

New York Dispute Resolution Lawyer

A publication of the Dispute Resolution Section
of the New York State Bar Association

Message from the Chair

This is a special edition of the *New York Dispute Resolution Lawyer*, honoring the memory of Judge Judith Kaye, who died on January 7, 2016. I am very pleased that the Section has produced this fitting tribute. Special thanks go to co-editors Edna Sussman, Laura Kaster, Sherman Kahn, Julie Bédard and Samaa Haridi for creating this wonderful publication.

Judge Kaye was a remarkable jurist and person. In addition to her many other involvements, she was a passionate supporter of dispute resolution in its various forms and processes. She was a committed member of the Dispute Resolution Section and a member-at-large of the Section's Executive Committee for many years. As recently as the Section's Fall Meeting on October 30, 2015, she actively participated on a panel. I spoke with her at some length at the Fall Meeting, and her engagement in issues relating to dispute resolution was enthusiastic.

In addition to her many other achievements, Judge Kaye was instrumental in the creation of the New York International Arbitration Center. She did not just lend her name or endorsement but rolled up her sleeves and did the hard work that was needed to create this important institution. Many agree that NYIAC would not have been established without her vision and leadership. NYIAC



Judge Judith S. Kaye

Photo by Dave Cross Photography

will be one of Judge Kaye's lasting legacies.

The Dispute Resolution Section is considering ways to honor the memory of Judge Kaye. This publication is but the first. In addition, the officers of the Section are exploring possibilities that include establishing in Judge Kaye's name an award and a scholarship, and renaming one of the Section's successful annual events.

We were honored that Judge Kaye was one of us. And she will remain with us in spirit as we continue doing our important work.

David C. Singer
Chair, Dispute Resolution Section

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SPECIAL EDITION: A TRIBUTE TO JUDGE JUDITH S. KAYE

Message from the Co-Editors



Edna Sussman



Samaa Haridi



Julie Bédard



Laura A. Kaster



Sherman Kahn

This special issue of the *New York Dispute Resolution Lawyer* is dedicated to New York as a place of arbitration.

We owe Judith Kaye, former Chief Judge of the State of New York and Chief Judge of the Court of Appeals, for the brilliant idea of creating the now thriving New York International Arbitration Center. It was her dedication to its creation and her hard work that made it possible. As Barry Garfinkel said, “Judge Kaye so enjoyed grappling with challenging international arbitration issues and problems.”

Judith’s recent passing is commemorated in this issue with memories from the judges who sat with her or succeeded her as Chief on the New York Court of Appeals, the executive committee members of the New York International Arbitration Center and her home after the bench, the firm of Skadden, Arps. Her funeral service, which filled the Lincoln Center Hall, is commemorated with the eulogies delivered by family and others. It is our hope that these tributes to her brilliance, humanity, humility and commitment to the delivery of justice will serve as a long lasting accessible record of her unique personal warmth and contributions to dispute resolution in the state of New York.

We are pleased to publish two articles by Judge Kaye. One she wrote for this publication several years ago for our gender diversity issue where she reflected on her “*déjà vu*” experience reentering a field 50 years later, once again populated by very few women. For this special issue she wrote an article just weeks before she passed recording the commitment of the New York courts to maintaining a body of contract law that was certain and predictable so that those engaged in commercial transactions could reliably depend on the courts to implement their contracts as written.

We welcome the NYIAC Case Law Library, which is the latest initiative of the Center in collecting and organizing all New York international arbitration decisions starting in 2015. Mark Stadnyk and Alexandra Dosman usefully provide an overview of this effort, which is ongoing and is a key resource on New York arbitration law.

Edna Sussman answers “10 Questions About New York as a Leading Arbitration Center,” but the proof is in the track record of the New York courts in international arbitration matters as they fulfill a critical role in the sustainability of New York as a top place of arbitration in the world. As Judith Kaye reminds us, “the need for a consistent, stable, predictable regime of contract law [is] central to business transactions, where certainty is a paramount concern.”

We continue to be indebted to James Carter and John Fellas for their authoritative single volume work “International Commercial Arbitration in New York,” which provides an essential roadmap to both New York and international practitioners alike, and this issue includes a short description of the latest edition. Among other topics of continued significant interest are the availability of judicial preliminary relief in New York (Julie Bédard and Christopher Pavlacka), proceedings during the arbitration (Lawrence Newman and David Zaslowsky; Jonathan Greenblatt and R. Zachary Torres-Fowler), the effect of arbitration awards (Tai-Heng Cheng and Adam J. DiClemente), and, of course, their enforcement, to which we have devoted several articles (Larry Shore, Joseph P. Zammit and Amal Bouchenaki; Samaa Haridi and Samuel Zimmerman; and Monique Sasson). We also offer a pre-hearing checklist (Aníbal Sabater).

New York arbitration is often closely associated with New York law as the law governing the dispute between the parties, and this issue contains a review of *New York Contract Law: A Guide for Non-New York Attorneys* (Glen Banks) and an article on choosing New York Law (Michael Galligan).

We look forward to reporting further on the work of New York arbitration practitioners and arbitrators against the backdrop of modern judicial decision-making supportive of the development of international arbitration in New York.

**Edna Sussman, Samaa Haridi, Julie Bédard,
Laura Kaster and Sherman Kahn**

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New York Court of Appeals Judges' Memories of Judge Kaye

Judge Joseph Bellacosa

A reflection in tribute of a dear friend and “forever colleague” (her lovely term) is mixed with pain of the profound loss and joy of beautiful memories. A treasured family prayer, that I shared with Judith Kaye many times when we lost loved ones, consoles and bridges the pain and joy. A Fourth Century mystic, St. John Chrysostom, encapsulates the swing of emotions this way:

Those whom we love and lose
Are not where they were before.
They are now wherever we are.

Her presence remains permanent to me through a Passover hymn that she sang to me and other “forever colleagues” of the Court of Appeals from time to time—*Dai Dai Dayenu*—“If it is only this, it would be enough; thank you, Lord.” She explained to those who needed and welcomed the instruction that the Jewish People in Exodus were grateful for their escape from Egyptian bondage even though still wandering in the desert on the way to the Promised Land. This “forever colleague” is thus grateful to be able to hum *Dai Dai Dayenu* out of the plenitude of her gracious sharing throughout the fullness of her life.

I recently collected personal memories of “Eight Chiefs” in the November/December 2015 issue of the *New York State Bar Association Journal*. The chapter which recounted our friendship gave her particular delight. That she was able to enjoy the remembrance, while still with us, gladdens my heart and softens the loss. Even as I write this *Ave atque Salve* salute to my “forever friend,” I can, through St. John Chrysostom’s reminder, hear her cheerful enthusiasm on the call that morning after she read the *Journal* article.

May she rest in a *Dai Dai Dayenu* Peace.

Judge Janet DiFiore

It is an honor to offer a brief reflection on the life and legacy of Judge Judith S. Kaye, who will be remembered as one of the most influential jurists and legal scholars of her generation.

I was fortunate to have many personal interactions with Judith. What I remember so vividly was her genuine humanity and empathy for families and children. Judith had a profound influence on me during my early years as a judge assigned to the Westchester Family Court. Upon meeting her, she questioned me with great care and in-

tensity about my experiences on the bench. It was truly inspiring to meet a Chief Judge so engaged and familiar with the hard issues we were facing in our courtrooms every day. How comforting it was to know that children and families were “priority one” on her reform agenda.

Judith Kaye focused a powerful spotlight on the needs of young people, especially those in foster care who yearned for, and deserved, permanent homes and caring families. She established Children’s Centers in our court-houses, streamlined matrimonial litigation, and established parent education programs for divorcing parents to reduce the level of destructive conflict for children.

Judith Kaye devoted herself, with every fiber of her being, to serving the public good and reforming nearly every aspect of our justice system. She pursued her visionary reforms with a passion, integrity and single-minded focus that inspired everyone she touched. In the process, she bettered the lives of millions of litigants, from those inhabiting the corporate world to those living on the margins of our society. For me, Chief Judge Judith S. Kaye will always be the great champion of New York’s children and families.

Judge Vicki Graffeo

“Honorable” was truly an appropriate title for Judith S. Kaye. Chief Judge Kaye was an exceptional leader and legal scholar who inspired generations of female attorneys and earned the respect of the Bar, her fellow jurists and the people of New York. She had “rock star” status in the legal community because she embodied the finest characteristics of professionalism and leadership.

She was a true visionary, pushing New York’s massive court system into the modern era by recognizing that courts could do more than adjudicate legal rights, they also could serve as a conduit for needed services to combat recidivism. Hence, the development of problem-solving, community and youth courts. Judith Kaye unquestionably had “true grit”—she persevered with boundless energy until her objectives were achieved. She had a rare sense of humanity for someone with such authority. Her desire to improve society went well beyond her caseload or administrative responsibilities, as evidenced by her efforts to push for improvements in the foster care system so more children could have permanent homes.

And, it was universally recognized that Judge Kaye had “class.” She had a style all her own and a formality that reflected her commitment to excellence, but she also

radiated warmth and concern for everyone she met. Her keen legal mind and clarity of written expression created a legacy of case law that is unsurpassed. Her career on the bench exemplified public service, and all of us who were fortunate to call her our “Chief” and our dear friend were truly blessed. Forever in our hearts, Chief Judge Kaye.

* * *

Judge Jonathan Lippman

The passing of Judith Kaye is a moment of great sadness for all of us. I tried to capture just a few of her qualities in “defending” her at the Twelfth Night festivities at the City Bar almost two decades ago. It is my hope that the excerpts below from that event will give you a sense of the Judith Kaye I knew and loved.

At the Court of Appeals, people talk about how Judith Kaye changed the Court. But, there is one innovation that she brought to the Court that *really* challenges tradition: kissing. Yes, I said kissing. Before Judith Kaye, there was no kissing at the Court of Appeals. Now, there is kissing, whenever the judges see each other. Before and after consultation, there is *kissing*; they put their robes on—there is kissing. They take their robes off—there is kissing. Hmmmm.... Now, it is one thing if you are kissing, might I be so presumptuous to say, the Chief Judge or Carmen Ciparick, but it is quite another thing to kiss *Vito Titone*, as any one of us who have had that privilege knows. But, she is the ultimate Jewish mother. It explains everything.

Judith Kaye always did the right thing for the courts, the legal community and the public. She clearly could have gone to Washington if she wanted to. But, she chose not to do so because of her commitment to New York. She has—by her elegance and grace, her unmatched scholarship, exceptional skills and standards of sheer excellence, her perseverance and her unwavering commitment to the indispensable independence of the Judiciary—made the New York State Courts the most modern, innovative and admired court system in the country. We were so proud to have her as our persona—as the symbol of the Judiciary and the justice system in this State.

* * *

Judge Susan Read

I have so many memories of Chief Judge Judith S. Kaye at Court of Appeals Hall—in her chambers; in the Red Room, before and after oral argument; on the bench; in conference; at the podium delivering an address or introducing a lecture. But my most precious memories are, of course, the personal ones. I shared with Judith a love of the performing arts, and we made many a jaunt to Lincoln Center to visit the School of American Ballet. I will never forget the time we audited a class of advanced students. When I met Judith beforehand in the School’s lobby, she laughingly told me that her husband Stephen had reminded her as she left their apartment not to forget her workout togs! Clearly, Stephen, like the rest of us, thought there was nothing Judith could not do.

At Judith’s memorial service, fittingly held at the Koch Theater, her daughter Luisa remarked that few people knew that her late mother always harbored the ambition to appear on that stage in *The Nutcracker*. The ballet heroine that Judith most resembled is not the Sugarplum Fairy, though; rather it is Princess Aurora who was visited shortly after birth by the Lilac Fairy and her retinue to bestow their gifts of purity, vitality, generosity, eloquence, passion and, of course, wisdom.

* * *

Judge Albert M. Rosenblatt

This is very good company indeed, as the contributors in this segment were her colleagues on the Court of Appeals. The biographers and obituary writers can report dutifully—and accurately—that she is best described in superlatives and achievements. It takes nothing away from those superlatives to add something a bit different. For those who worked at her side, and around the table, there is a dimension that goes immeasurably beyond her public persona and her accomplishments. For us, surely for me, she was a model in how to act with humility. Of course she never thought to instruct anyone on the subject; she simply was Judith and unwittingly served as a model.

It had never been attempted of course, but I would make an analogy to a blindfold tasting. I suggest that if the person with whom Judith was speaking was unidentified, an observer would not be able to tell whether she was speaking with a governor, a mail room attendant, a judge, or someone there to shampoo the rugs or take out the trash. She treated everyone with graciousness and good nature, with not a grain of haughtiness. That is what she was really like.

* * *

Judge Robert Smith

Judith Kaye and I were friends long before we ever dreamed we would be colleagues on the bench. In 1975, I was an associate of the Paul Weiss firm and Judith was (or was soon to become) a partner at Olwine Connelly. We were co-counsel at a six-week trial and had a wonderful time, getting a few witnesses of our own and keeping our charismatic seniors—Jack O'Donnell at Olwine and Arthur Liman at Paul Weiss—on the straight and narrow. Judith impressed me then as a wonderful lawyer; more important, she impressed Arthur, whose recommendation, I think, had something to do with the first Governor Cuomo's very wise decision to put her on the bench in 1983. Twenty years after that, when Judith was Chief Judge and I was nominated to her court, she embraced me like an old friend. "Can you believe this?" she said delightedly—and she wasn't just congratulating me and my good luck, but still reveling after all those years in her own. She loved her job.

Soon afterwards Judith had the idea of inviting Bob Carter, the judge who had presided at the 1975 trial, to have lunch with her and me. I well remember how thrilled Judge Carter, then in his late 80s, was to see Judith again and know how fondly she remembered him.

And that was Judith—this one of the kindest, most thoughtful human beings you'll ever meet—on top of being a great judge, a leader and innovator in judicial administration, and an inspiration to lawyers all over the state. I could go on and on just about her kindness to other people, if I only had the space.

* * *

Judge Sol Wachtler

When Governor Mario Cuomo delivered on his promise to appoint a woman to our New York Court of Appeals, the members of the Court were delighted. In its 136 year history, our Court had been all male. As judges of the Court we all recognized the need for a diverse perspective which only a woman could bring.

When Judith's appointment was announced, she was asked if she would bring a woman's perspective to the law of our State and to our bench. Her answer: "I take my gender with me wherever I go." We were to learn that during her almost one quarter of a century on the Court, she brought much more than her gender.

When Judith came to our Court she had no judicial, no less Appellate Court, experience. But there was no

learning curve for Judith. Her very first day on the Court, we heard oral argument on a case which was being reargued. The next morning at conference, she reported her analysis of the case in so persuasive a way as to convince the Court of her view: she wrote the decision in that case for a unanimous court.

Her remarkable judicial career demonstrates how much she brought to our Court, the judiciary, New York State and American jurisprudence. But on a very personal note: she brought to me her warmth, inspiration, humor and a supportive friendship for which I will always be grateful. May she rest in peace.

* * *

Judge Richard Wesley

How best does one capture the essence of a beloved colleague, dear friend and giant of a judge—Judith S. Kaye? One could focus on her opinions and the clarity with which she wrote, or note her innovations in how the courts of this state do business. Judith left her own indelible stamp on New York jurisprudence and fundamentally reshaped the courts of New York with her vision of a better way to deliver justice.

I will always remember watching young women—my lawyer daughter included—flock to her at events, listening to her joke with the Court's maintenance staff, and running with her before dawn during our time together in Albany. (A traffic savvy New York City pro, she once counseled me that when crossing the street you never look at oncoming traffic, as doing so "is a sign of weakness.")

In June of 2003 when I bid goodbye to the New York Court of Appeals, I said of my dear friend: "Is there another human being on this Earth with more energy and enthusiasm for just causes, with a kinder heart—a nobler view of what we do? I think not. When the book is closed—the portrait hung and the tally made—Kaye will stand with the great judges of all time." (Richard C. Wesley, *A Portrait of Judith S. Kaye*, 84 N.Y.U. L. Rev. 651 (2009)).

In this cynical age in which we live it was refreshing to see someone who was the real deal—a person whose compassion and commitment was genuine. Despite her absence, Judith will cast a long shadow for years to come. And I...I will dearly miss her.

A Tribute to Judith by Judge Carmen Ciparick

(on behalf of the New York Court of Appeals)

Thank you, Rabbi.

Good morning,

Many have gathered today to pay tribute to our dear friend, and colleague the very Honorable Chief Judge Judith S. Kaye. I am Judge Carmen Ciparick and am here to speak to you on behalf of the Court and as a close friend of Judith's as well.

I would like to begin by acknowledging the presence of some of our most distinguished guests and thank them for joining us today. From Washington, D.C. our esteemed Attorney General, the Honorable Loretta Lynch, former Governor Eliot Spitzer, former Mayor Michael Bloomberg and the other elected officials, Senator Schumer, Attorney General Eric Schneiderman and others who have joined us today. I especially want to acknowledge our New York State Court of Appeals Judges, headed by Acting Chief Judge Eugene Pigott, seated alongside our former Chief Judges Jonathan Lippman and Sol Wachtler, the former Judges of the Court of Appeals, a very special club, to which Judith and I belonged, and also our Chief Judge nominee, Janet DiFiore, our Appellate Division Judges and most distinguished Presiding Justices, Tom, Eng, Peters and Whalen our Administrative Judges, headed by our Chief Administrative Judge, Lawrence Marks, our trial judges and all those wonderful former judges—Judith would be so thrilled to have you all here.

Then, of course, Judith always saw fit to foster close familial ties with our Federal brethren, and they are all here. The Second Circuit Judges, headed by Chief Judge Robert Katzmann, and Federal Southern District Court Judges headed by Chief Judge Loretta Preska and Eastern District Judges and Magistrates have also joined us. Thank you for your tremendous showing of respect and admiration for our beloved Judge Kaye.

Looking around this beautiful auditorium at the outpouring of so many friends and admirers who have joined us today, I see not only many of our judges, as I



just indicated, but also our non-judicial employees of the Courts, who make everything work. Judge Kaye loved all of you and touched each one of you in a very special way. And to those elected officials and others who are here from the legislative and executive branches, you know that Judge Kaye was always a good partner in government. And then, of course, the private bar, who revered her, and her efforts on their behalf, the institutional lawyers, whose lives Judge Kaye sought to make better, her friends from the arts, from her many other organizations, her personal friends, neighbors, and of course her beloved law clerks and family, all coming together to celebrate Judith and wish her a fond farewell.

We have all been reading the tributes that have been pouring in over the last few days—newspaper articles, editorials, obituaries, testimonials from bar associations, law schools, law firms, and on and on—whose authors, at one time or another, have been recipients of Judge Kaye's great kindness and generous spirit. But, I do not plan on repeating what has already been said so very eloquently by others, nor do I plan to catalogue Judge Kaye's accomplishments, but rather, there is a string I wish to pull, ever so slightly, from all that has been written.

As you may know, Judith loved to write letters, she would write letters to friends and family, colleagues and employees, public officials and private citizens; she would write to anyone who bestowed a kindness upon her or upon the Court. She wrote many such letters and if you will indulge me, I will read my final farewell letter to Judith.

My Dearest Judith,

I first met you in 1983 when you were a newly minted Court of Appeals Judge. I marveled at your great accomplishments, but I didn't really get to know you well until ten years later, when I was fortunate enough to join your ranks. Then Governor

Mario Cuomo had brought you a long-awaited baby sister. I took my place at the bench, at the end by the window, and around the conference table right next to you.

I have so many fond memories of my early days on the Court of Appeals. I remember the night I arrived at Court of Appeals Hall. It was January, it was cold, it was snowy, I had missed my exit and had ended up in, of all places, Guilderland, but you anticipated my arrival and you were there waiting with a bottle of champagne and a warm embrace. I was soon to learn that that was *so* you, *so* Judith. Never missed a birthday, in fact you insisted on celebrating mine just 10 days ago with a beautiful Magnolia Bakery birthday cake. I was so touched. I will always remember that final gesture of friendship. You celebrated all joyous occasions, but also stood by your friends in times of grief and mourning. You stood by me when my husband was sick and dying, comforting me with your words of wisdom, you, who just a few years earlier, had lost your beloved husband, Stephen. We often recalled those days, and marveled about how fortunate we were to have been married to such great husbands, how lucky we were to have wonderful children and grandchildren. For you, Judith, your family was always first and foremost, your wonderful children Luisa, Jonathan and Gordy, your seven spectacular grandchildren. Birthday parties, graduations, hockey games, trips, bar mitzvahs, bat mitzvahs. You did it all Judith, you gave all of yourself to them.

But you gave so much to the rest of us also, to your friends, to your colleagues, to the Court system, to the people of this great state. Your 25 years on the Court of Appeals was marked by life-changing decisions, from capital punishment, to education financing, from same sex marriage, to major court reforms. You

instituted the problem solving courts. I remember how excited you were when you attended your first drug court graduation. You were beaming with pride. You were also so proud of your beloved Commercial Division, which you nurtured and watched mature and graduate to become one of the premiere commercial courts in the nation. You contributed so much, not just to the jurisprudence of this state, but also to the creation of a modern court system. And when you left the Court, Judith, you didn't stop. You kept going, though attached to a prestigious law firm, you continued pursuing your passions. Your work with the Children's Commission has yielded so much fruit and will continue to do so. You spearheaded the creation of the New York International Arbitration Center which has spawned a flurry of international arbitration activity in New York. New York is now a preferred arbitration venue, thanks to you, Judith. Your tireless work on the Commission on Judicial Nomination has given us such great appointments, and so much more. You just kept going Judith, in spite of your illness, and you will always keep going in our hearts and cherished memory. You literally left this world as you wanted to, with your boots on or, should I say wearing your red high-heeled shoes, and ready to get back to work. You were an inspiration, a mentor and a good friend Judith. I will miss our dinners, our shoe shopping forays, our occasional nights at the opera right across the plaza, just talking to you on the telephone, laughing with you, crying with you. I will miss you Judith and be forever grateful for your friendship. I thank your family for asking me to speak today. I hope my words bring some comfort to their heavy hearts. Judith, there is no more pain, you are now at rest. Sleep peacefully my dear friend.

With much love,
Carmen

New York International Arbitration Center Executive Committee Memories of Judge Kaye

James H. Carter

New York has an international arbitration “community” in large part because of Judge Judith Kaye’s good works. In this decade the lawyers in New York who practice in the field began to organize themselves to share experience and work together for the benefit of all those who use this important private justice system. Two important steps were the organization in 2010 of the International Arbitration Club of New York, of which Judge Kaye was a central member, and the creation in 2013 of the New York International Arbitration Center (“NYIAC”), which she largely created. Together, they have made the practice of international arbitration law in New York a family matter, in which lawyers interact regularly on a cooperative and not just an adversarial basis.

No other international arbitration city has a center like NYIAC, supported entirely by private funding from law firms and bar association sections. Most rely on governmental financing, which would also be welcome for NYIAC but thus far has not been available. When the idea of creating an arbitration center in New York arose, Judge Kaye was the person who said, “We can do it” and then made NYIAC a reality by persuading others to join in the effort. She was the ultimately persuasive leader.

