executive branch and not by the court system.

Mr. Zuleta presented on the topic of discretion of parties to appoint arbitrators to the tribunal. One question is whether appointing arbitrators without certain competencies is an unlimited right of states. Many countries insist that they have unfettered discretion in appointing their arbitrators. In doing so, the country may jeopardize being seen as a credible international player. Are there tools in the New York Convention to make states aware that an individual should not only be a lawyer, but also have competence in international investments? Ms. Kinnear responded that putting investment arbitrators on panels is important and ICSID

discusses doing so with states at annual meetings. The competency of international investment arbitration panels is important because of the increase in the number of cases and award challenges, as well as increasing debates about who should appoint arbitrators to these panels. Ms. Lamm stated that examination of the ICSID list will reveal inclusion of many of the good arbitrators. ICSID makes appointments from the list, giving confidence that the person selected knows about investment law; the list provides stability. Ms. Stevens added that there should be around 500 arbitrators on the list because there are 143 states and each can appoint 3 or 4 arbitrators. Mr. Zuleta pointed out, however, that the parties to a dispute may go off-list in appointing an arbitrator of their liking.

Responding to a question from Mr. Ojo concerning an arbitration panel decision wrong on the merits, Ms. Kinnear stated that there is no appeal system. *Ad hoc* panels provide the only option for review of an ICSID decision. *Ad hoc* panels deal with egregious procedural discrepancies. Ms. Lamm agreed that an appeal system in international investment arbitration would be a mistake, and that if the issue is serious an annulment should be requested. Regarding arbitrator competency, Ms. Stevens offered that the key is reminding states of solutions. Within the past two years, a system providing ballots as a final chance for parties to agree has been implemented. It is a way for parties to select and move forward when parties do not agree. In addition to expertise in investment law, Ms. Lamm stated, the state has to have someone with government, policy, or political experience.

11.

Disclosure and Discovery in International Arbitration: Do the Revised IBA Rules on the Taking of Evidence in International Arbitration Finally Bridge the Divide?

4:00-5:30 p.m., 17 April 2012

Rapporteur: Halley Espy, 3L, University of Georgia School of Law

John A. Sherrill, Seyfarth Shaw LLP, Atlanta, Georgia, moderated the panel, which included:

A. Stephens Clay, Kilpatrick Townsend & Stockton LLP, Atlanta.

Meghan Magruder, King & Spalding LLP, Atlanta.

John Beechey, Chairman, International Court of Arbitration, ICC, Paris.

Christof Siefarth, GÖRG, Cologne, Germany.

The panel discussed issues regarding disclosure and discovery in international arbitration in light of the 2010 revisions to the IBA Rules on Taking Evidence in International Arbitration. The panel discussion was structured to allow each panelist the opportunity to offer a perspective on the theme of determining whether the recent changes to the IBA Rules bridge the common law/civil law divide on taking evidence in international arbitration. Each panelist built on the previous points, as the discussion moved from a broad overview identifying salient features of the most recent changes to the IBA Rules to individual perspectives from both common law and civil law perspectives on how these changes are perceived as either a successful or inadequate attempt to bridge the common law/civil law divide on issues relating to disclosure and discovery.

Moderator Sherrill laid the foundation for the theme, touching on how, in his view, the IBA Rules on the Taking of Evidence successfully reflect a melding of common law and civil law approaches to disclosure and discovery issues. Drawing on his own perspective of domestic arbitration cases and the divergence of the discovery process of American-style litigation from arbitration, he invited the panelists to consider how successful the 2010 IBA Rules are in bridging the divide between common and civil law countries, focusing particularly on the challenge posed by electronically-stored documents and issues of privilege.

To paint a clear picture of how the IBA Rules procedurally aspire to bridge the common law/civil law divide, Stephens Clay identified the relevant recent changes to the IBA Rules. He described how the Rules function, what revisions merited consideration for comprehensively thinking about how the IBA Rules operate as a compromise between common law and civil law approaches, and how the revisions further incorporate the broad themes of efficiency and party-choice concerns at the core of the arbitral process.

Meghan Magruder addressed the effectiveness of the IBA Rules in striking a balance between common law and civil law traditions by providing a detailed, side-by-side comparison of the historical divide between the United States, Great Britain and other common law countries, civil law approaches, and the IBA Rules governing specific discovery issues. Points of contention in the common law/civil law divide include issues of disclosure and discovery inherent in pre-trial disclosure, accessing documents held by adverse parties, pleading requirements, privilege, fact witnesses, expert witnesses, and presentation of legal arguments.

Beyond how the IBA Rules work to strike a compromise between common law and civil law traditions, John Beechey and Christof Siefarth offered common law and civil law perspectives, respectively, on the rules in practice in international arbitration post-2010 revisions to the IBA Rules.

Summary and Identifying Points Made:

Opening with an anecdote from practice before the IBA Rules in 1999, Stephens Clay identified what he thought was the most salient practice point in thinking about issues of disclosure and discovery in arbitral proceedings: regardless of the text of IBA Rules or otherwise, the key consideration and first priority is the selection of a good arbitral panel. Whether certain evidence is allowed to come in or not pursuant to IBA Rules is less important if the arbitrators can correctly identify what evidence is credible and relevant to rely on in making the final arbitral decision and award. Addressing the recent changes to the IBA Rules, Mr. Clay counseled that the 2010 Rules should be regarded as refinements of the 1999 Rules, as the 2010 revisions do not reflect major, wholesale changes to the substance and spirit of the 1999 Rules. The latter were the product of meticulous drafting, and a long debate and compromise that had been vetted and shopped around the world before adoption. In Mr. Clay's view, the 2010 refinements to the disclosure and discovery process that had been in effect for over a decade reflect the success of the IBA Rules in bridging the divide between common and civil law approaches.

