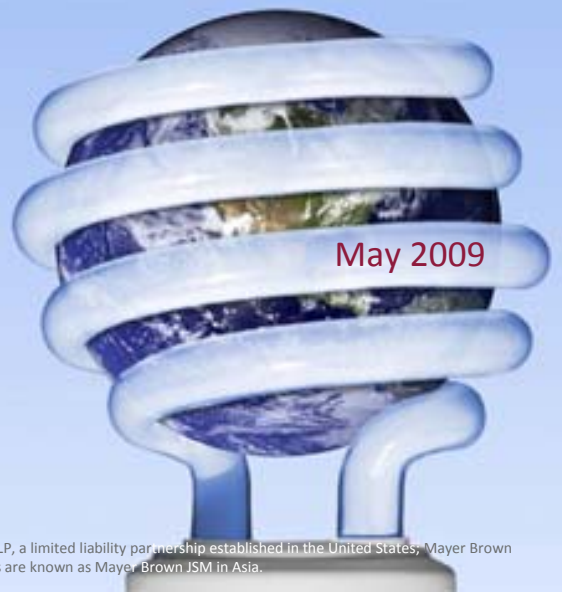
MAYER·BROWN

ACC Association of Corporate Counsel
The in-house bar association.℠

Recent Developments in International Arbitration

May 2009

William H. Knull, III
Partner
(713) 238-2636
wknull@mayerbrown.com



Flight from Arbitration: New Statist Regimes Seek to Attract Capital, Evade Accountability

- Some criticism of awards, especially arising from Argentine financial crisis, as excessively restricting freedom of governments to address crises
  - Reflected in revisions to BITs of US, China, other capital exporters
- Venezuela and fellow-travelers going beyond
  - Demanding waiver of right to arbitration as condition to negotiation, exclusion of international arbitration clauses from new agreements
  - Denunciation of treaties
    - Venezuela: Denounced Netherlands BIT; threat to withdraw from ICSID
    - Bolivia: Denounced ICSID Convention
    - Ecuador: Notified ICSID of withdrawal of consent to arbitrate disputes relating to natural resources before ICSID
- Expropriators' remorse: Confronting the need for investment in the wake of expropriation

Phoenix Action v. Czech Republic: Structured Investments for Treaty Protection

- Czech investor fled to Israel to escape prosecution, his company acquired "investments" from his wife and brought arbitration against Czech Rep. two months later. Tribunal clearly disapproved.
- Defenses to jurisdiction:
  - Excluded claims arising before investment acquired by Israeli investor and after it was sold; not subject to the BIT
  - No "investment": no contribution in money, no sufficient duration, no risk and no *contribution to the economy* of the host State
  - Abuse of arbitration process: Czech companies real parties in interest
- Jurisdiction denied: hard cases make bad law.

Phoenix Action v. Czech Republic: Structured Investments for Treaty Protection II

- "Investment": must meet both ICSID and BIT standards
  - BITs divide: some allow denial of benefits to claimants who do not have substantial activities in state of incorporation; others do not
  - *Phoenix Action:*
    - BITs can restrict, cannot expand ICSID jurisdiction
    - ICSID/BIT system does not protect transactions undertaken with *sole purpose* of taking advantage of BIT protections
    - "BITs are not deemed to create a protection for rights involved in purely domestic claims, not involving any significant flow of capital, resources or activity into the host State's economy. "
    - Subjective test: "if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment."

Phoenix Action "Investment" Standards: Beyond *Salini*

1. a contribution in money or other assets;
2. a certain duration;
3. an element of risk;
4. an operation made in order to develop an economic activity in the host State;
5. assets invested in accordance with the laws of the host State;
6. assets invested *bona fide*.

Phoenix Action "Investment" Standards: Beyond *Salini*

- Tribunal found 1-5 arguably satisfied
- Claim was "abusive," not in "good faith" because
  - Initial claim brought by domestic companies
  - Post-investment claim based on only 2 months activity
  - All transfers were within the family of the owner
  - No evidence economic activity conducted or intended
  - "… the manifest purpose behind its purchase of the Benet Companies was an attempt to render their purely *domestic* disputes subject to the protections of the BIT rather than to conduct business."
  - "Investment" intended to transform a pre-existing domestic dispute into an international dispute to subject to ICSID arbitration not a bona fide transaction and cannot be a protected investment under the ICSID system.