NYIAC therefore has decided to recognize Judge Kaye as its Founding Chair, to honor her with an annual Judith S. Kaye Arbitration Lecture and to display her portrait always at our Center. She brought us together as a community.

Michael W. Galligan

Judge Judith Kaye had many vocations during her life—journalist, lawyer, jurist, administrator, judicial reformer, advocate and trusted advisor. The last vocation of her life was as an internationalist. Upon the adoption



Photo by Fred R. Conrad/The New York Times/Redux

by NYSBA of the 2011 Report of the NYSBA Task Force on New York Law and International Matters, on which she served as an advisor, she became the driving force in implementing one of the Task Force’s key recommendations: the establishment of an international arbitration center in New York. Indomitable in the face of seemingly impossible financial and logistical odds, she seized the opportunity of a collaboration between the newly formed New York International Arbitration Center and the American Arbitration Association in the latter’s new premises at 150 East 42nd Street and galvanized the support of the leading law firms of New York to provide the financial underpinning for the venture.

Her inspiration was her understanding that the contract and commercial law of New York is not only domestic law but also international law—the law of choice of countless individuals and businesses

around the world for cross-border trade and commerce. Undeterred by the health challenges of the last few years of her life, her devotion to advancing New York law as an international standard and strengthening the role of New York judicial and arbitral tribunals in cross-border dispute resolution took her to Mauritius, Mexico and many other destinations far beyond as well as within the United States. May we all seek to emulate and sustain her dedication to New York-inspired internationalism, the focus of her last and perhaps crowning vocation.

Richard L. Mattiaccio

I first met Judith Kaye in close quarters in an early meeting of cock-eyed optimists who thought they could actually get major law firms in New York to work together to create a bricks-and-mortar international arbitration center. It seemed increasingly naïve to me, as one learned person after another expounded about the need for a center. Then Judith Kaye spoke, as learned and wise as anyone,

and then it seemed absurd to harbor any doubt at all. *Of course* it would succeed. Why would it *not* succeed? And so it went at each, at first daunting, then *of course* stage in the development of NYIAC, from a glint in Joe McLaughlin's eye to a toddler thriving under Judith's watchful, knowing gaze.

Judith Kaye was not simply a cheerleader. She was someone who recognized the strengths and unlocked the energy in everyone who was lucky enough to work with her on one or more of the causes and projects to which she tirelessly dedicated herself. Goal-directed beyond words, Judith also showed genuine interest in the insights, motivations and life stories of every team member. As we listened to one person after another speak at Judith's memorial service of her genuine interest in others, someone seated behind me muttered, "I thought it was only me." Indeed, Judith made everyone, no matter how new in her life, feel her interest at her core about what was important to that single person.

A gift.

To each of us.

Joe Neuhaus

As many have observed and I experienced firsthand, it was impossible to say no to Judge Kaye. In the initial round of fund-raising for NYIAC, my firm was holding back. Then I got the call. She pulled out the stops: mentioned her early years at Sullivan & Cromwell, how that meant it was particularly important that we be on board, asked me what kind of critical mass we needed, all with her usual charm and good humor. Eventually, of course, we signed up, and I have been very active with NYIAC ever since.

I have watched with awe as she turned multiple smaller visions into reality, closing every discussion with, "So what do we do next? So-and-so, will you do that?" No one ever said no. We immensely miss her energy, constant good humor and optimism.

Jennifer Permesly

In 2011, Edna Sussman invited me to join her to "take notes" for a group of lawyers dedicated to efforts to establish a bricks and mortar arbitration center in New York City. Little did I know that I would be meeting the *crème de la crème* of the New York arbitration community, fearlessly led by none other than arbitration newcomer Judith Kaye. Despite my being more junior and far less influential than everyone else in the room, the judge (as I never could stop calling her despite her insistence) embraced me from the start. Soon I was joining her at meetings with New York big-wigs and helping to brainstorm ideas for getting the center off the ground. To Judge Kaye, age and

status were irrelevant—ability and drive were all that mattered.

Due to Judge Kaye's ability and drive, our arbitration center (NYIAC) is now thriving, but the community it created is much more important than our physical space. I was married just around the Center's one-year anniversary. My favorite wedding card was hand-written by Judge Kaye—it reads, "From your friends at NYIAC, where you are also loved."

Peter Sherwin

Wasn't it wonderful to have Judith Kaye in our lives, leading, guiding, and encouraging us to do good things? I think everyone heartily agrees it certainly was.

Judith Kaye supplied the vision and then assembled the right team to make it a reality. That included so many great things, such as creating community courts, educating to reduce barriers to reentry for those convicted of crimes, and forming a world-class center in New York for international arbitration. And you would always say yes to her request to help even though it appeared to be difficult or even daunting. That was because you could sense her clear passion for the project, because you knew she would be there encouraging you throughout, and critically because she exuded faith that you were up to the task.

But there was another reason you said yes: she was a genuinely warm and welcoming person. Everyone has their own story of how they came to meet Judith. Mine was on a weekend afternoon twenty odd years ago in the Proskauer library, when I was a junior associate going through case volumes doing research. I turned the corner in the stacks, and there was Chief Judge Kaye. I was so surprised to find her there up to the same thing as I, even though I knew her spouse was our wonderful litigation partner Stephen Rackow Kaye. She introduced herself and graciously asked about my research in a way that conveyed true interest. With that simple gesture, she had won me over, and I'm proud to have always said yes to her thereafter.

With great love and admiration.

Richard H. Silberberg

I first encountered Chief Judge Kaye in 1993, when I argued my first case before the New York Court of Appeals. I recall being struck by the dignity that Judge Kaye lent to the proceedings, her laser-like focus on the appellate arguments, and her remarkable ability to instill in the apprehensive advocates who came before the Court both a level of comfort with the experience and confidence that their positions had been heard.

Like many New York lawyers, I followed the legal career of Judge Kaye with great respect for her intellect, appreciation of her judicial comportment, and admiration of her commitment to reforms aimed at modernization of the New York court system. But I could not have imagined that nearly two decades after I argued my first case before her, I would have the privilege of working with Judge Kaye in connection with the establishment of the New York International Arbitration Center. In the course of that work, we engaged in lively discussions about a wide range of topics, ranging from the personal (her fond memories of the Mohonk Mountain House in New Paltz, New York) to policy (including her hopes for needed improvements in the juvenile justice system). But the thing that I will remember most about Judge Kaye echoes my first encounter with her in 1993: whenever our paths crossed professionally or personally, she was always interested in, and respectful of, everyone with whom she came into contact. "Force of nature" is an oft-overused phrase, but as applied to Judge Kaye, it truly fits. She will be greatly missed.

Robert L. Sills

I first met Judge Kaye in the early days of NYIAC, when it was merely a concept. Given her career on the bench, I expected a distant and intimidating presence. Instead, I met a warm and funny individual fascinated by her new venture, who insisted that I call her Judith instead of Judge.

Running a meeting for a group like the NYIAC Executive Committee is no easy task, given that each member is a successful practitioner with a firm belief in his or her powers of persuasion. At each of our meetings, Judge Kaye presided with a mixture of firmness and humor, and with flawless judgment. Everyone felt that his or her views had been heard, even if they had not carried the day, and Judge Kaye made sure that we covered the entire agenda and ended on time. Without her ability to herd legal cats, NYIAC wouldn't be the going concern, and part of her legacy, that it is today.

Edna Sussman

Judith Kaye was a vigorous champion for the underprivileged, for youth, for justice, for gender equality (some of you will remember her red shoes campaign to promote gender equality on the judiciary) and in recent years, after leaving the bench upon reaching the New York Court of Appeals mandatory retirement age, for arbitration.

I had the privilege of getting to know Judge Kaye and work with her in connection with the founding of the New York International Arbitration Center. Without her

determined and consistent devotion to its creation, it never would have succeeded. When she had her eye on a goal, she went all out until it was achieved. And she had a great many diverse goals and I believe achieved them all.

She was not one who delegated but rather shouldered herself the work required. No task was too small for her to undertake. If a special skill set was required for the Center she knew somebody who could help whether it was blinds for the translators' windows, or a PR agent, or you name it, she had a connection who was happy to help out because of their affection for Judith. And she inspired that affection in all who met her because what was unique about Judith was her persona. She had a way of making each of us feel like we were really special to her. She was the most gracious, caring, attentive person I have ever met. She was full of life and humor with a constant twinkle in her eye.

Her passing is an extraordinary loss. We have lost a great leader and a great friend.

Stephen P. Younger

This year we lost a giant in the legal world—Judge Judith S. Kaye. Judge Kaye had a brilliant legal mind, was an extraordinary leader, was incredibly focused on getting things done and above all was one of the most caring individuals I have known.

It was a fortunate occurrence for me in 1983 to be clerking on the Court of Appeals when Judge Kaye arrived there as the first woman to serve on the Court. A long-time friendship began. As President of the New York State Bar Association, I launched a Task Force, on which Judge Kaye served as advisor, to explore how to maintain the pre-eminence of New York law as an international standard. With Judge Kaye as our esteemed advisor, the Task Force recommended the formation of an international arbitration center in New York.

I have no doubt that without Judge Kaye's extraordinary leadership, the report's recommendation would still be gathering dust on a bookshelf. Instead, we have the New York International Arbitration Center—which is one of world's leading international arbitration centers here in New York. This development was long overdue and will help ensure that New York keeps its stature as a leading global financial and legal center.

Judge Kaye paid attention to every last detail in the center's formation and evolution to ensure excellence—down to the selection of the carpets and the colors on the walls. It was her drive and passion for the center that resulted in leading New York law firms giving substantial financial support to the center—something that proved key to its success.

Judith, we miss you dearly—but your legacy lives on in the New York International Arbitration Center.

Remarks in Honor of Judith S. Kaye

By Alexandra Dosman, Executive Director, NYIAC

Annual Reception of the New York International Arbitration Center (NYIAC)

January 28, 2016

At last year's annual reception, inspired by David Letterman, Judge Kaye presented us with the "Top Ten Reasons to Choose New York Law and NYIAC." This year, in her memory, I will address the "Top Ten Ways Judge Kaye Inspired the New York International Arbitration Community."

"[Judge Kaye] was an optimist and an innovator. She always asked, what next, what more? She believed that with hard work, smarts, and maybe a bit of red shoe magic, nothing was impossible."

Number 10: She saw the big picture. In 2011, she was part of a New York State Bar Association task force that called for the "establishment of a permanent center for hearings in international arbitration" in New York.

Number 9: She made it happen. She took the idea of a center and turned it into NYIAC, a bricks and mortar reality. How? She persuaded 40 law firms and two sections of the state bar association to come together and take action. Imagine that, 40 law firms *agree* on something? Only for Judith.

Number 8: She motivated us and inspired the best from each of us. She would ask, what is the best way to do that? And can I count on you to do it? Of course, the answer was always yes.

Number 7: She knew that details matter. For NYIAC, Judge Kaye chose the perfect color of the walls, the el-

egant wallpaper, and our proud blue and orange colors—the colors of the great city of New York.

Number 6: She was relentlessly curious about the law. I always looked forward to calls from Judith—and many of you no doubt received similar calls—because we would talk not about mundane things, but rather about cases, arguments, ideas. She kept herself on the cutting edge.

Number 5: She believed in young people. She was constantly meeting students and young practitioners, and encouraging them. She particularly encouraged women to follow her in pursuing leadership roles in the legal profession.

Number 4: She built bridges between her worlds, in particular between the judiciary and the international arbitration community in New York.

Number 3: She was an optimist and an innovator. She always asked, what next, what *more*? She believed that with hard work, smarts, and maybe a bit of red shoe magic, nothing was impossible.

Number 2: She brought the same qualities she exhibited on the bench—integrity, clarity, and fairness above all—to her work as an arbitrator. She was guided by a deep respect not only for the legal process, but also for the dignity of each and every individual who came before her.

Which brings me to the Number 1 way Judge Kaye inspired us. She brought us together as a thoroughly collegial international arbitration community. I mean that in a general way, but I also mean that it is because of her that we are here, tonight, together. So let us raise a glass to the inspirational, extraordinary, deeply loved and dearly missed, Judith S. Kaye.

Chief Judge Judith Kaye at Skadden, Arps

Chief Judge Judith S. Kaye joined Skadden, Arps as “of Counsel” in early 2009. She had not left her dream job as Chief Judge of the New York Court of Appeals willingly, but rather by dint of the court’s mandatory retirement rules. It was abundantly clear that, at age 70, retirement was not for Judith and the judiciary’s loss became our gain.

At the same time, having decided to join the firm, it was not clear what practice area Judith would settle into. (The firm had given Judith wide latitude to see where she thought she would be happiest after she got here and encouraged her to maintain all of the projects that she was so passionate about while Chief Judge, including, most important, her youth courts initiative.) Fortuitously for our International Arbitration and Litigation practice, Judith saw international arbitration as a comfortable fit for her. And, indeed, it was.

“It was an honor to have Judith at the firm. Her exuberance was boundless, her graciousness infectious, and her attentiveness an inspiration to all she met.”

Judith was in immediate demand to serve on international arbitral tribunals and, but for the firm’s robust corporate practice, which, through conflicts, limited her ability to take up many of positions she was asked to fill, Judith would have been sitting as an arbitrator almost every day. It is easy still to see Judith’s broad smile when, having successfully navigated the conflicts labyrinth, she announced that she had gotten the last “all clear.”

Judith made no secret of the fact that she greatly enjoyed the camaraderie of a three-person arbitral tribunal: sitting with others and trying to get to the right result reminded her of the many court conferences that she had presided over on the Court of Appeals similarly striving “to get it right.” Notably, while Judith had gone from a standing start just six years earlier, at the time of her untimely passing, Judith was (deservedly) cited by Chambers in the first rank of international arbitrators in the United States.

Separately, other law firms often implored Judith to serve as an expert on New York law in pending litigation and arbitration matters. Although she was reluctant to do so, not wanting to go “head-to-head” with other former colleagues of the New York Court of Appeals, ultimately,

Judith did agree to take on a few (very few) expert assignments. But she simply did not enjoy being an expert nearly as much as being the decision maker.

Judith’s signal achievement in the international arbitration world was envisioning and launching the New York International Arbitration Center. Simply stated, without her unique talent in cajoling forty (40) New York law firms to participate in the venture there would be no Center. Her determination and perseverance made it happen, an enormous achievement given the initial skepticism she faced. But Judith was not a “No” person. New York needed a Center and it was going to have a Center. How right she was. In a sign of admiration and an acknowledgment of her pivotal role in its creation, following her death, the Center’s Board of Directors, comprising a lawyer from each of the now over 45 member firms, voted to bestow the honor of “Founding Chair” on Judith and to hold an annual lecture in her honor.

But Judith’s work at Skadden was not limited to the international arbitration arena. Far from it. Given her stature, she was called upon to be independent counsel in two major investigations. In one, she was appointed by Governor Andrew Cuomo to investigate several alleged ethics violations by former Governor Paterson. She also conducted an independent investigation of the athletics program at SUNY-Binghamton after allegations of NCAA rules violations surfaced with regard to the school’s men’s basketball program. In addition, she advised on countless state and federal appeals and provided invaluable insight into how appellate courts think. And for those of us that had the privilege of arguing before her when she was Chief Judge, it was even more rewarding (and surreal at times) to have her now as a friend and advisor providing such unique insights. Naturally, Judith also was frequently called upon to moot important arguments before they were made and to debrief on options afterwards. She also served in this role outside the firm, something she did with relish as it brought her into collegial contact with some of the pre-eminent legal scholars and practitioners in the country.

When Judith joined the firm, she looked forward to the day when she could resume her career as a commercial litigator, something she had done for twenty years before her appointment by Governor Cuomo to the Court of Appeals. Yet Judith was exquisitely sensitive to taking on anything that could raise even the slightest appearance of a conflict stemming from her judicial career. After much reflection and discussion, Judith took the helm in a case involving the \$3 billion Willets Point Development project.

For those lucky enough to work with her on this case—which she had looked forward to presenting to her beloved Court of Appeals—it was a magnificent experience. A consummate team player through-and-through, Judith relished the legal analysis and discussions, the stress and challenge of the briefs and oral arguments and perhaps most of all, the personal and professional friendships that such intense joint efforts foster.

Judith was unfailingly welcoming to everyone, encouraging everybody from support staff and summer associates to the most senior lawyers to visit her office at any time and she wouldn't hesitate to just pop into your office for a visit or to go to lunch. Judith also loved presiding over marriages and sometimes was able to enhance client service at the same time. For example, shortly after joining the firm, one of the in-house lawyers at a valued client needed a judge to officiate at his interfaith wedding and asked if Judith would be willing to help. Judith had never met this couple but she didn't hesitate for a minute in saying yes. She made it a point to get to know them both and on a sweltering August night she donned her robe and married them in an outdoor service, never once missing her signature smile. When the couple had their first child, she was named in part after Judith.

Inside the firm Judith was a valuable Trustee on the Board, selecting finalists awarded Skadden Fellowships to work in pro bono organizations throughout the nation. She chaired the Permanent Commission on Justice for

Children which strives to “keep kids in school and out of courts.” Judge Kaye used her position and gravitas to illuminate what was happening in New York, and nationally, to those kids being criminalized for being kids. She was a tireless advocate for Youth Courts.

Judith served as Chairwoman of the 12-member Commission on Judicial Nomination which is responsible for submitting a list of potential Court of Appeals appointees to the Governor. Judith's energy in the last months of her life did not wane as she strove to deliver two lists to Governor Cuomo: one to fill the Chief Judge vacancy created by Judge Lippman's mandatory retirement at the end of 2015, and the other to fill Judge Read's position as an associate judge on the bench following her decision to retire in July 2015. Judith was very proud of the work of the Commission and believed strongly that the candidates offered to the Governor were of the highest caliber. She was delighted to see that Judge DiFiore was picked by Governor Cuomo to fill her former position as Chief Judge and, though she did not live to see it, she would have been thrilled to see Michael Garcia selected to fill Judge Read's seat on the bench. Soon to be Judge Garcia had been a law clerk of Judge Kaye's many years ago!

It was an honor to have Judith at the firm. Her exuberance was boundless, her graciousness infectious, and her attentiveness an inspiration to all she met. And she certainly carried it all off with grace and style. We miss her every day.

Luisa M. Kaye Eulogy

(Judge Kaye's daughter)

Before I begin, some thanks. To the Skadden firm, not only for enabling my mother to attain her ultimate dream of appearing on the stage at Lincoln Center, but for giving her the post-judicial home without which she would not have survived these past five and a half years since her diagnosis. To the Board and staff of Lincoln Center. To the New York State Court Officers, who have taken care of her and her beloved courts so well. To Congregation Shearith Israel, her spiritual home for over 50 years. To Mayor Bloomberg and Judge Ciparick for their enduring friendship and beautiful tributes here today. To the honorable judges and justices of the state and federal courts, elected officials, and my mother's esteemed colleagues at the bar, to family and friends, and to everyone who is here to honor her and support us on this terrible day.

"My mother taught me many life lessons, most of all, by her example, that nothing of value comes without hard work and resolve, and that no change comes without making it happen. She worked harder than anyone I have ever known."

I have only worn red a handful of times in my life. It was and always will be her color. Red shoes, red suits, red blouses, red flowers, red lipstick. The most vibrant color reflecting the most vibrant soul it adorned. Today, unlike all other days when she would be here to light up the room with her spirit and her outfit, we wear red to invoke her and to honor her.

She wore it because she liked it, but it was also entirely fitting. Far from her rather staid image, she was actually a rebel. Not the sex and drugs and rock 'n roll kind of rebel, but the kind with convictions about what she could and should do with her life that may have contradicted expectations and norms, but she couldn't give a damn.

It may not sound like rebellion to go to Barnard and then NYU Law School, but that was not quite what her parents had in mind for their daughter in the 1950s. If she had been a good girl, she would have found a husband before graduation from high school, maybe gone to an upstate teachers' college.

Instead, my mother hit Manhattan to attend Barnard at age sixteen and one month. While she always maintained a deep affection for Monticello, I have an image of her arriving here and physically shedding rural life like a banana peel to reveal her true self. She wore black turtle-

necks and went to Café Wah and the Bitter End. While we were watching the *Downton Abbey* marathon last Sunday, she shared with me that she would sometimes watch three double features in a row. Can you imagine? Twelve hours of movies? I asked her how many buckets of popcorn she ate, but she could not recall. During the fundraising interlude between the marathon and the beginning of Season 6 of *Downton Abbey*, we donated at the level that got us the DVDs of all of Season 6. I am very sorry that she never got to binge on them.

Her rebelliousness had lots of other expressions, even though you may not have noticed them because of her consummate elegance and grace at all times. Her patterns and colors were really out there, you must admit. Many of the positions she took as a judge and things she did as an administrator, which would be described benignly once done as "innovative" or "progressive," were nothing short of rebellion. But always WITH a cause, and always perfectly. She didn't make a lot of noise or fuss. She just figured out what was right and kicked ass.

She was of course a very serious person, but she was also incredibly funny. She could do deadpan and irony like no one else, and she could also be very silly and zany. You would never get a birthday cake with your actual name on it. A familiar breakfast table ritual was for my father to ask for a piece of the paper, whereupon my mother would tear off a tiny corner of the page she was reading and hand it to him. She made up names for us based on the activity we were doing, like our "southern" names when we spent summers in Hilton Head Island. I was Magnolia Blossom. She loved to sing and she did it everywhere, and loudly. This was very embarrassing to me as an adolescent.

My mother taught me many life lessons, most of all, by her example, that nothing of value comes without hard work and resolve, and that no change comes without making it happen. She worked harder than anyone I have ever known. When we opened a closet the other day, we found a stack of copies of *The Little Engine that Could*, which she must have kept around for when she needed a gift for a little kid. She really believed the message of that story and she really proved it.

Some lessons she actually articulated, such as to me as a woman eternally conflicted between the demands of a career and family, to "be where you are, when you are," and don't worry about what you're not doing. Or less high-minded ones, like "never buy a wrap skirt," or "don't go out without lipstick on." I did not always listen

(continued on page 17)

Jonathan Kaye Eulogy of Judith Kaye

(Judge Kaye's son)

"Who is honorable? One who honors his fellows."

These words were expressed by Rabbi Ben Zoma more than 2000 years ago in a part of the Jewish Oral Law called "Avot," or "Sayings of the Fathers."

But everyone who met my mother knows she exemplified this wisdom.

My mother focused on how she made others feel, not on elevating her own stature.

She deeply believed in the goodness of people. When you talked with her, she made you feel important.

I can see in my mind being out with her on the street or somewhere, and I'd see out of the corner of my eye someone whisper "is that her?," "I think so" and they would approach her really cautiously, then start to speak. My mother would wheel around and effusively greet them. If she knew them, she would rattle off THEIR activities and accomplishments with such enormous and

sincere reverence. If she didn't know them, she would learn about them with a keen interest.

Anyone who had the chance to visit her office would see the walls filled from floor to ceiling with pictures and cards from the people she touched and what they had accomplished. This was not vanity—it was pride in THEIR accomplishments.

"My mother focused on how she made others feel, not on elevating her own stature."

Now, in this celebration of her life, looking out in this audience and beyond, I can see a "living" wall that testifies to the impact she has had on all our lives.

Who is honorable? She who honors her fellows.