Mr. Clay pointed to several articles in which the 2010 refinements enhance the compromise between common and civil law traditions: articles 11, 3.3(a)(2), 3.2, 6, 8, 9, and 9.2(g). Each of these provisions strengthens the panel's power or balance the competing common law and civil law approaches on certain discovery issues in order to make the procedural process fair to both sides. Mr. Clay concluded by mentioning the tribunal's power to draw adverse inferences for a party's failure to produce evidence found in Articles 9.5 and 9.6, noting that the way this power will play out remains to be seen.

Meghan Magruder then presented a primer on why a debate on international arbitration disclosure and discovery issues exists in the first place: the historical clash among common law and civil law approaches to the taking and use of evidence in a given proceeding necessarily

creates a divide in how to handle evidentiary issues. The story of the IBA Rules and their role in international arbitration is rooted in this historical divide, and to evaluate the success of the Rules, it is essential to identify the points of contention between the two traditions. Through a series of side-by-side comparisons, she illustrated the main points of divergence found in general theories of disclosure and discovery inherent in pre-trial disclosure, accessing documents held by adverse parties, pleading requirements, privilege, fact witnesses, expert witnesses, and presentation of legal arguments.

Ms. Magruder commented that many of these issue-specific differences stemmed from fundamental differences in the approach to evidence-gathering, with civil law countries on one end of a continuum generally adhering to a principle of limited disclosure, the United Kingdom further along toward some disclosure, and ultimately the U.S. approach of broad discovery. In her opinion, the IBA Rules successfully strike a balance in these competing general theories of disclosure and discovery.

John Beechey's perspective was as both a drafter of the Rules and a common law lawyer using the Rules in practice. For him, the 2010 revisions of the 1999 IBA Rules were very much an exercise of refining the Rules and trying to more effectively bridge the divide between common law and civil law approaches to disclosure and discovery issues in order to create a more level playing field in international arbitration. He noted the wide acceptance of the IBA Rules and how they aim to respect hallmark features of international arbitration: flexibility, party choice, efficiency, and cost considerations. From a common law perspective, Mr. Beechey remarked that the IBA Rules were not a U.S.-style approach to discovery issues. Rather, they constitute a framework adoptable in whole or in part by parties and tribunals in order to achieve a fair procedure in light of different legal traditions that is both efficient and cost effective.

As to the 2010 revisions' balance, Mr. Beechey noted the inherent tension between costs and justice. He explained how the rules aim to strike the right balance between costs and justice,

discussing issues of e-discovery, confidentiality, witness preparation, expert witnesses, and privilege. Fairness and equality between parties is the main goal in the structure of the IBA Rules in these issue areas, striking a compromise between the common law/civil law divide.

Christof Siefarth concluded the discussion by highlighting certain provisions in the IBA Rules and offering a civil law lawyer's impressions. He pointed out that the IBA Rules mention the phrase "relevant to the case and material to its outcome" nine times. This principle spoke to civil law lawyers' concerns over U.S. fishing-style discovery litigation techniques in international arbitration. The IBA Rules adequately reflect the civil law concerns here by specifically limiting disclosure and discovery to evidence that satisfies the two-prong test of relevance and materiality. But potentially troubling to civil law lawyers are the provisions governing e-discovery, confidentiality, and expert witnesses. However, the recurring principle of "efficient, economic, and fair," as well as limiting principles of relevance and materiality help to safeguard against importing U.S.-style discovery litigation techniques into the international arbitration system. Some provisions in the IBA Rules regarding the role of good faith, adverse inferences, and witness statements were highlighted as being different from a civil law approach but were not found to be troublesome from a civil law perspective in practice. Mr. Siefarth acknowledged that sometimes a common law approach to discovery may be more helpful in advancing a client's interests in international arbitration proceedings, and that civil lawyers, like common law lawyers, have the additional tool of 28 U.S.C. § 1782 to utilize American discovery rules in obtaining evidence when a civil law system does not afford procedural access to certain types of evidence, as long as a sufficient U.S. link exists to the evidence at issue.

Two common themes emerged: 1) a most important consideration in thinking about disclosure and discovery issues in international arbitration should be selecting the right arbitrators, rather than what evidentiary procedural mechanisms are adopted by the parties; 2) the IBA Rules generally can be seen as successful in bridging the common law/civil law divide.

Using the IBA Rules and adapting them on a case-by-case basis to fit the underlying evidentiary needs of the particular controversy was seen as a desirable way to handle the inherent divide on common law and civil law approaches to disclosure and discovery issues in international arbitration. All panelists agreed that adopting a U.S.-style litigation discovery process would not be effective in serving efficiency and cost concerns of international arbitration and that, in practice, the IBA Rules do a good job of leveling the playing field to make disclosure and discovery fairer between civil law and common law traditions. The IBA Rules offer a more limited approach to disclosure and discovery issues that balance flexibility and proportionality efficiently as compared to U.S.-style litigation discovery.

Most audience questions pertained to e-discovery and experts. Panelists responded that the IBA Rules provide avenues to ensure that the tenets of procedural fairness and keeping costs low, in particular with e-discovery requests, were reflected in the 2010 revisions. E-discovery can be excluded when the burden to produce such documents is too great on a party. Further, thinking about whether the arbitrators come from a civil law or common law background may be helpful in considering how the tribunal will approach the IBA Rules. This may be particularly relevant in how the IBA Rules are construed in reference to expert witnesses.

This concludes the RAPPORTERS' REPORTS