The Fairness in Arbitration Act: Threat Receding

- Bills arose to redress perceived unfairness in consumer, franchise contracts
  - Invalidated pre-dispute arbitration agreements in employment, consumer, and franchise disputes and disputes under civil rights statutes or transactions between parties of unequal bargaining power; other bills addressed automobile purchases, nursing home disputes
  - Validity of arbitration agreement determined by courts, not arbitrators
  - Originally applicable to, e.g., international franchise arrangements, contracts between parties of unequal bargaining power, …
- Risk: domestic reforms threatened international arbitration
- Active efforts by international arbitration bar and others results in confining modifications to new Chapter 4 of FAA, excluding impact on international arbitrations

Hall Street: Arbitration Paradigm Trumps Party Autonomy

- Applying FAA § 10 Literally: The court shall enforce an award unless it finds one of enumerated factors
- Rejected ability of parties to expand scope of judicial review by agreement
- Different paradigms
  - California permits parties to vary standards of review (*Cable Connection v. DirectTV)*
  - English Arbitration Act 1996: permits appeal on points of law by agreement of the parties or order of the court
  - Israeli Arbitration Act reportedly now permits parties to elect private or public review
  - CPR Rules: structure for review by arbitral appellate panel

Hall Street II: The Future of Manifest Disregard

- *Hall Street*:
  - FAA § § 10 & 11 provide exclusive grounds for vacating arbitral award
  - "Manifest disregard" is no longer viable as an independent, non-textual ground for vacatur
- Subsequent circuit split
  - 1st Circuit says manifest disregard is not ground for vacatur
  - 2nd and 9th Circuits say manifest disregard is judicial gloss on FAA § 10(a)(4) (arbitrator exceeded authority)
  - 5th Circuit says manifest disregard is not an independent ground

Discovery Convergence? The New Guidelines, Rules and Opt Outs

- ICDR Guidelines: To be incorporated in next change in rules; broad principles for resolving discovery issues
- CPR Protocols: Choice between pre-fab modules, usable under any set of rules
- Chartered Institute: E-Discovery
- IBA Rules: On wide-ranging review, minimal changes likely
- ICC Abstains: Conscious choice to preserve flexibility, avoid implicit endorsement of broad, "American-style" discovery

E-Discovery in Arbitration: The Unavoidable Anathema?

- More than 80% of documents and data now exist only in electronic format
  - If there is to be disclosure, electronic disclosure is unavoidable
  - Volatility of electronic material requires special consideration
  - Unfamiliar technical issues combined with dislike of discovery generally increase intensity of opposition
  - Frequently expressed as opposition to "Americanization" of the process
- New rules and protocols introduce the issues, permit familiarization with the process – CIArb, CPR, ICDR, ICC

Discovery in Aid of Foreign Arbitration 28 U.S.C. § 1782

- *Intel Corp. v. AMD,* U.S. Supreme Court holds discovery permitted in aid of European administrative proceedings, cites legislative history that includes arbitral tribunals
- 2nd and 5th Circuits previously denied discovery in aid of foreign arbitral tribunals
- District court decisions since *Intel* mostly permit discovery in aid of arbitration; exception is *Comisión Ejecutiva v. El Paso* in S.D.Tex.

Arbitrator Disclosure Guidelines: ABA Dispute Resolution Section Council Draft Raises Furor

- Current sources of arbitrator disclosure requirements
  - Federal Arbitration Act: evident partiality
    - *Positive Software Solutions* (5th Cir. 2007): failure to disclose trivial fact does not amount to evident partiality
    - "… in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The 'reasonable impression of bias' standard is thus interpreted practically rather than with utmost rigor."
  - ABA/AAA Revised Code of Ethics for Arbitrators (2004)
  - International Bar Association Guidelines

Arbitrator Disclosure Guidelines: ABA Dispute Resolution Section Draft Raises Furor II

- Proposed Checklist from ABA Dispute Resolution Committee goes well beyond *Positive Software*
  - Critique from ABA Int'l Law Section
    - Obligation to investigate and disclose the "attenuated, long past, trivial or insubstantial"
    - Enhanced obligations above international standards puts US based arbitrators at disadvantage
    - Risk of perception as official ABA default standard
    - Risk of expanding challenges to awards
- Proposed requirements rejected by ABA Dispute Resolution Section 4/15/09

Hague Convention on Choice of Court Agreements: Enforcing Judgments Abroad?

- Intent similar to NY Convention
  - Establishes jurisdiction in agreed court
  - Precludes other courts from hearing disputes
  - Requires enforcement of judgments in member states
  - Permits refusal of enforcement of judgments including punitive damages
- Applies to "exclusive choice of court agreements … in civil or commercial matters"
  - Excludes consumer transactions, employment relationships, family law matters, insolvency proceedings, nuclear damage, and personal injury claims
  - Excludes most IP claims except those that arise only as preliminary matters in reaching the main object of the proceedings

Hague Convention on Choice of Court Agreements II

- Agreement must be *in writing or any other means that renders agreement accessible so as to be usable for subsequent reference.*
- Convention was concluded in 2005
  - Ratified by Mexico in 2007
  - Signed by US, EU in 2009
  - Only one more ratification required to become effective
- If ratified, would make transnational litigation more competitive with arbitration