Luisa M. Kaye Eulogy *(continued from page 16)*

to her. I disappointed her profoundly when, once sometime in my 20s, I asked her where Saks Fifth Avenue was.

She told me a day or so before she died that she had had more in life than anyone could ever ask for or deserve: a wonderful marriage, an incredible career, children and grandchildren whom she adored and who adored her. Although she said she was weary of treatment, and obviously knew she was very ill, she never said she was ready to die. She fought very hard, the hardest, literally until the end. She did not lie down for death, either figuratively or literally: when my brothers found her, she was sitting up.

More than anything, I want my mother to be able to rest now. I know she is worried about all of us, and par-

ticularly about those whose lives she hoped to improve with her work. I want her not to worry. I want her to believe that there is no way she will EVER stop making an impact. Like a stone that skips across the water's surface a thousand times, she put in motion ripples that will go on expanding forever.

I'd like to read a few lines of John Donne's poem, "Death Be Not Proud:"

Death be not proud. Though some have called thee mighty and dreadful, for thou art not so. For those whom thou thinkst thou dost overthrow die not, poor Death, nor yet canst thou kill me.

Gordon Kaye Eulogy

(Judge Kaye's son)

On the wall of my mother's office there is a framed award that was given to her by the Center for Battered Women's Legal Services. I do actually carry a picture of it with me wherever I go. While the "formal" language of the word is beautiful, it's the handwritten inscription that really captured my attention. It's a picture of an African-American woman with tears streaming down her face. Underneath it is a note that reads "Please judge Kaye, can we clone you?"

For some reason every time I walked into my mother's office it was those words "Please judge Kaye, can we clone you" that captured my attention. Every time I walked in, every time I looked at the picture...even when I think of the picture, for some reason I pause.

"Clone" was an interesting word choice. Why didn't they use "copy" or "duplicate?" When I look up the word "clone" the definition seems very scientific—you read something like "the aggregate of genetically identical cells of organisms asexually produced by a single progenitor cell or organism." I would think...Is that something they want to do to my mother?

But the more I think about it, the more appropriate the word "clone" really is. It implies more than just make a copy or a duplicate—it *is* almost scientific. Just copying my mother really wasn't enough—there is something almost imperfect about a copy. The message clearly conveyed was "we want a perfect copy."

But alas, I think in true Judith Kaye fashion, her life was actually a scientific project to "clone" herself in each and every one of us. She's been at it for years, in true Judith Kaye style, without any of us really knowing what she was doing...it was her goal that each of us carry a piece of her, every day, so that when we put those pieces back together, we have a perfect copy—a clone.

We all know she was an outstanding jurist, a great legal mind, a tireless worker, and an innovator that, as someone rightly said, was a "towering force" in the New York legal community. She was a humble and gentle person with a huge heart and a glowing smile who believed that, in our souls, we were all put on this great earth to make a difference—to represent those that could not speak for themselves, to fight for those who could not fight on their own. Her strength of conviction was unbelievable—and she steadfastly believed in standing up for what she believed was "right" even in the face of overwhelming adversity.

More than that, she made me call her mommy...a sister, a wife, a friend, a colleague, a mentor, she was everywhere and everything to so many of us. She was loving and compassionate when necessary... Stern and shall we say "directed" in her own special way, whenever my brother or sister perhaps needed some extra "guidance."

Obviously I never saw that side of her. She took pride in reminding everyone that, even at the age of 47 "I was her baby boy."

I remember distinctly as I was preparing my remarks when my father passed away, my mother "politely suggested" (in her very own "politely suggested" way) that any good speech must (and I think you all know that "must" tone she had) include a personal story.... So here it goes. I was eight, and my mother was at Olwine. Evidently I could not find a shoe that I needed for school, and I called her to ask where the shoe was. As was her standing policy, her assistant interrupted her in the middle of an important meeting without knowing why I was calling. Of course she picked up the phone and of course she knew where the shoe was!

She *loved* telling that story, never shy to share it with any willing listener as I stood and blushed!

While in and of itself it may not seem to have any relevance here today, I tell the story because it is a perfect example of how my mother was cloning herself.... In telling the story, she was teaching me that family comes first—always answer the phone even though you have no idea what the question might be.

"Please Judge Kaye can we clone you?" She wasn't waiting for us to find the answer... She has been doing it herself all these years. My only request of you—those who loved her, admired her, worked with her...is that you carry on her legacy of not allowing roadblocks to stand in your way...not allowing adversity to be an excuse for inaction... not allowing the fear of uncertainty to prevent you from asking the question...or answering the phone. If we can do that, she was—as she always has been—successful in creating that perfect copy in all of us.... A clone.

Before I invite Rabbi Hidary to the stage to conclude this service, I would like to ask something very special of you. On Thursday, Bob Hardt, a reporter from *New York One*, wrote a beautiful blog post remembering his trips to the Metropolitan opera with her.... I would like to read part of it to you...

Sadly Judge Kaye's work is done and there will be no more trips to the Met because she died yesterday. But there could be no more appropriate place for Judge's memorial to be held than Lincoln Center—a place where she deserves to be on center stage getting a standing ovation for a daring and wonderful life. Brava!

I would ask that you join me in standing now, on this day, to honor her with a standing ovation, on center stage in this beautiful theater, for a daring and wonderful life....

Sonja and Andrea Hagemeyer Eulogy of Judith Kaye

(Judge Kaye's granddaughters)

We always knew that our Grandma was special—if her nearly undefeated Scrabble record wasn't enough, you'd know she was a big deal when you'd call her office and hear, "Judge Kaye's Chambers." However, to all of us, she was "Grandma," and our conception of how special she was really had nothing to do with her exceptional accomplishments or career.

"You've all probably read in her obituary that she had planned to go into a career in journalism. She probably would have been excellent at it, but [we] know that what she really wanted was to be a ballerina and dance in The Nutcracker."

While Grandma was certainly "Grandma" to us before we understood her as "Judge Kaye," we were all certain from a young age that she was not just your average granny. Unless she was wearing her vintage Reebok track pants, she always wore suits and skirts, her hair was always perfectly done, and let's be honest, it's safe to say that the kitchen was not her preferred domain. We shared countless times riding around in Grandpa's Barbie Magic Airplane, the three of us girls stuffed in the back, singing *Mamma Mia* in unison while Grandpa flew his Lincoln Town Car across the streets of New York City. Grandma and Grandpa always wanted us to be happy; growing up their favorite question was, "What do grandma and grandpa never say?" in which we would sing back in unison, "Grandma and grandpa never say no!"

A few nights ago, I was looking through my Instagram pictures when I came across a photo that I had posted of Grandma that was originally published in *The New York Times*. If you're not familiar, the photo catches

her in her office, the Empire State Building behind her, a sassy smile, and a power stance, emanating her contagious feminine prowess. I instagrammed this photo to show off how special my grandmother was, one could say I was humbly bragging. The caption on my photo is "#tbt to the time this fierce kitty was in *The New York Times* #justiceisserved #power-grandma." Grandma was always a little bit racy, or as I captioned so perfectly, a "fierce kitty." She loved red



Photo by Fred R. Conrad/
The New York Times/Redux

heels, fishnet tights, outlandish, colorful patterned blouses, bold jewelry, and Shun Lee Chinese food for every occasion. But more so than her ferocity and her work ethic, her love of family and the sense of home she provided not only to all 7 of her grandkids, but to our friends and our whole family, made her who she was to us.

It seems fitting that we are all gathered here today in Lincoln Center, a place she loved so much. You've all probably read in her obituary that she had planned to go into a career in journalism. She probably would have been excellent at it, but Andie and I know that what she really wanted was to be a ballerina and dance in *The Nutcracker*.

Whenever we went anywhere, whether it was Pomodoro or Saks, or even when we just ran into someone on the street, she would always ask "Isn't my granddaughter fabulous?" But really it was she who was the fabulous one.

Michael Bloomberg Eulogy

(former Mayor of the City of New York)

I can honestly say that I would never have become mayor without Judith Kaye. After all, she swore me in—twice. The first time, on New Year’s Day 2002, she couldn’t have gotten much sleep, because the night before she had run the New Year’s Eve race in Central Park. And just in case the new mayor didn’t believe she had run it, underneath her robes, she wore her race number!

As elegant as she was, she had a playful sense of humor. The court system can be stuffy, but Judge Kaye was anything but. At my second inauguration, we gave an orange scarf to all the volunteers who were working the event—and she liked the scarves so much that she asked for one, and she wore it when she swore me in. A year later, she called City Hall to ask if we still had any orange scarves because she wanted to wear one when she swore in Andrew Cuomo as Attorney General. We did, and I think it’s safe to say that no judge has ever looked more stylish.

“Judith was a brilliant jurist and a gifted writer whose opinions will be read for decades to come. But what I most admired about her, and what I think was her greatest asset, was her fearlessness. She was a trailblazer in every sense of the word.”

But the truth of the matter is: no judge has ever had a bigger impact on New York City and State than Judith Kaye—and given the distinguished jurists who have served over the course of New York’s history, including a few who have gone on to the Supreme Court—that is an amazing achievement.

Judith was a brilliant jurist and a gifted writer whose opinions will be read for decades to come. But what I most admired about her, and what I think was her greatest asset, was her fearlessness. She was a trailblazer in every sense of the word. She was, of course, the first woman to be chief judge, but she was also the first chief judge to have a vision of a justice system that was not only blind to bias, but also centered on solutions.

She became Chief Judge in 1993, at a time when crime was rampant and she understood that the courts had to play a more proactive role in reducing it. Churning cases wasn’t cutting it.

During her first year, she embraced the idea of a Midtown Community Court that would focus on helping people solve the problems that brought them there so that

they wouldn’t keep cycling back through the system. That meant combining punishment with help by giving judges more options and defendants more opportunities, through counseling, treatment, and social services. At the time, most of the legal establishment thought the idea of putting a community court in the middle of Times Square was—to use an old Gaelic word—*meshuganah*.

But Judge Kaye saw it differently. And she had the guts to throw the full weight of her office behind it. She wasn’t afraid of experimentation—far from it.

She helped create the Center for Court Innovation because she knew that the courts needed an R&D arm. Remember: The entire legal profession is built on respect for tradition. Judge Kaye, in her own elegant way, bucked it. And what a difference she made.

The story of Times Square’s comeback cannot be told without the Midtown Community Court and Judge Kaye; but that was just the beginning. She helped spread problem-solving courts across the city and soon they began appearing around the country. In fact, it’s fair to say, as her successor Jonathan Lippman did, that she helped start a revolution in the justice system. This elegant, classy, graceful, debonair woman was a revolutionary. And the revolution she ignited has helped countless Americans get their lives back on track and stay out of jail—and it has spared countless more people from being the victims of crime.

Here in New York City, problem-solving courts helped our administration cut crime to historic lows and they also helped us reduce the population of Rikers Island by one-third. All of us are the beneficiaries of her fearless leadership and her innovative spirit.

I first met Judge Kaye in 2001, when I was a first-time candidate. No one—and I mean no one—gave me a chance of winning, but Judge Kaye invited me to help her celebrate an anniversary of the court’s commercial division, which she had created. I was impressed. But I was even more impressed when I made a campaign stop at the Red Hook Community Justice Center, which she also helped launch. In fact, I was so impressed that after I won the election, I interviewed the guy who co-founded and ran it, John Feinblatt, for the position of criminal justice coordinator.

At my inauguration, after Judge Kaye went through the receiving line, she went through again, this time escorting John. I got the message and John got the job. Many members of our administration counted Judith as a friend, and one—Deputy Mayor Carol Robles-Roman—was lucky enough to be among the many young lawyers who counted Judith as a mentor.



As forward-minded as Judith was about the courts, she was just as forward-minded about the law. In cases involving education funding, free speech, and gay rights, she was a staunch defender of equality. Her dissent in a decision rejecting marriage equality stated: “The long duration of a constitutional wrong cannot justify its perpetuation...no matter how strongly tradition or public sentiment might support it.”

Nine years later, a majority of the U.S. Supreme Court agreed.

“As forward-minded as Judith was about the courts, she was just as forward-minded about the law. In cases involving education funding, free speech, and gay rights, she was a staunch defender of equality.”

There is one other issue I want to mention where Judith’s deep commitment to equality shaped our city and state: jury duty. Until Judith came along, 26 professions were exempt from jury duty, by far the most in the country. Judith said: “Not on my watch.” She persuaded Albany to eliminate all of the occupational exemptions. No group was too important to serve—including, I can tell you, mayors and CEOs. I happened to have jury duty last week, and while I can’t say that I’m sorry I wasn’t

selected for a jury, I can say that the process was orderly and painless.

Well, almost painless. I did have to turn off my cell phone.

But I was happy to serve—because that’s the way democracy should work. Everybody has to do their share—no matter how busy or self-important they are. That’s part of what makes America a beacon of equality and justice and it’s why Judge Kaye’s leadership on this issue was so important.

When you view her legacy in full, there’s no doubt that Judith was one of the most important figures in New York State history. And like the laws that she shaped and the courts that she fashioned, her influence on our city, state, and country will be felt for generations to come.

Luisa, Jonathan, and Gordon, and all her grandchildren, and her brother, Allen: We were awfully lucky that Judith chose to dedicate so much of her life to public service. And you should be awfully proud not only of what she accomplished, but how she accomplished it: With great dignity and decency, and absolute integrity. In a state capital notorious for corruption, no one bore the title of Honorable with greater ease, or greater distinction, than Judith Kaye.

God bless you, Judith. And thank you not only for making me mayor—but for making so much of our city’s progress possible.

Déjà Vu: A Personal Reflection on Women in International Arbitration

By Judith S. Kaye

A triangle of coincidences motivates this brief personal reflection. The first is the fiftieth anniversary (gulp!) of my graduation from law school. The second is my arrival back in the law firm world, at Skadden, Arps, Slate, Meagher & Flom. It's what I call my "after-life," my good fortune after more than 25 glorious years as a judge of the Court of Appeals (New York State's high court), 15 of those years as Chief Judge of the State of New York, both a judicial role and a chief executive officer role.

The third leg of the triangle was the invitation of Edna Sussman to set down my new-world observations, as I have shared with her a sense of "déjà vu all over again" (to quote Yogi Berra) about the place of women lawyers, particularly in the fascinating world of arbitration that is increasingly a part of my extraordinary life at Skadden. And just to make my point most dramatically, I'll stay with the subject of women as arbitrators in international arbitration, recognizing that the picture is somewhat brighter for women as lawyers and administrators in the arbitration field generally.

Getting Beyond the Front Door

I had my first real taste of being a female lawyer in a virtually all-male world in the early 1960s, still in the lifetime of many of our readers. One of ten women in a class of 300 at New York University Law School, I set my sights on the unattainable goal of a position in the Litigation Department of a major Wall Street firm. The Placement Office said it would be "interesting" to see how I did. The more I was turned away the more determined I became to get beyond the front door.

I've heard Justice O'Connor—just a couple of years ahead of me at Stanford Law School—tell of her own extensive job-hunting efforts, which netted her an offer of a secretarial position in a major California firm. Ultimately I did better, securing a spot in the Litigation Department at Sullivan & Cromwell, but only after scores of written and oral rejections saying, in essence, "Our quota of women is filled." The only other Wall Street firm to offer me a position made clear that my compensation would be lower than my male classmates. Today, of course, that is illegal conduct. It's all much more subtle today.

What stands out for me is not simply that law firms did such things but that they did so routinely, openly, even proudly if they actually employed a woman attorney. But even more breathtaking is the fact that women were so accepting for so long. The reasons were, after all, perfectly sound, weren't they? Clients wouldn't have us;

we would not be able to travel to distant cities with male colleagues; we couldn't work late (all-nighters were unthinkable); and we were in the law only to find husbands, then we would leave the profession.

The Dawn of Awareness

It wasn't for a decade or two, as our numbers in law school multiplied, that our consciousness, outrage, began to blossom. We proved beyond doubt that clients would have us, we could work late and travel without incident, and even marry and have families without leaving the law.

"Pity that, despite our advances and society's progress, women still have to work so hard simply to find our way through that glass ceiling."

Fast-forward to 1983, and then to 1993, when I became the first woman to serve on the State's high court, and then to preside over the New York State Judiciary. I especially remember that, anticipating my arrival at Court of Appeals Hall, for the first time a lock was placed on the bathroom door behind the courtroom (in case a judge had to slip off the bench during argument). And I will never forget counsel's enthusiastic response to one of my early questions: "Yes, Sir!"

My arrival as one of two or three women Chiefs at the nationwide Conference of Chief Justices ten years later again provoked a small stir. As more women Chiefs Justices joined us over the years, the meetings became less social occasions for the Chiefs and their wives and more intense dawn-to-dusk work sessions. I know that I am as Chief Judge credited with, or blamed for, eliciting greater unanimity in Court of Appeals decisions. And I know that problem-solving courts and family issues that swamp the state courts have assumed greater importance as the number of women Chief Justices nationwide has grown from virtually none to about one-third of the 56 jurisdictions that comprise the Conference. Often I wonder: are these changes purely coincidental, the product of an evolving society, or are they also in some part chromosomal? Diversity, I am convinced, is an enormously positive value.

The long and short of all this is that the courts are still standing despite significant (though not yet sufficient) growth in the number of women decision makers. Indeed, if not actually enhanced, society is hardly diminished by

the presence of women lawyers and judges, even at the helm of court systems, let alone women in high-power positions throughout the world, a consequence of a public, “political” process (whether elective or appointive) that has come to recognize the importance of equal opportunity, diversity and, maybe above all, simply securing the best talent.

Fast Forward Fifty Years

So imagine my disappointment, in 2009, as I settled into my “after (Chief Judge) life” at the great international firm of Skadden, Arps, to be greeted by headlines that for me harked back to the early days, like “Too Few Women Among Top International Arbitrators.” In all the articles, the very same few women arbitrators, and single digit statistics, are featured. By now I can recite the names and numbers, not far above those 1962 law school statistics, despite female law school graduates topping fifty percent in recent decades. A Sorbonne professor is quoted as saying, “Of course progress is being made, but the progress is quite slow,” the author concluding that “the dynamics of arbitral selection and the incentives at major law firms suggest that parity will be a long time coming.” A dismaying message I am seeing played out in real life.

For me a number of the “explanations” offered—for example, that clients prefer experienced lawyers who project an image or gravitas with which they are familiar—resonate with sounds of the ‘60s. When I visited a recent meeting of Arbitral Women, I saw lots of gravitas, lots of highly credentialed, highly experienced, highly impressive women. Pity that, despite our advances and society’s progress, women still have to work so hard simply to find our way through that glass ceiling. (After nearly fifty years as a woman lawyer, I question whether that ceiling is really made of glass, which generally symbolizes a fragile object.)

My essential posture, from 1962 law school graduate to Chief Judge of the State of New York and now to Skadden, Arps, has been one of determined optimism—meaning not passivity, never passivity, but diligent perseverance—which for several reasons remains the most promising prospect today.

The Positive Signs Ahead

First, of course, there are simply more of us—more networking, more channels of mutual support and mentoring, more exposure, all of which translates into greater opportunity.

Second, the fact that I have now collected several articles on the subject of women in international arbitration and learned of surveys on the subject is in a sense even good news. The imbalance, dismal though it may

be, is being noticed, talked about. A sign on the wall of a client’s facility decades ago left me with an unforgettable message: “People Do What You Inspect.” Greater public consciousness, even in the very private arbitration world, matters. Unknown concentrations of matters in the same few hands can unnecessarily add cost and delay. On my court, for example, we had an unwavering tradition of hearing cases one session and handing down the decisions the next session, weeks later, obviously an impossibility when even the most skilled decision makers’ private calendars grow too large.

“...the road ahead is distinctly more promising.”

Third, and perhaps most heartening, is to see the rise of women in the corporate world. Within recent months, for example, a book *Courageous Counsel*, appeared, chronicling the rise of several dozen women to the position of General Counsel in Fortune 500 companies, simultaneously with the increasing growth of counsel’s role as among the central corporate decision makers (again, just coincidences?). During these same months, I have enjoyed seeing *Fortune’s* lists of most prominent women chief executives (small, but a record high) and achievers, and not one but two extensive *New York Times* articles featuring IBM’s new CEO, Virginia Rometty. Each of these articles, interestingly, focused on a different aspect of her ascent, as a woman, up through the ranks. Gender mattered, and undoubtedly does, in all of these success stories—unforgettable lessons in the value of diversity, especially for the women who made those trips.

So though I am sorely disappointed that, half a century later, we seem still to be breaking the glass, or reinventing the wheel, the road ahead is distinctly more promising.

Judith S. Kaye joined Skadden’s Litigation Group in 2009. Before joining the firm, she served as Chief Judge of the State of New York for 15 years until her retirement in 2008, longer than any other Chief Judge in New York’s history. She first was appointed in 1983 by Gov. Mario Cuomo as an Associate Judge of the Court of Appeals, becoming the first woman ever to serve on New York’s highest court. Judge Kaye has published and lectured extensively and has received numerous awards recognizing her judicial and scholarly accomplishments. Judge Kaye passed away in January of 2016.

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New York and International Arbitration: A View from the State Bench

By Judith S. Kaye

Having served as a judge on New York State's highest court (the Court of Appeals) for more than a quarter-century—15 of those years as Chief Judge—it is my privilege to add a few lessons learned from those extraordinary years to this special issue of the *New York Dispute Resolution Lawyer*. Though the lessons are enduring, the times they are a-changing, so I note at the outset that I took the oath of office as Associate Judge on September 12, 1983 and the oath as Chief Judge on March 23, 1993, and left the Court on December 31, 2008—a total of 25 years, three months, 19 days and 12 hours. The world on September 12, 1983 was hardly what it is today. Nor is the international arbitration world.

“Without question the New York Court of Appeals recognizes the important role arbitration plays in the resolution of commercial disputes.”

A quick snapshot: the Court of Appeals is a law court that sits only as a bench of seven, all gubernatorial appointees, in Court of Appeals Hall, Albany, the state capital. We are a diverse group. I went directly from decades of commercial trial practice to the high court. Others are former lower court judges (the most common path), civil and criminal advocates, and academics from various parts of New York State. While our courts, like our nation, are divided into separate state and federal systems, state courts actually have the last word on state law issues, whether state statutory or common law, or even state constitutional law. So long as the federal constitutional floor is satisfied, the state court can afford greater rights under its constitution.¹

The Court of Appeals is essentially a *certiorari* court, enabling the court to choose its cases. Additionally, in New York (as in several other states) federal courts—including the Supreme Court of the United States—have the option of certifying state law questions for ultimate resolution to the state's highest court, so federal cases frequently find their way to Albany.² The Court of Appeals docket covers every imaginable subject, including—not surprisingly, given that New York is a global center for commerce and finance—a challenging commercial docket.

To add a bit of color to my snapshot, my quarter-century on the Court of Appeals I describe as Lawyer Heaven, though I am blessed beyond words, since mandatory retirement at age 70, with a varied practice at Skadden

Arps, including participation in the world of international arbitration. What a fortuity to have arrived on the bench directly from a sophisticated commercial litigation practice, then to have spent 25 years helping to shape New York law, and now to return to a globalized world where international parties often choose arbitration for resolution of their disputes, wisely selecting New York as the governing law and as the situs (particularly the New York International Arbitration Center).³ Great choices.

Judicial Deference to Arbitration

One subject I learned from infancy on the Court of Appeals was deference—virtual obeisance—to arbitral awards. (I'm not at all certain that my parents would concur as to my deference to them during my growing-up years.) Only once, months into judicial office, did I dissent from the Court's confirmation of an arbitration award, warning that—given the Courts' level of deference—once arbitration has been designated there is little hope of later containing it by way of judicial supervision. I cautioned that “electing arbitration should not be tantamount to assumption of the risk” (citation deliberately omitted).

I quickly came to understand, and join in, my colleagues' appreciation for the value of the parties' choice of alternative dispute resolution (ADR). Efficient, effective ADR requires that courts know when they should step in, and when they should not.

Over the decades we even brought ADR more and more into the state court system, most recently adding a pilot project of requiring mediation in a percentage of New York State's Commercial Division dockets. Without question the New York Court of Appeals recognizes the important role arbitration plays in the resolution of commercial disputes. The court system has even designated a special international arbitration part within its esteemed trial level Commercial Division, and—unanimously—treats arbitration with appropriate deference.

The Court's Role in a Changing Society

Perhaps the most difficult of all lessons was the Court's proper role in our evolving, hopefully progressing, society. In a Q&A following a recent talk I gave to a nonlawyer audience touching on court decisions influencing issues such as the demise of the death penalty in New York and the recognition of same-sex marriage, a plainly discomfited gentleman in the audience raised his hand to say: “I didn't realize that courts actually *made* law. Isn't

that the responsibility of the other, elected branches of our government? Courts are just supposed to *apply* the law.”

Well, yes and no, and precisely where the line is to be drawn between making and applying the law in a rapidly changing society is hard to fix. One thing for sure: staying within the lines that divide our three branches of government, the role of the courts is far more than just cutting and pasting provisions of decades-old if not centuries-old constitutions, case precedents and statutes onto new facts. Courts are there to give the promises and purposes of our foundational writings contemporary significance. Necessarily they both make and apply the law. I know no better way to describe this lesson than issues central to international arbitration, in particular a personally favorite subject: New York contract law.

New York Contract Law⁴

The most relevant example of judge-made law is, of course, the longstanding state court role of formulating the “common law,” all across the spectrum of disputes. And the best example that comes to mind is the law of contracts, embodied in part in statutes like the Business Corporation Law, the General Obligations Law and the Uniform Commercial Code. But at its heart contract law is out-and-out judge-made law.

A mountain top for me is *W.W.W. Assoc. v. Giancontieri*,⁵ argued November 19, 1990, and decided December 27, 1990 (with few exceptions, the Court of Appeals hands down its decision on a case the session following oral argument, usually the next month—yet another good reason for choosing New York; no long waits). Rereading the decision, I was reminded that I was a proud member of “The First Paragraph Club,” positing the issue, legal conclusion and relief in a succinct opening paragraph that says it all and enables the reader to easily grasp the law and the court’s holding:

In this action for specific performance of a contract to sell real property, the issue is whether an unambiguous reciprocal cancellation provision should be read in light of extrinsic evidence, as a contingency clause for the sole benefit of plaintiff-purchaser, subject to its unilateral waiver. Applying the principle that clear, complete writings should generally be enforced according to their terms, we reject plaintiff’s reading of the contract and dismiss its complaint.

Today I might simply encapsulate the *W.W.W. Assoc. v. Giancontieri* holding as steadfast affirmation of the “four-corners” rule. When parties set down their agreement in what the court determines is a clear, complete

document, their writing will be enforced according to its terms, with extrinsic (or parol) evidence as to what they might have meant inadmissible to vary what they in fact wrote. Over the ensuing decades, the Court has repeatedly endorsed that essential principle, in much more felicitously-named cases, like *Philles Records*⁶ and *Vermont Teddy Bear Co.*⁷ It is without question bedrock New York law.

Far more significant, of course, as society digitizes and globalizes—including a mixture of cultures and languages—and as business arrangements and financial instruments undergo dramatic transformation, are the strong public policy principles on which the four-corners rule rests.

“[P]arties negotiating contracts are reminded to take special care to say what they mean in writing their agreements—including provisions for alternative dispute resolution. The words of their written agreements will be taken seriously by the New York courts.”

First and foremost is the need for a consistent, stable, predictable regime of contract law central to business transactions, where certainty is a paramount concern. To that end, parties negotiating contracts are reminded to take special care to say what they mean in writing their agreements—including provisions for alternative dispute resolution. The words of their written agreements will be taken seriously by the New York courts.

At a recent conference I attended, one participant—house counsel to a major corporation—put, among the contract negotiation choices to be made, highest value on the choice of English as the governing language. The fact that English is a language now familiar to many across the globe not only strengthens this foundational principle, but also makes New York law easily accessible to participants for cross-border transactions.

Equally important, it will be the courts that decide whether an agreement, read as a whole by the courts with every part to be interpreted with reference to the whole, to determine whether there is any ambiguity in the writing. In reaching this determination, the New York courts will not consider outside evidence offered to create an ambiguity. An analysis that begins with consideration of outside evidence of what the parties really, really had in mind—instead of looking first to what they actually said—unnecessarily denigrates the contract and unsettles the law. Another bedrock principle of New York contract law.

Conclusion

The fact that thousands of cases, and innumerable business transactions, continue to revolve around these clear, longstanding judge-made rules of law permits the state courts to revisit the issues in light of a changing society,⁸ strengthens the guidance they provide, and counsels in favor of choosing New York law to determine important commercial matters.

Endnotes

1. See, e.g., *Campaign for Fiscal Equity, Inc. v. The State of New York*, 100 N.Y.2d 893 (2003); *Immuno v. Moor-Jankowski*, 77 N.Y.2d 235, 248-251 (1991).
2. See, e.g., *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013). By way of an *amicus* brief in support of the Petition for Writ of Certiorari in *Republic of Argentina v. NML Capital, Ltd.*, Skadden Arps as counsel urged that the Supreme Court of the United States certify to the Court of Appeals of the State of New York the proper contractual interpretation of the *pari passu* clause in the sovereign debt agreement at issue in that case. High state courts generally have the last word on contract interpretation as a matter of common law. Counsel argued that the federal courts' reading of the *pari passu* clause allowed the "holdouts to become the holdups." (Amicus Brief, p.5.) The Petition was denied (134 S. Ct. 2819 (2014)).
3. See *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 20 N.Y.3d 312 (2012) [legislature and courts both underscore importance to

New York, as a world commercial center, of recognizing parties' choice of New York substantive law and New York forum].

4. See generally Glen Banks, *New York Contract Law: A Guide for Non-New York Attorneys* (NYSBA, 2014). In my book foreword, I had the pleasure of quoting the author's description of New York contract law as "a thing of beauty."
5. 77 N.Y.2d 235, 248-251 (1991).
6. *Greenfield v. Philles Records*, 98 N.Y.2d 562 (2002).
7. *Vermont Teddy Bear Co. Inc. v. 538 Madison Realty*, 1 N.Y.3d 470 (2004).
8. See, e.g., *Ellington v. EMI Music, Inc.*, 24 N.Y. 3d 239, 244-245 (2014) [rules of law applied to changed manner in which publishers pursue foreign publication of creative works].

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10 Questions About New York as a Leading Arbitration Center

Interview with Edna Sussman

Financier Worldwide recently interviewed **Edna Sussman**, an independent arbitrator and mediator and Vice Chair of the New York International Arbitration Center about the advantages of New York as a centre of arbitration.

QFW: In your opinion, what reputation does New York hold as a centre of arbitration? How does it compare as a chosen seat of arbitration versus other locations?

A Sussman: There are several excellent seats for arbitrations and I have had the pleasure of sitting as an arbitrator in a few of them. New York has long been one of the favored and continues to be one of the most popular legal seats and locales for the actual conduct of the arbitration. Why is that? Because New York has the best of everything that users consistently list in survey after survey as the factors they look for in selecting a seat and locale for arbitration. First, the courts and the law: New York has neutral courts which strongly support arbitration and a well-developed body of commercial law recognised and used in transactions around the world. Second, the professionals: New York offers a deep pool of lawyers and arbitrators well-schooled in the conduct of arbitrations of all sizes and related to disputes in every industry. Third, infrastructure: New York is equipped to provide support at a reasonable cost for even the most complicated arbitrations and is able to meet every item on a traveller's wish list.

QFW: You mentioned the courts. What are the courts like in New York and what is their attitude towards arbitration?

A Sussman: Arbitration matters in New York City are brought to judges in the US federal court or to the special commercial division of the State court in New York County, all of whom have significant experience in business disputes. The law in New York is strongly pro-arbitration. The courts recognise New York's role as a center of financial and business transactions and realise that its role is strengthened by the dependability of its international commercial arbitration laws and its support of international arbitration. The courts repeatedly refer to the federal policy which strongly favours arbitration, a policy which is stated by the courts to be even stronger in the context of international business transactions. In New York the law requires that any doubt as to the scope of arbitration be resolved in favour of arbitration and the courts readily enforce arbitration agreements and compel arbitration. Arbitration awards are very rarely vacated in New York and challenges to awards based on the narrow grounds for *vacatur* are routinely rejected. The Supreme

Court of the US, in the Oxford Health Plans decision issued in June of 2013, reaffirmed the deference that must be accorded to arbitral awards in stating "So far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.... The arbitrator's construction holds, however good, bad, or ugly."

QFW: To what extent will New York assist with the arbitration process when called upon—for example, by empowering the arbitrator, ordering preliminary relief, and granting injunctions?

A Sussman: New York courts frequently refer to the efficiencies realised by honoring party decisions to refer disputes to arbitration and issue rulings to support arbitration and restrict judicial review. Thus, New York courts will assist in the appointment of arbitrators, issue attachments in aid of arbitration, grant preliminary injunctions and issue anti-suit injunctions to prevent parties from engaging in competing parallel proceedings to address the same dispute properly requiring arbitration in New York. The courts will also support arbitral orders directing preliminary relief in the form of injunctions such as prohibiting parties from transferring assets, requiring deposits of funds in escrow, preserving or gathering evidence, or other measures to preserve the status quo. The courts in New York handle such arbitration matters expeditiously so as not to slow down the arbitration process. Petitions to vacate or confirm an award are also handled promptly.

QFW: What is the reputation of New York Courts when it comes to enforcing arbitral awards? Can New York Courts be considered neutral when resolving litigation arising from international arbitration agreements or proceedings?

A Sussman: The courts in New York have a reputation for being fair and neutral. They follow a pro-enforcement policy regarding the enforcement of arbitration awards and construe narrowly the limited grounds for *vacatur*, which are very similar to the parallel provisions of the New York Convention to which the US is a party. In response to questions raised abroad about the doctrine of manifest disregard in New York as an additional basis for *vacatur*, a New York City Bar Association Commit-

tee recently conducted a study. It found that no court in New York had ever vacated an international arbitration award based on the doctrine of manifest disregard. The committee further found that legal doctrines for review of arbitral awards, while called by different names and also rarely utilised, are found in the law of other principal arbitration seats, including England, Hong Kong, Switzerland and France. The courts in New York are impartial when parties from different countries appear before them and have denied challenges made by US parties to awards made in favor of foreign parties and confirmed awards against US parties that have concerned entities from diverse countries including China, Japan, Switzerland, Norway, Austria and the UK.

QFW: We have been talking about the choice of seat for an arbitration based on the arbitration law. Does the substantive law of the jurisdiction matter?

A Sussman: This is an important question. As you know, while the arbitration can be physically conducted in any locale, the choice of arbitral seat specified in the contract generally dictates the procedural law that will be applied to the arbitration, while the substantive law selected will govern the merits of the dispute. These choices can and often are made independently, but, in a recent survey, 68 percent of the respondents stated that these choices influence one another and often the choice goes together. New York law is widely preferred and is very frequently selected as the substantive law for transactions around the world, even those with no US party. This preference for New York law is well justified. New York offers one of the most sophisticated and developed bodies of contract, commercial, and business partnership law available anywhere, and New York makes it easy for participants to enjoy the benefits of New York law even if their business has little or no connection to New York. New York contract law gives great deference to the contract's terms and the courts do not substitute their judgement for the parties' business decisions. Moreover, New York is a common law jurisdiction which enables its sophisticated courts to respond promptly and develop legal principles and binding precedents as new forms of business transactions and relationships develop in the marketplace.

QFW: You mentioned professionals. What advantages does New York offer in this regard as a seat and locale for arbitration proceedings?

A Sussman: As a leading global financial and commercial centre New York affords its lawyers the opportunity to engage in representations in a broad range of industries and financial matters and to practice in many areas of the law. There are many highly qualified New York lawyers who have comprehensive experience in conducting both international and domestic arbitrations. Many are multi-lingual and practice in large international

law firms with access to and expertise in multiple legal systems. New York also offers a large pool of arbitrators of many nationalities who are practiced in handling commercial disputes of all sizes and in all business sectors. Arbitrators can be drawn in New York from both legal and other disciplines, from the growing body of full time independent arbitrators, from counsel and arbitrators at multi-national law firms, or from the academic rosters of New York's many leading law schools. Absent specific contractual provisions to the contrary, in accordance with the ethical code for arbitrators issued ten years ago, all US arbitrators are neutral and serve as impartial and independent decision makers. I should note that there are no restrictions on the nationality or qualifications of those who can serve as an arbitrator or counsel in an international arbitration in New York. In addition, New York has many expert mediators should such services be desired.

QFW: You mentioned infrastructure. Compared to other major centres around the world, how does New York's infrastructure measure up as an arbitration centre for resolving international, cross-border disputes in particular?

A Sussman: As your question recognises, a locale's infrastructure is very important. As a melting pot for diverse populations and as the home of the United Nations, New York has translators who work capably in every language. Court reporters with excellent qualifications are readily available in New York. In this digital age and expansion of telecommunication, arbitrations frequently require sophisticated technological support, all of which can be found easily in New York. In many other locales translators, court reporters and technology have to be imported which significantly increases costs and causes inconvenience. New York offers direct flights from multiple cities and many and varied accommodation and dining choices. New York hosts the offices of four of the leading arbitral institutions, including the home office of three of them. In addition, New York offers a broad range of options for extracurricular activities. For restaurants, music, dance, art, theatre, sports and shopping, New York's offerings are unparalleled. And jogging in Central Park, bicycle riding along the Hudson River or ice skating at Rockefeller Center can be a welcome break from a difficult hearing. Whatever one's hearing needs and personal preferences, New York has it.

QFW: How has New York's status as a prime arbitration seat and locale been bolstered by the opening of the New York International Arbitration Centre?

A Sussman: New York is pleased to offer its newly established New York International Arbitration Center (NYIAC) for the conduct of arbitrations in New York. Arbitration centers have been emerging in jurisdictions around the world, including other standalone arbitration hearing facilities. While New York has many other facili-

ties suitable for a hearing, New York too needed a dedicated arbitration hearing space. A recent survey of what users are looking for in an arbitration hearing centre identified various qualities. NYIAC satisfies every user priority for a hearing space. NYIAC offers hearing rooms that can seat as many as 43 people or as few as 8 people at the table, a translators' booth for simultaneous translation, separate breakout rooms for each party and for the arbitrators, state-of-the-art Wi-Fi and IT, and a neutral ground in a brand-new facility with broad daylight in every room at a reasonable price with an attentive staff dedicated to addressing user needs. The facility is located at 150 East 42d Street directly across the street from Grand Central Station, a location adjacent to many transportation options and numerous hotels and restaurants. I would like to call attention to the fact that NYIAC will *not* be administering arbitrations; there are many institutions in New York that already do that. But NYIAC does do a great deal more than host a hearing facility. NYIAC coordinates with institutional providers, bar associations and other professional organisations and develops programs and materials about international arbitration in New York, the application of New York law in international arbitration, and the recognition, enforcement and implementation in New York of arbitral awards.

QFW: Have any recent developments affected the arbitration process in New York?

A Sussman: The entire arbitration community has been sensitised to the call by users to deliver more expeditious and cost effective arbitration and New York based arbitrators, arbitral institutions and counsel have all responded to meet that call. Numerous arbitration programs and trainings have been conducted which focus on the subject. The New York State Bar Association issued guidelines for streamlining the pre-hearing and disclosure process. The Commercial Division of the Supreme Court in New York City recently appointed a single judge to hear all matters relating to arbitration in order to assure even more expeditious resolution of arbitration issues that go to court. On the federal level, the proposed Arbitration Fairness Act bill drew criticism from the arbitration community when introduced in Congress a few years ago. That bill was amended to limit arbitration to a post dispute choice only as applied to consumers, employees and antitrust class actions, leaving the well-developed US case law relating to arbitration of commercial disputes unaffected. In any case, that bill is not likely to be law any time soon.

QFW: Is there any advice you can give to firms considering arbitration proceedings in New York? What steps can they take to control the costs involved?

A Sussman: As the practice has globalised and common and civil law traditions have been melded in arbitration, the advice for arbitration users in New York would be the same as would apply in other jurisdictions. One of the key advantages of arbitration over courts is the ability to pick the decision maker and to design the process. Both should be approached with deliberation and care. New York arbitrators are generally sensitive to the need to control the time and cost of the proceedings, and arbitrators can be chosen by the parties to meet their needs. The drafting of the contract can be tailored to meet the requirements of the parties and, if time and cost is a concern, provisions can be included in the arbitration agreement or arbitration clause to circumscribe pre-hearing exchanges of information and specify time limits for various phases of the arbitration. In addition, choosing counsel with arbitration expertise committed to containing costs and expediting the proceeding, selecting an arbitral institution that fosters expedition and cost savings, setting an abbreviated schedule for the arbitration, working cooperatively with opposing counsel and taking steps to streamline the hearing are all options that are in the hands of the parties and their counsel. Attention to these choices and seizing the opportunities that arbitration affords can significantly increase satisfaction with the arbitration process and reduce time and cost in all jurisdictions.

Edna Sussman is a full time independent arbitrator and mediator. Ms. Sussman is the President of the College of Commercial Arbitrators, chair of the AAA-ICDR Foundation, Vice-Chair of the New York International Arbitration Center and serves on the Board and Executive Committee of the American Arbitration Association. She serves as the Distinguished ADR Practitioner in Residence at Fordham University School of Law in New York City. Formerly a litigation partner at White & Case LLP, she is a fellow of the Chartered Institute of Arbitrators and is certified by the International Mediation Institute. Ms. Sussman can be contacted at +1 212 213 2173 or by email: esussman@SussmanADR.com.

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NYIAC Case Law Library—Overview

By Mark Stadnyk and Alexandra Dosman

New York is one of the leading arbitral seats worldwide and an important jurisdiction for the enforcement of international arbitral awards. New York's state and federal courts play a range of roles in the international arbitration process, from considering the scope of an agreement to arbitrate through to orders of execution on enforced awards. While some New York international arbitration case law is extensively publicized and discussed, many decisions are not.

Recognizing the public interest and importance in cataloguing such decisions, the New York International Arbitration Center (NYIAC) has collected and reviewed all international arbitration decisions issued since January 1, 2015 by New York state and federal courts. This catalogue, the NYIAC Case Law Library, went "live" on September 24, 2015, and will be continuously refreshed with new court decisions as they are handed down. All decisions are freely available on NYIAC's website, www.nyi.ac.org.

The NYIAC Case Law Library presently stands at more than eighty New York state and federal decisions involving a panoply of arbitral seats, applicable laws, and judicial relief sought. Several key decisions involve sovereign states or their instrumentalities. The NYIAC Case Law Library provides key information for each decision, as well as a short summary of the decision's main holdings. Significantly, the NYIAC Case Law Library, in conjunction with Fastcase, provides public links to each decision so that users may easily access these rulings.

The NYIAC Case Law Library testifies to the quality and quantity of international arbitration decisions by New York courts. The majority of the jurisprudence arises under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* New York state and federal courts have demonstrated keen awareness of the limited nature of judicial review under the Federal Arbitration Act, especially in international cases. The 2015 jurisprudence is no different. In motions to compel arbitration, the courts have adhered to the parties' agreement. Very recent jurisprudence from the Second Circuit Court of Appeals has illuminated the proper judicial procedure when all claims are referred to arbitration and a stay has been requested. The Second Circuit's decision, which was analyzed in the third installment of NYIAC's Case Law Chronicles, closely tracks the Federal Arbitration Act's aims and structure.

As for enforcement of international arbitral awards, New York courts continue to grant significant deference to

arbitrators, and, perhaps as a result, a number of enforcement actions in 2015 were unopposed. Attacks on international arbitral awards both directly (under the Federal Arbitration Act) and indirectly (*e.g.*, under Rule 60 of the Federal Rules of Civil Procedure) rarely succeed, and 2015 has been no exception. While "manifest disregard of the law" is still theoretically available in New York courts as a ground for vacatur in matters governed by the Federal Arbitration Act, the doctrine's interpretation in the 2015 jurisprudence has affirmed that it is of extremely limited practical application. The doctrine does not apply to international arbitration awards rendered outside the United States.

The 2015 jurisprudence has also put the New York courts at the cutting edge of investor-state arbitration. Several of these matters have involved enforcement of arbitral awards issued under the auspices of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"). Such actions are governed by statute—22 U.S.C. § 1650a—to the express exclusion of the Federal Arbitration Act. In 2015, the Southern District of New York recognized and enforced an ICSID award against a sovereign state using a mechanical process borrowed from local rules. The Court analyzed and rejected arguments that because the award debtor was a sovereign state, any enforcement action would be subject to the restrictions set out in the Foreign Sovereign Immunities Act. (That decision, which at time of writing is on appeal, is the subject of the second NYIAC Case Law Chronicle.) This same simplified procedure was followed in another ICSID enforcement case—while a court in the District of Columbia reached a contrary result. These recent matters firmly put New York at the forefront of the debate over the procedure by which ICSID awards are enforced in the United States.

The above-mentioned overview by no means exhausts the diverse roles played by New York courts in international arbitration matters in 2015. In another set of cases, New York courts have rendered nuanced and balanced decisions on 28 U.S.C. § 1782, a statute governing the instances in which federal district courts may offer evidentiary assistance to foreign and international tribunals (and to litigants before such tribunals).

A core pillar of NYIAC's mission is contributing to legal education and research. With the Case Law Library, New York jurisprudence on international arbitration is now easy to access, analyze, and discuss.

The Case Law Chronicle

New York court decisions of note for international arbitration practitioners

Second Circuit Finds That *Res Judicata* Issue Is for Arbitrators, Not Courts

This is the first installment in a regular series offered by NYIAC's Executive Director, Alexandra Dosman. Follow this series to learn about recent decisions by New York federal and state courts and for easy access to the full text of the decisions.

Under the Federal Arbitration Act, "the claim-preclusive effect of a prior federal judgment confirming an arbitration award is to be left to the arbitrators" (p. 10).

Who decides: courts or arbitral tribunals? The Second Circuit has put one more issue—whether a federal judgment confirming a prior arbitral award precludes subsequent arbitration of claims—squarely within the remit of arbitrators. *Citigroup, Inc. v. Abu Dhabi Investment Authority*, No. 13-4825-cv (January 14, 2015) [Dkt. 86-1] (U.S. Court of Appeals for the Second Circuit).

The case arose out of an investment agreement between Citigroup, Inc. and the Abu Dhabi Investment Authority ("ADIA") that contained an arbitration agreement. ADIA commenced arbitration, and the arbitrators issued an award in favor of Citigroup. In 2013, the award was confirmed by the United States District Court for the Southern District of New York (Daniels, J.). ADIA appealed to the Second Circuit seeking to vacate the award; the appeal was denied.

Meanwhile, ADIA served a new notice of arbitration on Citigroup under the investment agreement. Citigroup brought a new action in the Southern District of New York to enjoin the arbitration. Citigroup argued that ADIA's claims were barred by the doctrine of *res judicata* (claim preclusion) because they could have been adjudicated in the first arbitration. Declaratory judgment—otherwise an "assault" on the first court judgment confirming the award.

The district court (Castel, J.) compelled arbitration on the basis that Citigroup's *res judicata* defense was a matter for the arbitrators, not the court.

On appeal, the Second Circuit agreed: "The FAA's policy favoring arbitration and our precedents interpreting that policy indicate that it is the arbitrators, not the federal courts, who ordinarily should determine the

claim-preclusive effect of a federal judgment that confirms an arbitration award." The court noted that the breadth of the arbitration clause ("any dispute that arises out of or relates to the [Investment Agreement], or the breach thereof") further supported the conclusion that the claim preclusion issue was one for the arbitrators rather than the court.

The Second Circuit's guidance is clear: "even if we harbored some doubt as to whether the claim preclusion dispute in this case is arbitrable, we would resolve that doubt in favor of arbitration." Who decides? The arbitral tribunal.

Circuit Judges: Wesley, Hall, Lynch

Counsel to Citigroup: Paul, Weiss, Rifkind, Wharton & Garrison LLP (Leslie Gordon Fagen, Brad S. Karp, Gregory Laufer)

Counsel to ADIA: Quinn Emanuel Urquhart & Sullivan, LLP (Sanford I. Weisburst, Peter E. Calamari, Tai-Heng Cheng)

Sovereign Immunity Is No Defense to the Recognition of ICSID Award Against Venezuela; New York Court Stays Recognition on Basis of ICSID Internal Proceedings

This is the second installment in a regular series offered by NYIAC's Executive Director, Alexandra Dosman. Follow this series to learn about recent decisions by New York federal and state courts and for easy access to the full text of the decisions.

Below, read more about *Mobil Cerro Negro Ltd., et al. v. Bolivarian Republic of Venezuela*, Case No. 14 Civ. 8163 (February 13, 2015), in which the Southern District of New York upheld a simple, mechanistic procedure for registering an ICSID award against a sovereign state, despite arguments based on sovereign immunity. The recognition of the award has been stayed pending resolution of Venezuela's application to ICSID to review the award. NYIAC has also learned that on February 9, 2015, Venezuela applied to ICSID to annul the award; the annulment proceedings are pending.

In *Mobil Cerro Negro Ltd., et al. v. Bolivarian Republic of Venezuela*, Case No. 14 Civ. 8163 (February 13, 2015), the Southern District of New York addressed an issue of first impression in the district: do statutory protections afforded to sovereign states require a “plenary action” in proceedings to recognize international arbitral awards issued under the ICSID Convention, or may a simplified procedure be followed? In a 50-page decision, Judge Paul A. Engelmayer provided a clear answer: the procedures applicable to the recognition process are simplified and “automatic,” even as against sovereign states. The Court denied Venezuela’s bid to vacate an ex parte order recognizing a USD 1.6 billion ICSID award against it (but stayed the recognition pending further proceedings within ICSID). The case is instructive on several points.

ICSID Awards Become Federal Court Judgments in “Automatic” Process Under New York State Law

This case involved an ICSID award rendered against Venezuela in October 2014. Venezuela declined to pay the award, and the award creditors, ExxonMobil entities (“Mobil”), submitted an ex parte petition to recognize the award in federal court in Manhattan as a precursor to enforcement against the award debtor’s assets. To obtain recognition, Mobil invoked the United States statute implementing the ICSID Convention, which provides that pecuniary obligations imposed by an ICSID award “shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.” 22 U.S.C. § 1650a(a). The enabling statute does not, however, stipulate a process for how that enforcement is to take place.

In order to fill what Judge Engelmayer observed was a “statutory gap,” Mobil followed the process set out in New York state law for the recognition of foreign judgments entitled to full faith and credit, typically judgments of other United States courts.¹ The procedure is streamlined and involves no substantive review by the court: such a judgment may be registered in an ex parte proceeding, as long as the debtor is notified within thirty days. Mobil petitioned (ex parte) to have the ICSID award registered and converted into a judgment of the federal court. The petition was granted on October 10, 2014, the same day it was filed.

Sovereign Immunity Provides No Defense to Recognition—but Execution Is Another Story

Venezuela argued that the order should be vacated because the Foreign Sovereign Immunities Act (“FSIA”) provides exclusive rules for subject matter jurisdiction, service of process, personal jurisdiction, and venue in cases against sovereigns.

As to subject matter jurisdiction, the Court noted that the FSIA itself provides exceptions to sovereign immunity

in the case of confirmation of arbitral awards and that Venezuela had waived its immunity in actions to enforce ICSID awards by adhering to the ICSID Convention. Previous case law in the Circuit had reached the same conclusion.

Questions of service of process, personal jurisdiction, and venue were more complex. The FSIA sets forth special procedures for serving foreign state entities, specifies that the proper venue is the federal court in the District of Columbia, and does not contemplate ex parte actions.² It was uncontested that Mobil did not follow these procedures. Venezuela argued that the order enforcing the ICSID award must be vacated on that basis.

Having examined the history and text of the FSIA, the Court concluded that congressional intent was “unclear as to whether the procedures the FSIA prescribes were to apply to conversion of ICSID awards against foreign sovereigns.” To resolve the ambiguity, the Court analyzed the broader context of the ICSID Convention and its enabling statute, and noted the intent of the drafters to depart from the New York Convention recognition scheme: “the contracting states to the ICSID Convention intended to put in place an expedited and automatic recognition procedure.” The only role of national courts is to confirm the authenticity of ICSID awards. To find that a plenary lawsuit was required to enforce ICSID awards would be contrary to the ICSID Convention and its enabling statute—and would provide recalcitrant award debtors with an “avenue for delay.”

Sovereign immunity will, however, continue to play a role in proceedings to execute against assets of states following the recognition of an ICSID award. Judge Engelmayer noted that the ICSID Convention Contracting States left questions as to immunity against execution to national law. The FSIA’s provisions on execution—limits on what assets are subject to execution, requirement of court approval—will continue to apply when award creditors attempt to collect from a sovereign state.

Federal Courts Defer to Proceedings Within ICSID, Including Stays of Enforcement

The Court deferred to the internal review process at ICSID, noting that it is a “unique” tribunal and that “[a]ny challenge to the award is to be made within ICSID.” Venezuela has in fact applied to ICSID for revision of the award. The ICSID Secretary-General granted a stay of enforcement while those issues are resolved. Noting that stay, the New York federal court adopted the “prudent solution” of staying the enforcement of the award against Venezuela until the stay is lifted by ICSID. The Court directed the parties to notify it of the status of the ICSID proceedings every 30 days.

According to Venezuela’s latest filings in federal court, which post-date Judge Engelmayer’s decision, on

February 9, 2015 Venezuela applied to ICSID to annul the underlying ICSID award awarding Mobil USD 1.6 billion in damages. The annulment proceedings are pending.

What's Next?

The decision provides a clear answer as to how ICSID awards are recognized in United States courts—automatically and without regard to the FSIA. Given the hotly contested issues of first impression arising before Judge Engelmayer as well as the sums in dispute, it is perhaps unsurprising that an appeal was filed.

*Southern District of New York: Judge Paul A. Engelmayer
SDNY Part I (emergency) Court: Judge J. Paul Oetken*

*Counsel to Mobil Cerro Negro Ltd., et al. in the SDNY case:
Stepto & Johnson, LLP (Evan Glassman, Jared Robert Butcher,
Jeffrey Michael Theodore, Michael Jeremy Baratz, Steven K.
Davidson)*

*Counsel to the Bolivarian Republic of Venezuela in the SDNY
case: Curtis, Mallet-Prevost, Colt & Mosle, LLP (Joseph D. Piz-
zuro, Juan Otoniel Perla)*

*Tribunal in the underlying arbitration: Gabrielle Kaufmann-
Kohler, Ahmed El-Kosheri, and Gilbert Guillaume (Chair/
President)*

Endnotes

1. Civil Practice Law and Rules (“CPLR”), Article 54. Section 5401 reads: “In this article ‘foreign judgment’ means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, except one obtained by default in appearance, or by confession of judgment.” A separate article governs recognition of money judgments issued by courts of foreign countries (CPLR, Article 53).
2. Personal jurisdiction is present when there is both subject matter jurisdiction and proper service of process.

* * *

“To Stay or Not to Stay”: Second Circuit Clarifies Procedure Following Successful Motion to Compel Arbitration

By Mark Stadnyk, Norton Rose Fulbright US LLP (New York)*

This is the third installment in a regular series on New York case law. This article was contributed by Mark Stadnyk of Norton Rose Fulbright US LLP (New York). Follow this series to learn about recent decisions by New York federal and state courts and for easy access to the full text of the decisions.

Below, read more about *Michael A. Katz v. Cellco Partnership dba Verizon Wireless*, Docket Nos. 14-138 and 14-291 (July 28, 2015), in which the U.S. Court of Appeals for the Second Circuit clarified that a district court order referring all claims to arbitration cannot be appealed on an interlocutory basis. The decision means that successful motions to compel arbitration cannot be delayed by further litigation in the form of an appeal, reinforcing the strong pro-arbitration policy of the Federal Arbitration Act.

In *Michael A. Katz v. Cellco Partnership dba Verizon Wireless*, Docket Nos. 14-138 and 14-291 (July 28, 2015), the U.S. Court of Appeals for the Second Circuit (the “Court”) addressed an important procedural matter under the Federal Arbitration Act (the “FAA”). Namely, does the FAA require a stay of proceedings when all claims are referred to arbitration and a stay has been requested, or do federal district courts enjoy the discretion to dismiss the case outright after granting such a motion to compel arbitration?

The Court provided a clear answer to this question: a stay of proceedings is required following a successful motion to compel arbitration of all claims pending before the district court. The alternative—a final order from the district court dismissing the case—would open an avenue for further litigation in the form of an immediate appeal. In *Katz*, the Court clarified that the FAA and its policy in favor of arbitration leave no room for immediate appeal of a district court decision to compel arbitration.

Background

Katz sued Cellco Partnership d/b/a Verizon Wireless (“Verizon”), alleging breach of contract and consumer fraud under New York state law. Katz’s agreement with Verizon incorporated an arbitration clause that invoked the FAA. While he conceded the prima facie arbitrability of his claims, Katz contended that “application of the FAA to those claims was, on various grounds, unconstitutional.” Verizon moved to compel arbitration and to stay the court proceedings.

The District Court for the Southern District of New York (Briccetti, J.) dismissed the constitutional objections to the application of the FAA and granted Verizon’s motion to compel arbitration of all of Katz’s claims. However, it then dismissed the action, albeit recognizing that “whether district courts have such dismissal discretion remains an open question in this Circuit.”¹

State of Play Before *Katz*

On appeal, the Second Circuit affirmed the District Court’s grant of Verizon’s motion to compel arbitration. It then acknowledged that “[t]he question whether district courts retain the discretion to dismiss an action after all claims have been referred to arbitration, or whether in-

stead they must stay proceedings, remains unsettled.” The U.S. Supreme Court has not yet decided the matter,² and the “Courts of Appeals [of the various Circuits] are about evenly divided.”³ Moreover, even earlier Second Circuit authority on the matter, while not “directly address[ing] the question posed here,” nevertheless “suggested different conclusions.”⁴

The Court’s Decision—“To Stay or Not to Stay”

The Court held that “a stay of proceedings [is] necessary after all claims have been referred to arbitration and a stay requested.” In other words, under the FAA, district courts in the Second Circuit lack the discretion to dismiss an action after all claims have been referred to arbitration.

First, the Court emphasized the language of the FAA, 9 U.S.C. § 3, which provides that when issues are referable to arbitration, a court “*shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the [arbitration] agreement” (emphasis added).⁵ Second, the Court acknowledged that a “mandatory stay comports with the FAA’s statutory scheme and pro-arbitration policy.”⁶ The FAA, it observed, “authorizes immediate interlocutory review of an order refusing to compel arbitration or denying a stay of proceedings,” but “explicitly denies the right to an immediate appeal from an interlocutory order that compels arbitration or stays proceedings.”⁷ Yet, the effect of the district court’s dismissal was to “effectively convert[] an otherwise-unappealable interlocutory stay order into an appealable final dismissal order,” potentially leading to further litigation in contravention of the policy at the heart of the FAA.

While the Court acknowledged the validity of the judicial concern with “efficient docket management,” it held that such interests “cannot trump a statutory mandate, like Section 3 of the FAA, that clearly removes such discretion” from the district courts.

Ramifications of *Katz*

While *Katz* was a domestic arbitration, the Court’s interpretation of the FAA’s Section 3 also clarifies the

appropriate procedure in international cases within the Second Circuit. When a motion to compel arbitration has been granted with respect to all claims, and a stay has been requested, the district court has no discretion and must grant a stay of the proceedings. As observed by the Court, a stay is in accordance with the pro-arbitration policy of the FAA, as it curtails further litigation while the arbitration proceeds.

United States Court of Appeals for the Second Circuit: Judges Wesley, Livingston, and Carney.

Counsel to Michael A. Katz: William Robert Weinstein (Law Offices of William R. Weinstein).

Counsel to Cellco Partnership, dba Verizon Wireless: Andrew G. McBride and J. Michael Connolly (Wiley Rein LLP).

*The views expressed in this case note do not necessarily reflect the views of Norton Rose Fulbright US LLP or its clients.

Endnotes

1. *Katz* at 5. All citations are to the Court of Appeals’ opinion in *Katz*, unless otherwise noted.
2. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n.2 (2000).
3. *Katz* at 7-8, contrasting the Circuit Courts of Appeals “h[old]ing] or impl[y]ing] that a stay must be entered” (Seventh, Third, Tenth and Eleventh Circuits) with those “suggest[ing] that district courts enjoy the discretion to dismiss the action” (First, Fifth and Ninth Circuits).
4. *Katz* at 6-7 and n. 5.
5. FAA 9 U.S.C. § 3 provides as follows: “If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” (Emphasis added.)
6. *Katz* at 9.
7. *Katz* at 10.

International Arbitration Pre-Hearing Checklist

By Aníbal Sabater, Chaffetz Lindsey LLP¹

Hearing Dates and Location

1. On what day is the hearing scheduled to start?
2. On what day is the hearing expected to end?
3. Are there going to be days “off” between hearing start and end?
4. At what time will sessions start and end every day?
5. When and for how long are breaks expected to take place during the hearing?
6. Are hearing facilities booked with an appropriately sized hearing room? Does this include set-up and break-down time?
7. Have arrangements been made such that the tribunal, each party, and other hearing participants have their respective break-out space as appropriate?

Hearing Sequence and Time Allocation

8. Is there a clearly defined hearing sequence? Specifically:
 - a) Will the parties deliver opening statements? If so, what is their expected duration?
 - b) Is there a list of the fact and expert witnesses who will be examined at the hearing?
 - c) Is it clear in what order, approximately for how long, and approximately when each fact and expert witness will be examined?
 - d) Will there be any direct examination of witnesses and, if so, how extensive can it be? Is there a different rule for expert witnesses?
 - e) Will the parties deliver closing statements? If so, when and for how long?
9. Are witness or expert conferences contemplated/possible? If so, on what terms?
10. How will hearing time be allocated? Specifically:
 - a) Is there party agreement concerning the use of hearing time and how it will be divided between the parties?

- b) If there is no party agreement on use of hearing time, has the tribunal addressed the matter?
- c) Have the parties budgeted sufficient time into the expected hearing schedule to allow the tribunal to ask questions to counsel and fact and expert witnesses?

Attendees

11. Will the hearing be open to the public? If so, what arrangements have been made to that effect?
12. Who is expected/allowed to attend the hearing for each party?
13. Do any of the party’s expected hearing attendees need visas or travel permissions to attend the hearing? Have those been obtained?
14. Are there any circumstances that may limit the time frame during which a witness can testify?
15. Is a court reporter expected to be present at the hearing? If so:
 - a) Has the court reporter already been identified and engaged?
 - b) How will the court reporting cost be allocated between the parties prior to definitive allocation in the final award?
 - c) Will the court reporter use LiveNote or similar software? If so, will the court reported provide laptops or should the parties bring their own?
 - d) Will rough transcript drafts be provided? If so, when?
 - e) When is the final hearing transcript expected?
16. Is an interpreter going to be present at the hearing? If so:
 - a) Has the interpreter already been identified and engaged?
 - b) How will the interpretation expenses be allocated between the parties prior to definitive allocation in the final award?

- c) Will interpretation be simultaneous or consecutive? If simultaneous, is an interpretation booth available and has interpretation equipment been reserved?

Witness Testimony

- 17. Do the laws of the seat or any other applicable law require that fact or expert witnesses, court reporters, or other personnel be sworn in? If so, is there any specific language that should be followed?
- 18. Can fact or expert witnesses attend the hearing before they provide oral testimony or will they be “sequestered”? If the general rule is “sequestration,” will exceptions be allowed for fact witnesses who are also corporate representatives?
- 19. Can witnesses or experts discuss the contents of the hearing or access the transcript before they provide oral testimony?
- 20. Should the tribunal give any directions on what and with whom a fact or expert witness can discuss during a break in his/her testimony?
- 21. Is all testimony expected to be provided live, or are fact or expert witnesses expected to join by videoconference or telephone? Are any specific arrangements needed in this regard?
- 22. Is it clear what consequences may follow if a fact or expert witness fails to appear?
- 23. Should specific provisions be made with respect to witness recall?

Documents

- 24. Does the party have sufficient sets of exhibits ready for use at the hearing?
- 25. Is there going to be a party-agreed set of key exhibits?
- 26. How will exhibits be shown to witnesses and other hearing participants—in hardcopy, electronically, or both? Are arrangements made to that effect?
- 27. Do provisions need to be made with respect to the introduction of impeachment evidence or any other new evidence in the course of hearing?

Hearing Space Set-up & Technology

- 28. Have the parties agreed to the layout of the hearing room (e.g., U shape, courtroom style, *etc.*)?

- 29. Are IT consultants/personnel expected to be present and assist a party during the hearing? If so, do any specific provisions need to be made in this regard?
- 30. If screens are going to be used for the display of documents at the hearing, are the screens visible and conveniently placed?
- 31. Does the party need any A/V equipment, such as projectors, and has it checked the compatibility with its computers?
- 32. Is special hearing software going to be utilized at the hearing? If so, have appropriate arrangements been made?
- 33. Will the parties need, and if so will they have access to, phone lines, printing, photocopying, Wi-Fi, scanning or other IT facilities in the course of the hearing? If so, what arrangements will be made to that effect?
- 34. Has all of the technology to be used been tested prior to the commencement of the hearing?

Logistics and Catering

- 35. Do the hearing participants have expedited access to the building where the hearing is hosted (for instance as a result of having been granted access cards)?
- 36. Do special arrangements need to be made for delivery of hearing materials and setting up for the hearing, such as reserving the building’s freight elevator?
- 37. Have arrangements been made for removal of documents and items at the conclusion of the hearing—reservation of freight elevator, provision of FedEx labels, *etc.*?
- 38. Are the parties aware of their catering/food options, especially for lunch breaks?
- 39. Are there hearing attendees with any special building access needs, dietary restrictions, or health conditions to be taken into account?

Endnote

- 1. The author is very grateful for the comments Alexandra Dosman, NYIAC’s Executive Director, and Alethea Gross, a paralegal at Chaffetz Lindsey LLP, provided to earlier drafts of this Checklist.

BOOK REVIEWS

International Commercial Arbitration in New York

By James Carter and John Fellas, Editors

Reviewed by Edna Sussman

This authoritative single-volume work on international arbitration in New York, edited by the well-known practitioners and arbitrators, James Carter of Wilmer Cutler and John Fellas of Hughes Hubbard & Reed, gathers together some of the leading lawyers in the international arbitration field in New York to write on the law and practice relating to the conduct of international arbitration in New York.

The book is arranged in the order in which arbitrations are conducted and includes, *inter alia*: drafting of the arbitration clause, jurisdiction, enforcement of the arbitration agreement, application of New York law to contracts, provisional remedies, disclosure, damages, challenges to and enforcement of arbitral awards, and enforcing awards involving foreign sovereigns. Each chapter presents a careful and thoughtful discussion of the subject, providing not only the kind of keen discussion that can come only from lawyers experienced in the field, but also references to authorities, referral to which will guide the reader to a greater understanding of the issues.

New York is the most important venue in the United States for international arbitration and New York has extensive case law involving issues relating to international arbitration law. Therefore, discussion of international arbitration law as interpreted and applied in New York can be a solid base for obtaining an understanding of the law in other parts of the country where many of the issues addressed in New York courts have not been addressed.

New York Contract Law: A Guide for Non-New York Attorneys

By Glen Banks

(New York State Bar Association, 2014)

Reviewed by Stefan B. Kalina

There is no such thing as a simple agreement. Any dispute unearths the complexities of the parties' relationship—whether commercial or otherwise—and casts a harsh light on the particular facts of their disagreement.

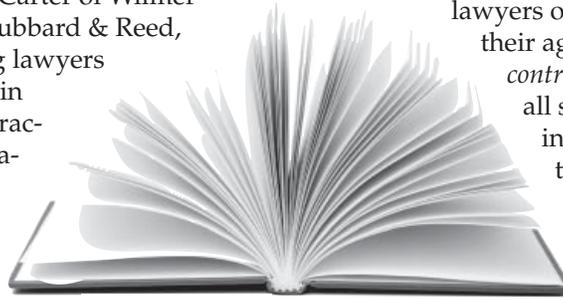
Readers of this *Journal* are particularly interested in how to manage these issues to resolve them through mediation, arbitration or some other alternative method. Aside from craft and method, however, practitioners must also consider the substantive contractual law that governs the dispute and the enforceability of any dispute resolution mechanism the parties may have selected in the contracting process.

Here and abroad, contracting parties and their lawyers often select New York law to govern their agreement. Understanding New York's *contractual* law is, therefore, essential to all stages of dispute resolution, from initial clause drafting through resolution. Although styled as a guide for "non-New York" attorneys, this book serves as a useful guide to gaining this critical understanding and applying it to the specifics of the arbitrations and mediations

venued here in New York, regardless where one may practice.

Indeed, New York practitioners in particular stand to benefit from the "non-New York" approach of this book, which grew out of the recognition that foreign practitioners "had no resource to quickly and easily get a basic understanding of New York Contract Law." As the author, Mr. Banks, points out, judges in New York "have refined New York Contract Law while applying it to sophisticated commercial agreements." Mr. Banks surveys this judicial refinement, as aptly described by Chief Judge Kaye in her foreword, in an accessible question and answer format that posits issues as they arise—from formation through the "consequences of the contract's demise"—and provides thoughtful and articulate answers to questions of New York law. More than providing the answers, this book enables readers "to plunge right into" the question and learn the precise answer "without plodding through a lot of preliminary turf." Such accuracy and alacrity are helpful to New York attorneys, and especially to those seeking to benefit from the speed and efficiency of alternative dispute resolution from any vantage point in the process.

In the main, this book addresses issues of substantive law and "focuses upon the law and principles that would be applied by a court sitting in New York and applying New York law to decide the issues concerning a contract." Such pointed guidance helps drafters anticipate the effects of applying New York law to the particulars of a contract. With equal weight, the book helps litigators identify viable points of contention and how contractual issues would be likely resolved.



In so doing, the book also tackles those contractual issues that affect alternative dispute resolution, both directly and indirectly. As but one example, Mr. Banks discusses how forum selection clauses generally impact such arbitration issues as compelling arbitration in the first instance, obtaining injunctive relief in aid of arbitration and confirmation of arbitral awards. In a later section, Mr. Banks deals directly with the agreement to arbitrate “as a specialized type of forum selection clause” and how New York’s state law of contracts applies to construing this particular agreement. Readers can therefore access precise standards by which the arbitrability of all or certain issues in a dispute will be resolved, and apply it to the particular facts of their cases.

“[T]his book reflects same attributes of New York’s developed contract law that has, and continues, to drive the oft-repeated selection of New York as the chosen law and forum to resolve commercial disputes.”

In addition, the book answers whether a non-signatory can be bound to the forum selection clause to contract. By extension, Mr. Banks outlines the principles pertinent to whether a non-signatory can be bound by an arbitration clause. Consequently, readers can benefit from learning how New York contractual law would apply to this thorny, arbitration-specific issue.

In reviewing these issues, and many more in the book, readers will appreciate and likely agree with Chief Judge Kaye, that New York’s contractual rules and principles “have been carefully developed over the past two centuries, and why they are an excellent choice for dispute resolution today.” In its own clarity of prose and certainty in explanation, this book reflects same at-

tributes of New York’s developed contract law that has, and continues, to drive the oft-repeated selection of New York as the chosen law and forum to resolve commercial disputes.

The utility of the book is further enhanced with its ample citation to authoritative cases, many of which reflect a recent articulation of the contractual principle by New York’s Court of Appeals, its highest court. The text is not, however, bogged down by extensive string cites, thereby allowing the reader to gain an uninterrupted, cohesive understanding of the principle at issue. An index of cases is provided, as well as suggestions to further resources, at the end of the book for ease of further reference. Mr. Banks also provides an appendix of contractual clauses that comport with New York law for additional perspective. This creates a neatly crafted book that can meet the time-sensitive demands of daily practice.

Mr. Banks has thus succeeded in preparing a book that justifiably should become an “often used tool in the practice of a lawyer who represents sophisticated clients in commercial transactions in the global economy” that belongs “near the desk where the reader works so that the reader can refer to it from time to time as questions concerning New York Contract Law arise.” The dispute resolution practitioner achieves the same benefits by extension and is commended to this book as a valued resource.

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Why Choose New York Law?

By Michael W. Galligan

New York offers international commercial businesses, investors and co-venturers, as well as exporters and importers around the world, the choice of one of the most sophisticated and developed bodies of contract, commercial, and business partnership law available anywhere to govern their transactions and investments. New York law includes an almost inexhaustible set of rules and precedents covering a wide spectrum of business transactions, ranging from purchases, sales and leases of goods, property rights and business interests, to business collaborations, partnerships, and joint ventures. New York, as more fully explained below, makes it easy for participants in international commerce to enjoy the benefits of New York law even if their business has little or no current connection to the state or city of New York.

“New York courts pride themselves on their rigorous respect for the terms of agreements private parties have negotiated and to which they have subscribed.”

New York law stands in the common law tradition: New York courts have interpreted and developed the principles of New York law in a body of case law that has addressed issues arising from many, if not all, of the most sophisticated commercial transactions to take place since the beginning of the Industrial Revolution. At the same time, New York contract and commercial law, as noted in greater detail in this article, offers important points of contact with the tradition of the civil law that are not found in many other leading common law jurisdictions.¹

New York contract and commercial law has three fundamental components: (1) the New York common law of contracts, partnerships and business obligations, (2) comprehensive rules governing the sale of goods, commercial leases, payment systems, securities and security interests contained in the New York Uniform Commercial Code, and (3) rules of international commercial law incorporated in international treaties to which the United States of America, of which New York has been a state since the nation’s founding, is a party.

New York contract law is private-party driven. It provides a broad framework for honoring, interpreting and enforcing agreements shaped and negotiated by private parties without attempting to dictate the content of such agreements. New York courts, as evidenced by the jurisprudence that makes up the great body of New York contract law, advisedly give great deference to the business

terms of contracts that private business parties negotiate among themselves. New York courts are loathe to substitute their judgment for the business decisions of parties to commercial transactions. This holds equally for cross-border transactions as well as for domestic transactions.²

Strict Adherence to the Written Terms of Agreements

At the heart of New York contract law is the importance New York places on written expressions of commercial agreements and careful adherence to the written terms of the transaction to which the parties have voluntarily agreed. New York’s requirement that many forms of commercial contracts be in writing, while more rigorous than the requirements of many civil (and even some common) law jurisdictions, reflects good commercial practice as well as the requirements of most civil as well as common law jurisdictions for proving a contract in court. More to the point, New York courts pride themselves on their rigorous respect for the terms of agreements private parties have negotiated and to which they have subscribed. New York contract law, as a matter of substantive law, disallows consideration of prior negotiations and representations between parties in interpreting and enforcing their agreements. New York contract law also strictly disallows evidence of collateral agreements when the parties have incorporated an “entire agreement” or “merger” clause in their agreements. New York law requires that a written contract be interpreted according to its written terms and that oral evidence be considered in interpreting a contract only if the provisions are so ambiguous that they do not allow a reasonable construction on their own terms.³

“Good Faith” and Fiduciary Duty

As already noted, New York law, consistent with the common law condition, resolutely upholds the duty of contracting parties to fulfill their obligations to each other and disfavors excusing parties when the fulfillment of their obligations becomes difficult or costly. At the same time, New York law, consistent with the civil law tradition, implies a covenant of good faith and fair dealing in contracts between independent parties and implies a fiduciary duty of utmost care, loyalty and diligence among business partners, co-venturers, and collaborators.

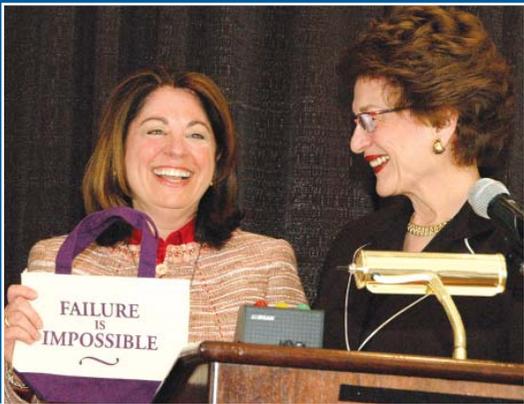
New York was the first U.S. jurisdiction to adopt the implied covenant of good faith and fair dealing into its law of contracts, which it defines, at a minimum, as a duty of honesty in commercial dealings, and in many contexts, as a duty, in the performance of contracts, to act

(continued on page 42)

Honorable Judge 1938-



Judith S. Kaye -2016



in accordance with commercial standards of fair practice in the trade. Not intended to provide a separate cause of action, the incorporation of the good faith obligation into New York contract law provides courts with the ability to penalize party conduct intended to subvert another party's performance of its obligations and, in limited circumstances, to supply missing terms to an otherwise enforceable contract.⁴

The higher and more exacting fiduciary duty imposed on business collaborators by New York law is intended to provide a context of trust and confidence without which long-term partnerships and joint ventures cannot be expected to succeed. In some of the most eloquent words of commercial jurisprudence, Judge Benjamin Cardozo, writing for the New York Court of Appeals (the apex court of the New York court system), ruled that "something more than the morals of the market place is required in the relations of business partners to each other" and that "only the punctilio of an honor most sensitive" would suffice. New York has steadfastly resisted a tendency evident in some other U.S. jurisdictions to weaken the legal duties of business partners to each other.⁵

Contrasts with Civil Law

1. *Pre-Contract Negotiations.* Some civil law jurisdictions combine contract law and tort law under the general rubric of "obligations" and therefore are more willing than New York to allow that contract-like obligations can arise among negotiating parties even if the negotiations do not result in a concluded contract. New York, which insists on the distinct legal nature of contracts, does not generally recognize claims in contract until a contract has actually been formed, although New York courts have enforced obligations to negotiate in good faith where parties to an existing contract have expressly agreed to negotiate extensions or modifications.⁶
2. *Consideration.* Under New York law, consideration (rather than the civil law concepts of "object" and "cause") is the main requirement, in addition to an offer and acceptance, for the formation of a valid contract. Consideration (roughly, an exchange of some value expressed in some form of action, obligation or forbearance) need not be adequate or sufficient to meet the requirement of New York law. Perhaps most importantly, New York, by statute, has abolished the requirement of consideration for all written contractual amendments, written assignments of contractual rights and written releases of contractual obligations.⁷

3. *Economic Hardship.* Parties cannot, under New York law, be easily excused from their contractual obligations because of economic hardship, although there is a possibility of limited relief under contracts for the sale of goods when an obligation has become "impracticable." New York law has not adopted the notion of "collapse of the foundation of a contract" or "change of fundamental circumstances" found in some civil law codes. However, parties may provide in their contracts for an adjustment mechanism in the event of a fundamental shift in economic circumstances, provided they provide unambiguous criteria for determining when such an adjustment should be available and provide clear guidance as to the nature of the available adjustments. Ideally, they will also delineate a form of arbitral procedure to be followed in the event of any dispute regarding implementation of the adjustment provision.⁸

4. *Remedies.* New York law, in contrast to the civil law tradition, makes a sharp distinction between remedies for contractual breach and remedies for tortious or "delictual" conduct. New York imposes strict liability for contractual breach; issues of fault are not relevant although, in many circumstances, compensation for economic loss may be reduced if the non-breaching party fails to take steps to "cover" or mitigate losses arising from breach.

- (a) Punitive damages are not available for contractual breach and New York also strongly disfavors penalty clauses. Parties may provide for "liquidated damages" in the event of a breach as long as the amount of the damage bears a reasonable relationship to the loss likely to be suffered by the non-breaching party.
- (b) New York law disfavors the remedy of specific performance except in the case of real property sales; however, private parties may stipulate to the availability of the remedy of specific performance provided the criteria for determining when and how such a remedy should be administered are clearly delineated in the parties' contract.⁹

Contrasts with English Law

1. *Consideration.* New York law does not incorporate "contracts by deed," which, under English law, are exempt from the common law requirement of consideration and also double the statute of limitations on party obligations; under New York law, contracts retain their distinct legal identity and the statute of limitations can be extended only by express agreement. England has not comprehensively and by statute abolished the requirement of

consideration for written contract modifications, assignments, and releases, as has New York.¹⁰

2. *Reliance.* New York law and English law recognize that detrimental reliance can be a defense to a claim for contractual breach but only New York law recognizes that reliance can give rise to a cause of action in contract. While claims on the basis of reliance in the commercial context may not be common, in some cases not related to sub-contractor bidding, a claim for detrimental reliance may offer relief if a party to pre-contractual negotiations, in bad faith, induces another party to act or refrain from acting in a matter related to the proposed transaction.¹¹
3. *Transfer of Title.* Under English as well as French law—title to sold goods passes to the purchaser when the agreement of sales is entered into. Under New York law, there is a presumption that title—and with it, usually risk of loss—passes when the seller has completed its obligations regarding physical delivery of the goods.¹²
4. *Third Party Beneficiaries.* Since at least 1918, New York has recognized that the common law doctrine of contractual privity could be set aside in the case of contracts that benefit a third party so that third parties could have a right to enforce contracts from which they benefited. England’s recognition of the exception dates back only to legislation passed in 1999, which imposes express conditions for allowing third party beneficiaries the right to enforce contracts.¹³

International Sales of Goods

New York offers, for many international merchants, a choice between two alternative legal regimes: the rules of the United Nations Convention on the International Sale of Goods (the “CISG”), to which the United States of America is a party, and the rules of Article 2 of the New York Uniform Commercial Code:

1. *Contract Formation.* Under the CISG, an acceptance of an offer that varies a material term of the offer constitutes a counter-offer, while under the Code, the same acceptance will generally cause a contract to be formed but the divergent term is construed as a proposal for an addition to the contract.¹⁴
2. *Contract Terms.* The CISG does not require any writing as a condition to the enforcement of a sales contract while the Code requires a writing for any sales contract in excess of \$500. The CISG does not limit the use of oral evidence to augment or interpret the terms of a contract while the Code bars oral evidence of contemporaneous terms of a written contract.¹⁵

3. *Contract Performance.* Under the CISG, a buyer may reject delivered goods only if the seller’s failure to perform an obligation under the contract of sale is a “fundamental breach” of the contract. Under the Code, a buyer may generally fail to accept delivered goods if they fail in any respect to conform to the contract. On the other hand, the CISG enables a buyer to unilaterally adjust the price of goods that do not completely conform with the contract whereas the Code does not offer any such parallel remedy of “self-help.”¹⁶

The legal default regime under New York law where all of the parties to a transaction for a sale of goods have their places of business in jurisdictions that have ratified the CISG (83 as the end of 2014) are the rules of the CISG itself. The legal default regime under New York law for transactions in which one or more of the parties has its place of business in a jurisdiction that has not ratified the CISG is Article 2 of the New York Uniform Commercial Code. The CISG allows parties to opt out of some (or even all) of the CISG rules and Article 2 of the Code also allows parties to opt out of virtually any of the Code’s rules except for the obligation of good faith, diligence, reasonableness and care prescribed by the Code. Therefore, New York offers legal practitioners a unique opportunity to create combinations of CISG and Code rules that best meet the needs and concerns of their clients.¹⁷

Payment and Security Systems

New York was one of the first U.S. jurisdictions to adopt the Uniform Commercial Code, which constitutes the law of New York on major forms of commercial payment as well as commercial leases, securities and security interests. As to payment systems, the Code reflects the fundamental requirement of “good faith” or “honesty in fact” among merchants that pervades the entire Code. Thus, under New York law, someone who has stolen a note or draft cannot be a “holder” and therefore cannot be a “holder in due course” or endorse or negotiate a note or draft to someone else; payment on a letter of credit can, subject to certain requirements, be withheld in the face of evidence of the seller’s fraud on the buyer; and a carrier who issues a bill of lading when the shipmaster misrepresents that the master has received the goods is protected from liability on the bill. Article 9 of the Code, which governs security interests, allows for floating liens and allows a security interest to be perfected by registration without requiring actual notice to the debtor’s creditors.¹⁸

Dispute Resolution

1. *Arbitration.* New York was the first jurisdiction in the United States to make private arbitration awards enforceable with the same force and effect

as court judgments. It is therefore fitting that the 1958 United Nations Convention on the Enforcement and Recognition of Arbitral Awards was negotiated and signed in New York, from which follows the common practice of calling it “the New York Convention.” New York hosts headquarters or offices of leading international arbitral institutions in the world and its bar includes many of the most distinguished international commercial arbitrators and agents in the world. Parties electing arbitration have the ability not only to choose arbitrators or arbitral institutions but to elect the procedural rules that will govern the arbitration, including the rules that will govern pre-hearing disclosure. Parties may insure that pre-hearing disclosure is conducted in accordance with “international standards” rather than the more elaborate and extensive possibilities for discovery in New York court proceedings by adopting the 2011 New York State Bar Association Guidelines for International Arbitrators or the rules proposed by the International Bar Association on the Taking of Evidence in International Arbitrations. The spring of 2013 saw the opening of the New York International Arbitration Center, located at 150 East 42nd Street in New York City, which now offers state-of-the-art facilities for international arbitrations sited in New York City as well as resources and support for the use of New York as an arbitral venue.¹⁹

2. *New York Courts.* The Commercial Division of New York State Supreme Court (New York State’s court of first instance) offers to commercial litigants a judicial chamber whose judges devote themselves exclusively to the adjudication of domestic and international commercial disputes. The Court’s procedural rules are designed to facilitate the effective and efficient disposition of cases: most cases are resolved by dispositive motion and settlement with only a tiny percentage of cases going to trial. Parties may ask that a judge be assigned to the case upon commencement of the case, even if no dispositive motion is pending, to set a schedule for pre-trial disclosure and the eventual disposition of the case. The same judge will be in charge of adjudicating the case to final disposition. Court papers are filed electronically and every effort is made to process cases in a manner that will enable business litigants to resolve their disputes and return to productive commercial endeavors outside the courthouse.²⁰

New York, as is well known, offers the possibility of more extensive pre-trial discovery than is common in civil law jurisdictions and many common law jurisdictions; for parties for whom resolution

of a case carries “life and death” business consequences or where parties cannot assume each other’s good faith, it can be argued that recourse to the full panoply of New York discovery mechanisms offers the only realistic possibility that the claims will be decided based on a full disclosure of all relevant facts. In cases of less significance or greater mutual trust, a more restrained use of pre-trial discovery may be appropriate; New York courts can be expected to defer to agreements between parties to limit or even proscribe pre-trial depositions and other discovery mechanisms. Parties can always agree to waive jury trial and awards of punitive damages in civil disputes.²¹

3. *Federal Courts.* Another alternative for court-assisted dispute resolution is offered for some parties by the Federal District Courts that sit in New York State. To meet the Courts’ jurisdictional requirements, a dispute must generally call for the application of a U.S. federal statute or a rule of international law recognized by the United States of America; alternatively litigants must meet the technical requirements of “complete” jurisdictional diversity among themselves as defined by Federal law. Federal courts have been long respected for the high quality of their judges and court staff, although they do not offer the judicial specialization in commercial law available in the Commercial Division of New York State Supreme Court.²²

Choosing New York Law

Parties who wish to adopt New York as the governing law of a commercial contract may do so in all cases where the agreement is in consideration of, or relates to an obligation arising from, a transaction covering in the aggregate not less than \$250,000, regardless of whether the agreement bears any reasonable relation to New York. Furthermore, parties, including non-New York individuals, entities and even “foreign states” whose disputes have no New York “nexus” may agree to submit to the jurisdiction of the state courts of New York any commercial dispute that arises from a contract, agreement or undertaking that is expressly governed by New York law and is in consideration of, or relates to, any obligation arising from a transaction covering, in the aggregate, not less than \$1,000,000.²³

New York Law—A Legal Bridge

Choice of law in international commercial transactions often turns on a fundamental choice between a representative jurisdiction of the common law or a representative jurisdiction of the civil law; often in a case where common law is desired, the choice is often between New York law and English law. As noted above, New York

law offers a significant and well-entrenched respect for private party ordering in commercial transactions that equals or even surpasses that of English law, while incorporating concepts of good faith and fiduciary conduct that are in some ways closer in spirit to civil law. At the same time, the law of New York in most relevant areas related to payments as well as security interests—in addition to contracts for the sale of goods—is embodied in a code that is closer in spirit to the civil law preference for comprehensive statutory guidance. Thus, New York law, which has been forged in the crucible of one of the world’s greatest centers for cross-border trade, financing and investment, represents a dynamic bridge between the civil law and common law traditions and is a law that parties from all legal traditions will find hospitable and constructive for the long-term success of their business endeavors.²⁴

Endnotes

1. For general background on New York contract law, see Glen Banks, *New York Contract Law: A Guide for Non-New York Attorneys*, 2014; Michael W. Galligan, *Choosing New York Law as Governing Law for International Commercial Transactions*, 26 NYSBA International Law Practicum 79 (Autumn 2013).
2. Banks, *id.*, §I.1; Galligan, *id.*, at 1-2.
3. Banks, *id.*, §V.1; Galligan, *id.*, at 81-82.
4. Banks, *id.*, §VI.8-VI.13; Galligan, *id.*, at 83-85.
5. Galligan, *id.*, at 87-88. See *Meinhard v. Salmon*, 249 NY 458, 463-464 (1928).
6. Galligan, *id.*, at 85-86; See generally, Martin V. Vranken *Fundamentals Of European Civil Law*, 101-144 (2010).
7. Galligan, *id.*, at 79-80.
8. Galligan, *id.*, at 86-87.
9. Galligan, *id.*, at 90-92. For a more extensive comparison of New York contract and commercial law with French and German contract and commercial law, see Galligan et al., *International Practice Comparative Charts* (2012) at <http://goo.gl/k5zoz>.
10. Galligan, *Choosing New York Law, supra* at 80; See also John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, 114-116 (2008).
11. Galligan, *id.*, at 86.
12. Galligan, *id.*, at 89-90.
13. Galligan, *id.*, at 88-89; see Cartwright, *supra* at 226. See also Banks, *id.*, §II.9 regarding indications of a trend under New York law to more strict conditions on allowing third-party beneficiaries to enforce a contract. For a more extensive comparison of New York contract and commercial law, with English contract and commercial law, see also Galligan et al., *International Practice Comparative Charts* (2012) at <http://goo.gl/k5zoz>.
14. Galligan, *Choosing New York Law, supra* at 95.
15. Galligan, *id.*, at 96.
16. Galligan, *id.*, at 97-98.
17. See discussion and citations in Galligan, *id.*, Appendix B, 108, note 3. For a more extensive comparison of New York law regarding the sale of goods with the law of the CISG, see Galligan et al., *International Comparative Charts* at <http://goo.gl/k5zoz>.
18. Galligan, *Choosing New York Law, supra* at 93-94.
19. James Carter & John Fellas, *International Commercial Arbitration In New York* (2013). For a rich source of materials on conducting arbitration in New York State, see the website of the New York International Arbitration Center at <https://www.nyiacc.org>.
20. For the rules of the Commercial Division of New York Supreme Court, New York County, see <http://nycourts.gov/courts/comdiv/ny/newyork.shtml>.
21. Final Report of the New York State Bar Association’s Task Force on New York International Law in International Matters, Section II(B) (25 June 2011).
22. *Id.*
23. NY General Obligations Law Sections 5-1401 and 5-1402.
24. For a discussion of proposals that would in some ways make New York law a more notable “bridge” between the common and civil law traditions, see Galligan *id.*, at 95-98.

Michael W. Galligan is a Partner (Trusts & Estates, Tax and Immigration) at Phillips Nizer LLP; Member-at-large of the Executive Committee of the New York State Bar Association; Member of the New York State Bar Association Task Force on New York Law in International Matters (2010-2011); and Past Chair of the New York State Bar International Section (2009-2010).

The International Commercial Disputes Committee of the New York City Bar Association Reports on the Manifest Disregard of Law Doctrine and International Arbitration in New York

By Laurence Shore, Joseph P. Zammit, Amal Bouchenaki

In the face of the frequently heard criticism that the existence of the “manifest disregard of law” doctrine makes New York a poor choice as a seat for international arbitrations, the International Commercial Disputes Committee of the New York City Bar Association sought to evaluate whether such a position is justified. In particular, the Committee undertook an empirical review of the extent to which the manifest disregard doctrine has actually been applied in the Second Circuit (as well as in other Circuits) to set aside international arbitration awards, and examined whether the doctrine in fact renders New York a less desirable venue than other major international arbitration fora such as Paris, London, Switzerland, and Hong Kong.

“[C]ourts in other leading international arbitral seats have shown a comparable willingness to provide relief from awards that clearly depart from basic notions of fairness.”

The Committee, in a report entitled “The Manifest Disregard Doctrine and International Arbitration in New York,” issued in the fall of 2012, found that the doctrine has been applied exceedingly sparingly, especially in the context of international awards rendered in New York. In fact, since the Second Circuit began applying the doctrine in 1960, it appears from the Committee’s research that *none* of the arbitral awards vacated on that ground was an international or Convention award. The Committee also found that, regardless of the legal rubric used, courts in other leading international arbitral seats have shown a comparable willingness to provide relief from awards that clearly depart from basic notions of fairness. Consequently, the existence of the manifest disregard doctrine does not make New York unique in this respect.

Empirical review of the application by the federal courts in New York of the manifest disregard doctrine reveals: (i) that manifest disregard of the law is rarely raised as the sole ground for challenging an arbitral award; (ii) that review for manifest disregard does not amount to a review of substantive arbitral decisions for errors of law; and (iii) that litigants are rarely successful in invoking the doctrine in either federal or state court. Moreover, almost

fifty percent of all cases in which defendants successfully invoked manifest disregard involved domestic employment issues.

The limited actual impact of manifest disregard on international arbitration in New York is further reinforced by the very high threshold required to set aside an award on the ground of manifest disregard. Following the Supreme Court’s holding that parties cannot contractually expand the grounds for judicial review of an arbitral award in *Hall Street Associates, LLC v. Mattel*,¹ the Second Circuit “reconceptualiz[ed] manifest disregard as judicial gloss on the specific grounds for vacatur of arbitration awards under 9 U.S.C. § 10.”² In *Stolt-Nielsen*, the Second Circuit recognized that some of its previous pronouncements of the “manifest disregard” standard as an entirely separate ground for vacatur from the FAA enumerated grounds were “undeniably inconsistent” with the *Hall Street* holding.³ Nonetheless, the Second Circuit later held that manifest disregard “remains a valid ground for vacating arbitration awards” as a gloss on the exclusive grounds for vacatur provided in the Federal Arbitration Act.⁴ However, since Second Circuit jurisprudence is highly deferential to arbitrators’ findings and reluctant to disturb the finality of arbitral awards, judicial review on manifest disregard grounds is “severely limited.”⁵ A party challenging an arbitration award on the basis of manifest disregard bears a “heavy burden.”⁶

In determining whether a petitioner has carried the heavy burden for invoking the doctrine, the Second Circuit has required parties challenging awards on manifest disregard grounds to show that: (i) “the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators [as] an arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable[.]”⁷ (ii) “the law was in fact improperly applied, leading to an erroneous outcome[.]”⁸ and (iii) the arbitrator knew of a governing legal principle that was applicable to the facts of the dispute but refused to apply it or ignored it all together.⁹ For example, the Second Circuit has repeatedly clarified that determinations of the applicable law,¹⁰ or “disputes over contractual interpretation do not rise to the level of manifest disregard of the law.”¹¹ As one federal judge in New York observed, the manifest disregard standard in the Second Circuit is so difficult to satisfy that it “will be of little solace to those parties who,

having willingly chosen to submit to unarticulated arbitration, are mystified by the result.”¹²

Unsurprisingly, the other Circuit Courts of Appeal have also adapted the manifest disregard doctrine for cases arising under the FAA. Nevertheless, the lack of clarity from the Supreme Court concerning the standard’s application and scope has led to a renewed circuit split. On the one hand—consonant with the Second Circuit’s position—the Fourth,¹³ Seventh,¹⁴ Ninth¹⁵ and Tenth¹⁶ Circuits have held that manifest disregard remains viable (either as an additional ground for vacatur, or as a judicial interpretive gloss on the court’s power to vacate pursuant to the FAA) after *Hall Street*. On the other hand, the Fifth,¹⁷ Eighth¹⁸ and Eleventh¹⁹ Circuits have excluded it as a ground for vacating awards. While there is less clarity in the other Circuits,²⁰ none of the recent decisions addressing the manifest disregard of law doctrine resulted in a set-aside of international arbitral awards. Rather, the uncertainty lies in whether the manifest disregard of law doctrine should even continue to apply as a ground for judicial review of arbitral awards. However, the importance of the Circuit split should not be overstated. The Supreme Court has not granted certiorari on this issue recently, despite several petitions.²¹ Many of the arbitral cases in the other Circuits only tangentially identified manifest disregard of the law as a possible ground for vacatur without any further consideration, or the doctrine only arose in the context of a domestic labor dispute.²² Moreover, these Circuits did not vacate any international awards on manifest disregard grounds. Thus, the Second Circuit is not an exception in this regard.

Moreover, the United States, and certainly the Second Circuit, is not unusual when compared to the other leading arbitration-friendly jurisdictions. The Committee’s review shows that, like the manifest disregard doctrine, standards of substantive review under the 1996 English Arbitration Act allow English courts to set aside arbitral decisions that create a risk of manifest injustice. For example, the English doctrines of public policy and exceeding powers under section 68 of the Act—especially as colored by the conscious disregard doctrine—are comparable to manifest disregard in that they entail a substantive review of arbitral awards. As with the manifest disregard doctrine in the United States, these doctrines are applied extremely sparingly by the English courts. While it may be too soon to say that England embraces a “conscious disregard” doctrine per se, English courts’ review of arbitral awards under a variety of grounds for vacatur approaches the American doctrine of manifest disregard to a greater degree than other major arbitral seats.

The Committee found a similar result in studying its other common law subject, Hong Kong, which has adopted the UNCITRAL Model Law. Under Article 34(2), which provides the exclusive grounds for setting aside an international arbitral award, a party to an arbitration may move to set aside an award if the party can show that the

matters decided by the award exceeded the scope of the arbitration agreement or were beyond the authority of the arbitrator. A court may also set aside an award if it finds that the award conflicts with State public policy. Though a narrow exception, this allows courts to set aside awards in extreme circumstances. Additionally, there is a requirement in Hong Kong that enforcement of an award not be repugnant to conceptions of justice and fairness.

The grounds upon which an arbitral award may be challenged in the two civil law jurisdictions the Committee studied, Switzerland and France, are limited and in line with the statutory grounds provided in other arbitration-friendly fora, including the United States. Swiss courts have reviewed arbitral awards pursuant to the enumerated grounds for setting aside in Article 190 of the Swiss Private International Law Act, such as the “right to be heard” and public policy. The French Code of Civil Procedure provides five grounds pursuant to which an international arbitral award may be set aside. A review of the French decisions on challenges to arbitral awards since 2000 shows that, like the courts of the other jurisdictions analyzed here, French courts do not revisit the merits of international arbitral decisions, but do vacate awards where there has been a flagrant and concrete breach of French international public policy or a violation by the arbitrators of their mission. Over the years, French courts have identified key principles and mandatory rules of French (or European) law that have been elevated to the level of principles of French international public policy.

Conclusion

The doctrine on manifest disregard of the law has been applied infrequently and in a restrained manner in the context of international arbitration, especially in the Second Circuit. Thus, any perception that New York is a less desirable seat because awards rendered there are more vulnerable to vacatur than those rendered in other major international venues is both inaccurate and unfair. In the “Report on Manifest Disregard of the Law and International Arbitration in New York,” the International Commercial Disputes Committee of the New York City Bar Association did not take a position on the value of the manifest disregard doctrine or whether the doctrine should continue to apply as a gloss on the FAA grounds for vacatur of international arbitral awards rendered in New York. The Committee simply noted that, as the Second Circuit has done by means of the manifest disregard doctrine, leading foreign arbitral seats have each provided safety valves for the vacatur of particularly egregious arbitral awards. The Committee concluded that these jurisdictions have impliedly or expressly recognized the need for substantive safety-valve mechanisms, but that, like the Second Circuit, they have also exercised restraint in their application.

Endnotes

1. 552 U.S. 576 (2008).
2. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (quoting *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. ___, 130 S. Ct. 1758 (2010)).
3. 548 F.3d 85, 94 (2d Cir. 2008).
4. *T.Co Metals*, 592 F.3d at 339 (quoting *Stolt-Nielsen*, 548 F.3d at 94).
5. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003) at 389.
6. *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003).
7. *Duferco*, 333 F.3d at 390 (citation omitted).
8. *Id.*
9. *Id.*
10. See, e.g., *Abu Dhabi Inv. Authority v. Citigroup, Inc.*, 776 F.3d 126 (2d Cir. 2015) (holding that the arbitral tribunal did not act in manifest disregard of the law or exceed its powers in deciding to apply the law of New York, rather than the law of Abu Dhabi, to investment authority's common-law fraud and negligent misrepresentation claims).
11. See *Landmark Ventures, Inc. v. Insightec, Ltd.*, 63 F.Supp.3d 343, 356 (S.D.N.Y. 2014), quoting *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997).
12. *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp.*, No. 10 Civ. 5622 (JSR), 2010 WL 4877847, at *2 (S.D.N.Y. Nov. 30, 2010), *judgment amended by Goldman Sachs Execution & Clearing, L.P. v. The Official Unsecured Creditors' Committee of Bayou Group, LLC*, No. 10 CIV. 5622 JSR, 2011 WL 2224629 (S.D.N.Y. May 31, 2011), *affirmed by Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Committee of Bayou Group, LLC*, No. 10-5049-CV, --- F.App'x ---, 2012 WL 2548927 (2d Cir. July 3, 2012).
13. *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (reading *Stolt-Nielsen* "to mean that manifest disregard continues to exist either 'as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.'").
14. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) ("Except to the extent recognized in *George Watts & Son*, 'manifest disregard of the law' is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act.").
15. *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1281 (9th Cir. 2009) ("in this circuit, an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act.").
16. *Lynch v. Whitney*, 419 Fed. Appx. 826, 833 (10th Cir. 2011) (expressly recognizing manifest disregard of the law as a current ground for vacatur).
17. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.").
18. *Medicine Shoppe International, Inc. v. Turner Investments, Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding that "an arbitral award may be vacated only for the reasons enumerated in the FAA.").
19. *Frazier v. CitiFinancial Corporation*, 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*. In so holding, we agree with the Fifth Circuit that the categorical language of *Hall Street* compels such a conclusion.").
20. See, e.g., *Schafer v. Multiband Corp.*, 551 F. App'x 814, 819 (6th Cir.) *cert. denied*, 134 S. Ct. 2845, 189 L. Ed. 2d 808 (2014) ("Since *Hall Street*, we have continued to acknowledge 'manifest disregard' as a ground for vacatur—albeit not in a published holding. E.g., *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.Appx. 415, 418 (6th Cir.2009) (stating that manifest disregard survives *Hall Street*); *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 n. 2 (6th Cir. 2008) (same); *Ozormoor v. T-Mobile USA, Inc.*, 08-11717, 2010 WL 3272620, at *2 (E.D.Mich. Aug. 19, 2010), *aff'd*, 459 Fed. Appx. 502 (6th Cir.2012); *but see Grain v. Trinity Health, Mercy Health Services Inc.*, 551 F.3d 374, 380 (6th Cir.2008) ("Hall Street's reference to the 'exclusive' statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory.")). See also *Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 64-5 (1st Cir. 2015) ("Whether the manifest-disregard doctrine remains good law, however, is uncertain. [...] We need not resolve the uncertainty over 'manifest disregard' here. As we explain below, even assuming the doctrine remains available, it would not invalidate the award in this case."); *Bellantuono v. ICAP Secs. USA, LLC*, 557 Fed. Appx. 168, 173-74 (3d Cir. 2014) ("This Court has not yet ruled on the issue. Because we find that the District Court was correct in concluding that the Panel did not act in manifest disregard of the law, we need not do so here.").
21. See, e.g., *Schafer v. Multiband Corp.*, 551 F. App'x 814, 819 (6th Cir.) *cert. denied*, 134 S. Ct. 2845, 189 L. Ed. 2d 808 (2014); *Republic of Argentina v. BG Group PLC*, 555 Fed. Appx. 2 (D.C. Cir.) *cert. denied*, 135 S.Ct. 441, 190 L.Ed.2d 329 (2014); *Dewan v. Walia*, 544 Fed. Appx. 240, 248 (4th Cir.), *cert. denied*, 134 S.Ct. 1788, 188 L.Ed.2d 757 (2014); *Frontera Eastern Georgia, Ltd. v. Arar, Inc.*, 483 Fed. Appx. 896 (5th Cir.) *cert. denied*, 133 S.Ct. 890, 184 L.Ed.2d 661 (2013). It should be noted, however, that certiorari may have been denied on other grounds than the circuit split on the viability of the manifest disregard of law doctrine.
22. See, e.g., *Dewan v. Walia*, 2013 U.S. App. LEXIS 21970; 2013 WL 5781207 (4th Cir. Oct. 28, 2013) (vacating arbitral award rendered in favor of a former employee who had previously executed a release agreement with his former employer).

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Using New York Fora to Enforce Judgments After *Motorola Credit Corp. v. Standard Chartered Bank* and *Daimler AG v. Bauman*

By Samaa A. Haridi and Samuel L. Zimmerman

The New York Court of Appeals' 2009 decision in *Koehler v. Bank of Bermuda, Ltd.*¹ for a short time gave creditors an advantage in enforcing judgments and converted arbitral awards in New York courts against assets of judgment debtors held outside of New York. By requiring the Bank of Bermuda to turn over assets, held in Bermuda, of a judgment debtor, despite there being no connection between New York and the subject matter of the judgment and no jurisdiction over the judgment debtor, the Court of Appeals appeared to reject the long-standing "separate entity doctrine"² and tip the scales in favor of judgment creditors. Recent decisions of the Court of Appeals and U.S. Supreme Court, however, have firmly shifted the balance back to center. In *Motorola Credit Corp. v. Standard Chartered Bank*,³ the New York Court of Appeals expressly adopted the separate entity doctrine, restricting judgment creditors' ability to seek turnover of assets held by foreign bank branches, and in *Daimler AG v. Bauman*,⁴ the Supreme Court adopted a stricter standard for general jurisdiction, making it difficult for judgment creditors to obtain jurisdiction over the foreign bank branches in New York fora.

Despite these rulings, judgment creditors in New York fora, particularly in federal court, have continued to seek ways to execute their judgments against judgment debtors' assets abroad. One tool that has survived following *Motorola* and *Daimler* is the ability to get broad post-judgment discovery, including against third parties such as foreign banks holding the judgment debtors' assets abroad.

The Separate Entity Doctrine and *Koehler*

At the time *Koehler* was decided, the New York Court of Appeals had not explicitly endorsed the separate entity doctrine, but it had been widely accepted in lower New York courts and other U.S. jurisdictions. And *Koehler* itself did not tackle the doctrine head on. In *Koehler*, a judgment creditor sought to enforce a judgment in New York against a Bermudian judgment debtor by compelling the Bank of Bermuda to turn over stock certificates it held in Bermuda on behalf of the debtor. The judgment creditor served both the Bank of Bermuda and its New York branch. After ten years of litigation, the Bank of Bermuda ultimately consented to jurisdiction in New York. The Court of Appeals held that a court can order a garnishee to turn over assets held abroad as long as it has personal jurisdiction over the garnishee.

This decision caused speculation and disagreement over whether the Court of Appeals had rejected the separate entity doctrine. Because the *Koehler* decision focused on whether the court had personal jurisdiction over the foreign bank, some federal courts found that a foreign bank's branch operations in New York provided general personal jurisdiction sufficient for a turnover order.⁵ Other courts, in particular New York state courts, took the position that the separate entity doctrine was unchanged, because personal jurisdiction in *Koehler* was based on the consent of the Bermudian bank, not general jurisdiction based on the New York branch.⁶

Daimler and *Motorola*

Whatever uncertainty existed regarding the status of the separate entity doctrine in New York and the ability of judgment creditors to compel the turnover of assets held in foreign banks was put to rest by two decisions in 2014. First, the Supreme Court decided *Daimler AG v. Bauman*. Prior to *Daimler*, U.S. courts, in New York and elsewhere, typically held that there was general jurisdiction over a defendant if the defendant did business through branches or offices in the court's jurisdiction. For New York courts, this test was readily met by any foreign bank operating a New York branch.

Daimler changed this. In *Daimler*, a group of Argentinian residents brought a suit against a German corporation in California, based on allegations that the corporation's Argentinian subsidiary had collaborated with Argentinian security forces to kidnap, torture, and kill the plaintiffs and their relatives, in Argentina, during the "Dirty War," between 1976 and 1983. The plaintiffs based personal jurisdiction on the corporation's "substantial, continuous, and systematic course of business" in California, which it conducted through a subsidiary corporation.⁷ The Court flatly rejected this, calling the plaintiffs' theory "unacceptably grasping." Instead, the Court determined that the test is whether the foreign corporation's contacts with the forum are so "continuous and systematic as to render it essentially at home in the forum." Because neither the corporation nor its subsidiary was incorporated in or had its principal place of business in California, the Court held that there was no personal jurisdiction.

The practical result of the *Daimler* decision was to moot the controversy over *Koehler*'s effect. Even if *Koehler* were to be read so broadly as to permit New York courts

to compel the turnover of assets held by any entity over which they had personal jurisdiction, *Daimler* made clear that New York courts do not have personal jurisdiction over corporations (including banks) that are not incorporated in or do not have their principal place of business in New York. This would be true even for banks with New York branches.

The New York Court of Appeals subsequently expressly adopted the separate entity doctrine. In *Motorola Credit Corp. v. Standard Chartered Bank*, the plaintiff received federal court judgments of over \$3 billion. However, the judgment debtor went through great lengths to frustrate the judgment, requiring the judgment creditor to engage in third-party discovery to locate assets against which to enforce its judgment. As part of this endeavor, the judgment creditor learned that a bank incorporated and headquartered in the United Kingdom held some of the judgment debtor's assets in its UAE and Jordanian branches. The judgment debtor served a restraining order on the New York branch of the bank requiring it to freeze the foreign-held assets. After the federal district court granted the bank relief from the restraining order based on the separate entity doctrine, the federal court of appeals certified to the New York Court of Appeals the limited question of the validity of the separate entity doctrine.

In its decision, the New York Court of Appeals adopted the separate entity doctrine, holding that serving the restraining notice on the New York branch was insufficient to freeze foreign-held assets. The court noted that the *Koehler* decision did not implicate the separate entity doctrine, as the foreign bank had consented to jurisdiction. The court further observed that, although technological advances made it easy for bank branches to communicate, the rationale behind the separate entity doctrine still held true. In particular, the separate entity doctrine still promotes international comity by avoiding conflicts between competing legal systems and protects banks from double liability.

District Courts Continue to Permit Broad Post-Judgment Discovery Against Foreign Banks

The *Daimler* and *Motorola* decisions significantly restricted judgment creditors' ability to enforce their judgments against foreign-held assets through the New York courts. But it did not eliminate that ability entirely. In particular, federal courts in New York have not interpreted these decisions to limit their ability to compel third-party discovery from foreign banks so that the judgment creditor may identify where to pursue enforcement actions abroad.

In the *Motorola* litigation, after losing in the New York Court of Appeals on the separate entity doctrine, the judgment creditor moved the district court to reconsider its prior ruling denying certain subpoenas served

on the New York branch of foreign banks regarding accounts of the judgment debtor held in foreign branches.⁸ Requests for documents located abroad are subject to the guidelines set forth in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*. There, the Supreme Court identified five relevant factors:

- (1) the importance to the...litigation of the documents or other information requested;
- (2) the degree of specificity of the request;
- (3) whether the information originated in the United States;
- (4) the availability of alternative means of securing the information;
- and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.⁹

On the motion for reconsideration, the court reevaluated the first factor: the importance of the documents to the litigation. Initially, the court had determined that because the foreign accounts could not be attached under the separate entity doctrine, the discovery was of little value.¹⁰ On reconsideration, however, after the Court of Appeals decision, the court stated that it was now convinced that the judgment creditor would not be able to pursue the necessary enforcement actions abroad until it learned the location of the judgment debtor's assets. After evaluating all of the factors, the court required the bank to comply with the request as to its branches in France, Jordan, and the UAE.

Another district court has held that *Daimler's* limitations on jurisdiction do not apply to information subpoenas in aid of post-judgment discovery. In *Vera v. Republic of Cuba*, a judgment creditor served information subpoenas on the New York branches of Spanish and UK banks, seeking information regarding the judgment debtors' assets held by the banks' New York and international branches.¹¹ The banks argued that the court lacked jurisdiction over the international branches, under *Daimler* and *Gucci Am., Inc. v. Weixing Li*,¹² in which the federal court of appeals held that courts do not have jurisdiction to issue asset freeze injunctions in aid of pre-judgment discovery against third-party banks whose principal place of business and place of incorporation are outside the U.S. The district court rejected this argument. It held that the foreign banks had consented to jurisdiction by registering branches in New York. It further held that *Daimler* and *Gucci* do not apply to post-judgment discovery orders, as the court needs only jurisdiction over the judgment debtor. Because the court had jurisdiction over the judgment debtor, and broad post-judgment discovery is favored, the court required the banks to comply with the information subpoena.¹³

Conclusion

While the decisions in *Daimler* and *Motorola* closed the door that *Koehler* opened for judgment creditors to use New York courts to compel New York branches of foreign banks to turn over assets of judgment debtors held abroad, judgment creditors still have options in New York. In recent decisions, New York federal courts have declined to view these cases as limiting their power to grant broad post-judgment discovery. This has allowed the holders of court judgments and converted arbitral awards to obtain information regarding foreign accounts of judgment debtors by serving broad discovery demands on New York bank branches. Broad post-judgment discovery continues to make New York an important forum for both judgment creditors attempting to locate foreign assets and foreign banks who often find themselves at the center of these efforts.

Endnotes

1. *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 911 N.E.2d 825 (2009).
2. The separate entity doctrine is a common law doctrine under which the courts will treat separate bank branches as distinct entities, regardless of the corporate structure, for certain purposes. Significantly for the enforcement of judgments, this includes turnover orders pursuant to Article 52 of the New York Civil Practice Law and Rules, through which a court can compel a third-party garnishee holding a judgment debtor's assets to turn over the assets. The practical effect of the doctrine is that a judgment creditor must serve and obtain jurisdiction over the specific bank branch where an account is located in order to obtain a turnover order. The doctrine arose prior to the advent of high-speed computers to address three concerns: (1) the impracticability of bank branches monitoring the accounts held in other branches, (2) the potential for liability under foreign banking laws, and (3) the possibility that a foreign branch might receive competing turnover orders, resulting in double liability. See also Samaa A. Haridi, Marguerite C. Walter & Sylvana Q. Sinha, *Enforcement of International Arbitration Awards in New York*, *New York Law Journal*, Apr. 1, 2013; Samaa Haridi & Meredith Craven, *New York Courts Revisit the Balance between Debtors and Creditors in Enforcement Proceedings*, *IBA Arbitration News*, Vol. 19, No. 1, Feb. 2014.
3. *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 21 N.E.3d 223 (2014).
4. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
5. See, e.g., *JW Oilfield Equip., LLC v. Commerzbank, AG*, 764 F. Supp. 2d 587 (S.D.N.Y. 2011); *Eitzen Bulk A/S vs. Bank of India*, 827 F. Supp. 2d 234 (S.D.N.Y. 2011).
6. See, e.g., *Samsun Logix Corp. v. Bank of China*, 31 Misc. 3d 1226(A), 929 N.Y.S.2d 202 (Sup. Ct. 2011).
7. *Daimler*, 134 S. Ct. at 761.
8. *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).
9. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987).
10. *Motorola Credit Corp. v. Uzan*, 293 F.R.D. 595, 599 (S.D.N.Y. 2013), *rev'd on reconsideration*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).
11. *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015), *appeal dismissed*, 802 F.3d 242 (2d Cir. 2015).
12. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014).
13. 91 F. Supp. 3d at 572-73.

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“Who Decides?” The *Res Judicata* Effect of Arbitral Awards and Federal Confirmation Judgments Are Matters for Arbitral Resolution

By Tai-Heng Cheng and Adam J. DiClemente

Whereas court jurisdiction is mandatorily imposed, international arbitration is consensual. When parties choose international arbitration, they expect that their dispute will be resolved with finality. Thus, for international arbitration to continue to be selected by actors in international arrangements, arbitral awards should preclude re-adjudication of issues that they resolved. This policy goal is supported by the legal doctrine of *res judicata*. For this doctrine to have effect, however, it must be applied. One key question is whether the proper decision maker to apply this doctrine is the international arbitration tribunal constituted to decide a legal dispute, or a national court exercising a supervisory role over the arbitration.

In a recent decision, *Citigroup Inc. v. Abu Dhabi Investment Authority*,¹ the United States Court of Appeals for the Second Circuit squarely affirmed that arbitrators and not courts are the proper decisionmakers to decide whether an international arbitration is barred by *res judicata*. When parties agreed to arbitrate all disputes, arbitrators, not courts, are the proper decisionmakers to determine the scope and effect of a prior international arbitral award. Beyond policing the finality of decisions in international arbitration, the court specifically concluded that international arbitrators may also determine the *res judicata* effect of *judicial judgments* confirming arbitral awards. Arbitrators—engaged for the private resolution of disputes—are presumptively competent and able to protect decisions issued through the exercise of State judicial authority. While this decision is plainly rooted in law—what the court called a “simple intuitive step” based upon established case law—it reflects international arbitration’s respected status as a dispute resolution mechanism and robust judicial acceptance thereof. It is another aspect of how the United States generally, and courts in New York specifically, support arbitration without unnecessarily interfering with the arbitral process.

Res Judicata Is for the Arbitrators

The allocation of decisional authority between courts and arbitrators concerning issues within the range of an arbitration agreement has been the subject of significant jurisprudence over the past quarter century. It is now well-settled that “most disputes between parties to a binding arbitration agreement are ‘arbitrable,’ meaning that they are to be decided by the arbitrators, not the courts.”² Thus, as a general rule, courts will not decide an issue that goes to the resolution of a claim or dispute because these

are “presumptively *not* for the judge, but for an arbitrator, to decide.”³ Of course, the exceptions to this principle are questions of “arbitrability”—assertions that a particular dispute is not subject to arbitration because the parties are not contractually bound to arbitrate or because the subject matter falls outside the scope of a valid arbitration agreement. Arbitrability issues are for courts, not arbitrators, to resolve unless the parties clearly and unmistakably provide otherwise.⁴

In *Citigroup*, the Second Circuit confirmed its prior holdings establishing that *res judicata* (that is, the claim preclusive effect of an arbitral award) “is an issue for the arbitrators to decide” rather than the courts.⁵ The court explained that this issue does not go to arbitrability because it is a “legal defense to the opposing party’s claims and, as such, was ‘itself a component of the *dispute on the merits*.’”⁶ In other words, while the result of finding that a claim breaches the preclusive terms of an earlier decision is often an outright dismissal of such claim, *res judicata* necessitates a comparative analysis of claims asserted for resolution in the first and second action. The Second Circuit’s view, as confirmed in *Citigroup*, is far from isolated. Parties subject to an arbitration agreement can fairly expect courts to refer to arbitration claims based on *res judicata* effects of arbitral awards across the United States.⁷

The Preclusive Effect of a Prior Federal Judgment Confirming an Award Is Also a Question for Arbitrators

In *Citigroup*, Citigroup—appellant and the respondent in arbitration—sought to enjoin an arbitration instituted by the Abu Dhabi Investment Authority, claiming that the subject matter of the arbitration was resolved by the *res judicata* effect of a previous award between the parties. That award was confirmed in a federal judgment “through a limited procedure that did not require consideration of the underlying claims.”⁸ In what appeared to be a novel argument, Citigroup argued that the federal courts could and should decide a *res judicata* defense for an award confirmed in a federal judgment, rather than submitting it to arbitrators. Citigroup relied on a footnote in *In Re American Express Financial Advisors Securities Litigation*,⁹ noting the possibility that “in certain circumstances, the [federal] All Writs Act could permit a court to enjoin an arbitration.”¹⁰ The court disagreed. Guided by its precedents in *Belco*, establishing that the preclusive effect of an award confirmed in state courts was for arbitrators, not the fed-

eral courts,¹¹ and *United States Fire Ins. Co. v. National Gypsum Co.*,¹² holding that arbitrators were to decide whether decisions in a prior federal litigation precluded certain issues in arbitration, the court reasoned that arbitrators are likewise competent to assess the preclusive effect of a federal judgment confirming an award.

This holding is subject only to two general restrictions. First, the federal judgment confirming the award “merely confirmed the result of the parties earlier arbitration [and] did not require consideration of the merits of the underlying claims.”¹³ The court left for later decision whether the preclusive a federal judgment that does independently assess the merits of an arbitrated dispute will be addressed by courts. Second, the arbitration agreement is sufficiently broad to cover “any dispute” over whether “current claims were or could have been raised during the first arbitration.”¹⁴

These two restrictions are unlikely to significantly restrict the impact of the *Citigroup* decision in practice. The Federal Arbitration Act, as confirmed by U.S. case law, definitively excludes courts from considering the merits of the dispute.¹⁵ Instead, arbitral review is limited to narrow questions such as whether the tribunal applied law at all and does not extend to whether the tribunal applied the law correctly, or not.¹⁶ Therefore, it is difficult to envisage a proper judicial confirmation of an award that results from consideration of the merits of the underlying claims. Moreover, arbitration agreements commonly, if not routinely, use language similar to that deemed sufficiently broad in *Citigroup*—“any dispute that arises out of or relates to [the contract], or the breach thereof.”¹⁷

In one sense, *Citigroup* fits squarely within the well-accepted position that tribunals have the authority to determine if a dispute is barred by *res judicata*, whether as a result of a prior award or judgment. In another sense, however, the Second Circuit’s decision goes even further. By expressly allocating protection of the preclusive effect of federal confirmation judgments to arbitrators, the *Citigroup* decision demonstrates continuing judicial support for international arbitration as an autonomous and dependable system of dispute resolution.

Endnotes

1. 776 F.3d 123 (2d Cir. 2015).
2. *Citigroup*, 776 F.3d at 129 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002)).
3. *Id.* at 129-30 (citing *Howsam*, 537 U.S. at 84-85).
4. See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).
5. 776 F.3d at 131 (affirming *Union Fire Ins. Co. of Pittsburgh, PA v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996) (“*Belco*”).
6. *Id.* (quoting *Belco*, 88 F.3d at 135-36) (emphasis added).

7. See, e.g., *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139 (3d Cir. 1998) (holding that whether a prior arbitration proceeding precludes a second proceeding is to be determined by arbitrators in the second case); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1132 (9th Cir. 2000) (“a res judicata objection based on a prior arbitration proceeding is...a component of the dispute on the merits and must be considered by the arbitrator, not the court”); *Shell Oil Co. v. CO2 Comm., Inc.*, 589 F.3d 1105, 1109 (10th Cir. 2009) (“[t]he district court correctly determined that the res judicata effect of the original panel’s order is an arbitrable issue that should not be decided by a court”); *Weaver v. Florida Power & Light Co.*, 172 F.3d 771, 774 (11th Cir. 1999) (holding that the federal policy favoring arbitration indicates arbitral “competence that extends to deciding issues of waiver, *res judicata*, and other defenses that challenge whether a matter should be arbitrated at all”).
8. *Citigroup*, 776 F.3d at 129.
9. 672 F.3d 113 (2d Cir. 2011).
10. *Citigroup*, 776 F.3d at 128.
11. *Belco*, 88 F.3d at 135-36.
12. 101 F.3d 813, 816-17 (2d Cir. 1996).
13. *Citigroup*, 776 F.3d at 129.
14. *Id.* at 131.
15. See *Hall Street Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586-587 (2008) (holding limited Federal Arbitration Act (“FAA”) grounds for vacatur, rehearing and modification are exclusive); 9 U.S.C. §§ 10-11 (grounds for vacatur are corruption, evident partiality, arbitrator misconduct or excess of powers; grounds for modification are evident material miscalculations or descriptions in award, awards beyond scope of agreement, and form of award); Restatement (Third) of International Commercial Arbitration § 4-11 (Draft No. 3, 2011) (vacatur or denial of recognition to international awards limited to grounds in Chapter One of the FAA or Article V of the New York Convention).
16. See, e.g., *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000) (judicial conviction that arbitrator “committed serious error does not suffice to overturn his decision”); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (“[T]he award should be enforced, despite a court’s disagreement with it on the merits, if there is a barely colorable justification for the outcome reached”) (quotation and emphasis omitted).
17. For example, the International Centre for Dispute Resolution’s “short form standard clause for International Commercial Contracts” provides that “[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration...” See ICCDR, *Guide to Drafting International Dispute Resolution Clauses*, available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002539 (visited August 2, 2015). The International Chamber of Commerce’s proposed standard arbitration clause provides that “[a]ll disputes arising out of or in connection with the present contract shall be finally settled” by arbitration. See ICC, *Standard Arbitration Clauses*, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/> (visited August 3, 2014).

Tai-Heng Cheng, a member of Quinn Emmanuel Urquhart & Sullivan, LLP, was counsel for Abu Dhabi Investment Authority in *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F.3d 123 (2d Cir. 2015). Adam J. DiClemente is an associate of the firm.

Court Review of Arbitral Tribunals' Jurisdictional Decisions

By Monique Sasson

Introduction

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention," does not impose limits on the grounds to set aside an arbitral award in the country where the award was rendered. Accordingly, while rules concerning the recognition and enforcement of foreign awards are standard across New York Convention member countries, each member country is free to implement its own rules for setting aside awards. Even though setting aside rules are remitted to local laws, the local law approaches to this procedure are relatively similar with one significant exception: the assessment of jurisdictional decisions by arbitral tribunals.

"Among the obstacles to uniformity is the lack of an accepted definition of 'jurisdiction.' The Oxford Dictionary defines the term as the 'official power to make legal decisions and judgments.' This appears straightforward, but in the arbitration world there is a wide variation in the understanding of 'official power' and how the reviewing court should determine whether an arbitral tribunal has properly exercised this power."

International arbitration practitioners need to be aware of the absence of uniformity and the importance of certain differences. Among the obstacles to uniformity is the lack of an accepted definition of "jurisdiction." The Oxford Dictionary defines the term as the "official power to make legal decisions and judgments." This appears straightforward, but in the arbitration world there is a wide variation in the understanding of "official power" and how the reviewing court should determine whether an arbitral tribunal has properly exercised this power. For example, United States jurisprudence, under the Federal Arbitration Act, differs from other major arbitral seats by expressly dividing the "official power" into two types: procedural jurisdiction and substantive jurisdiction. In order to convey the variability and indicate some of the important local intricacies, this essay summarises how UNCITRAL Model Law countries, England, Switzerland, and the United States treat the issue of review of jurisdictional decisions by arbitral tribunals.

The UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration ("Model Law") was adopted by the United Nations Commission on International Trade Law in 1985 and was amended in 2006. More than 65 countries have implemented the Model Law (either the 1985 or 2006 amended version) as their national arbitration act. The UNCITRAL website contains the text of the Model Law and the list of countries: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. One of the aims of the Model Law is to circumscribe the intervention of local courts: "Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties)."¹

The Model Law does not itself define the concept of jurisdiction, an omission that neither enhances predictability nor diminishes the possibility of disruptive court interference. However, according to the Explanatory Notes (paragraph 26), jurisdiction refers to "the foundation, content and extent" of the arbitral tribunal's "mandate and power." Under the Model Law, it is clear that the arbitral tribunal, rather than a court, is to assess arbitral jurisdiction at first instance. Article 16 of the Model Law provides that the arbitral tribunal may rule on its own jurisdiction, "including any objections with respect to the existence or validity of the arbitration agreement." Timing is key in a number of respects. First, an objection that the tribunal is exceeding "the scope of its authority" must be raised as soon as "the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings." Second, the tribunal may rule on such an objection either as a preliminary question or in an award on the merits. A determination on jurisdiction as a preliminary question usually comes very early in arbitral proceedings, in circumstances where the tribunal believes that the objection can be readily addressed either for or against. If the tribunal rules as a preliminary question that it has jurisdiction, a party has thirty days to request immediate review by a designated court at the seat of arbitration. Under the Model Law, the decision by the court is not subject to appeal.

Challenges to "preliminary question" jurisdictional rulings under Article 16 constitute a special, limited instance of "setting aside" review by the court at the seat. Moreover, it is apparent that this preliminary question ruling is not intended to be in the form of an award (unless it is a ruling that no jurisdiction exists and the arbitration is

therefore concluded). However, the Model Law is silent as to the standard of review that the reviewing court is to apply in assessing the tribunal's ruling in favour of jurisdiction. This silence gives Model Law jurisdictions great leeway in assessing a tribunal's determination that it has jurisdiction over the case.

When the tribunal joins the issue of jurisdiction to the merits of the case, court review of the jurisdictional decision is only available pursuant to a setting aside application under Article 34 of the Model Law. The Article 34 grounds for setting aside an award are exhaustive, and there is no separation or identification of those that pertain to jurisdiction and those that do not. However, the ones that most naturally address jurisdictional decisions by the tribunal, though not stated expressly to do so, are as follows: if one of the parties of the arbitration agreement was under some incapacity (Article 34(2)(i)); if the arbitration agreement was not valid under the law selected by the parties or the law of the forum (Article 34(2)(i)); if the award deals with matters not covered in or not contemplated by the arbitration agreement or "contains decisions on matters beyond the scope of the submission to arbitration" (Article 34(2)(iii)).

The burden of proof for all Article 34(2) grounds is on the party applying to set aside the award. There are other grounds that the court may consider on its own initiative: non-arbitrability of the subject matter or violation of public policy ("serious departures from fundamental notions of procedural justice" (Explanatory Notes, paragraphs 45-48)).

The Model Law grounds to set aside an award parallel the ones listed in Article V of the New York Convention for refusing recognition and enforcement of foreign arbitral awards. Model Law countries therefore do not seek to reach beyond the standard New York Convention grounds in supervising jurisdictional decisions by arbitral tribunals. This is part of the idea of minimizing local law intervention in the arbitral process, although, as indicated above, the provision for immediate court review of jurisdictional decisions issued as "preliminary questions" introduces the possibility of court supervision at an early stage of the proceedings. There are additional crosscurrents in the Model Law regarding arbitral autonomy. Since jurisdictional decisions are treated like any other tribunal decisions in Article 34 setting aside proceedings, there is no apparent special deference to be given to arbitrators' assessment of their jurisdiction: *i.e.*, "Kompetenz-Kompetenz" exists as an important Model Law principle, but, upon a setting aside obligation, the reviewing court is not restricted—at least under the Model Law's provisions—from overturning a jurisdictional decision on the same basis as any other ground for setting aside an award.

Model Law countries should nonetheless be regarded as supportive of the arbitral process in one very im-

portant respect: unlike United States jurisprudence, the Model Law does not distinguish between "procedural" and "substantive" jurisdiction. There is, quite simply, "jurisdiction," and the tribunal—not the court—is the first body that makes a jurisdictional determination. There is no "gate-keeping" function that the court serves.

The English Arbitration Act 1996

The arbitration legislation of England and Wales (Scotland has adopted the Model Law) differs from the Model Law in that the Arbitration Act 1996 (the "1996 Act") establishes a separate basis for reviewing jurisdictional decisions at the setting aside stage of proceedings. Section 67 of the 1996 Act provides that a party may apply to the court and challenge any award "as to its substantive jurisdiction" (or may apply for an order declaring an award to be of no effect, in whole or part, "because the tribunal did not have substantive jurisdiction"). The term "substantive jurisdiction" finds its definition in Section 30 of the 1996 Act and includes: "a) whether there is a valid arbitration agreement; b) whether the tribunal is properly constituted, and c) what matters have been submitted to arbitration in accordance with the arbitration agreement." The existence and clarity of this definition constitute an extremely useful aspect of the 1996 Act and distinguishes it not only from the Model Law, but also from most other major national arbitration acts.

An objection to substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond the tribunal's jurisdiction is raised (Section 31). When an objection to substantive jurisdiction is raised, the tribunal may, pursuant to Section 31(4), either "(a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits." Although this would seem similar to the Model Law, it is not. Under Article 16 of the Model Law, as discussed above, the tribunal may rule on jurisdiction as a preliminary question, but this ruling is clearly not required (or intended, in the case of a ruling sustaining arbitral jurisdiction) to be in the form of an award. Under Section 31(4) of the 1996 Act, the tribunal must issue an award (either as a preliminary issue or at merits stage), which implicates the setting aside provisions of Section 67 (see below). However, there is also a separate possibility of early court involvement in the 1996 Act that is highly unusual among national arbitration acts: under Section 32, a party can apply to the English High Court for consideration of a tribunal's substantive jurisdiction if the tribunal permits such an application.

Sections 31, 32, and 67 are mandatory provisions of the 1996 Act; they cannot be waived by the parties or dispensed with by an arbitral tribunal. Section 67 provides for a challenge in court to a Section 31 award on substantive jurisdiction, and it is clear that both questions of fact and questions of law that affect jurisdiction can be challenged under section 67.² Thus, as commentators

have noted, the court review pursuant to Section 67 is a complete retrial: there is a full hearing in which the court rehears all the arguments and evidence advanced before the arbitral tribunal.³

Finally, it should be noted that while the 1996 Act defines “substantive jurisdiction,” there is no discussion of “procedural jurisdiction” and, as in the case of the Model Law and Model Law jurisprudence, there is no consideration of a gate-keeper function of the court in relation to possible arbitral jurisdiction.

The United States: The Federal Arbitration Act

In the United States, the statutory provision that most directly addresses review of arbitral jurisdiction is Federal Arbitration Act (“FAA”), 9 U.S. Code § 10(a)(4):⁴ “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” Thus, the basis for jurisdictional review is whether the arbitrators have exceeded the scope of their authority under the arbitration agreement by reaching a certain issue, if it is determined that a valid arbitration agreement existed.⁵

The United States courts have explained that FAA Section 10(a)(4) and New York Convention Article V(1) (c) have generally been interpreted consistently. Accordingly, as set out in *Parsons & Whittemore Overseas Co. v. Societe Generale de L’industrie du Papier*⁶ (RAKTA), (“Parsons & Whittemore”), “[b]oth provisions basically allow a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration. This defense to enforcement of a foreign award, like the others already discussed, should be construed narrowly. Once again a narrow construction would comport with the enforcement-facilitating thrust of the Convention. In addition, the case law under the similar provision of the Federal Arbitration Act strongly supports a strict reading.” The Second Circuit added that “[a]lthough the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator’s jurisdiction, it does not sanction second-guessing the arbitrator’s construction of the parties’ agreement.”

Extensive judicial review under FAA Section 10(a)(4), the Second Circuit emphasized in *Parsons & Whittemore*, would defeat the purpose of arbitration. As other courts have put it, in discussing review of a tribunal’s determination of the scope of the arbitration agreement, if there is a clear and unmistakable agreement that parties left this jurisdictional decision to the tribunal, the review by the court must be highly deferential.⁷

However, the narrowness of Section 10(a)(4) judicial review at the conclusion of arbitral proceedings is, unfortunately, counter-balanced by the gate-keeping or

“arbitrability” aspect of FAA jurisprudence at the commencement of proceedings. Under, for example, First Options of *Chicago v. Kaplan*,⁸ the U.S. courts first ask the question whether the parties clearly and unmistakably agreed to arbitrate the question of arbitral jurisdiction.⁹ If there is such a clear and unmistakable agreement, the parties are deemed to have remitted to the arbitral tribunal the authority to decide on its own jurisdiction. If there is no such clear and unmistakable agreement, then it is for the courts to decide the matter of who should first decide the question of arbitral jurisdiction. Thus, it is within the court’s authority to determine whether it or the tribunal should first make an assessment on arbitral jurisdiction. The court does so on the basis of the distinction between procedural and substantive jurisdiction: a challenge implicating the former means that the arbitrators shall first decide; a challenge implicating the latter—e.g., whether the arbitration agreement exists—arguably points to the court keeping for itself the first assessment on jurisdiction. This FAA jurisprudence on “arbitrability” sets the United States apart from other major international arbitral seats.

The “gatekeeper” aspect of FAA jurisprudence is commonly thought by many international arbitration practitioners to reflect a lack of confidence by the United States courts in the jurisdictional decision-making of arbitral tribunals. Yet, if one compares the Second Circuit’s opinion in *Parsons & Whittemore*, stating that a tribunal’s decision as to the scope of its authority is entitled to deference, with the 1996 Act’s provision for a full retrial on facts and law for Section 67 challenges to substantive jurisdiction, the United States, and not England, arguably provides greater support for arbitral decision-making—at least when “gatekeeping” is not at issue.

Switzerland: The Private International Law Act

The term “jurisdiction” is not expressly defined in the Swiss Federal Statute on Private International Law, Chapter 12 (International Arbitration) (“PILA”). Article 186 of the PILA provides that “the arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.” Article 190 of the PILA states, *inter alia*, that an award may be annulled if the arbitral tribunal wrongly accepted or declined jurisdiction (190(2)(b)) or if the arbitral tribunal’s decision went beyond the claims submitted to it (190(2) (c)).

A preliminary award on jurisdiction is limited to review on the grounds stated in Article 190(2)(b).¹⁰ The text of the PILA is silent on the Article 190(2)(b) standard of review. However, the Swiss Federal Supreme Court, which is the sole judicial authority that may set aside an award (Article 191), is bound by the facts established by the arbitral tribunal, unless the tribunal’s finding of facts is subject to challenge because of an alleged violation of the right to be heard or the right to equal treatment between the parties.¹¹ Thus, the standard may be consid-

ered highly deferential to the arbitral tribunal. Indeed, in a recent case, the Federal Supreme Court determined that the issue of whether consent was reached between the parties on the entry into force of an arbitration agreement was an issue of fact outside the Court's reach.¹²

Conclusion

Since the setting aside of arbitral awards at the seat of arbitration is not regulated by the New York Convention, it is not surprising that national arbitration acts, even of some of the most mature seats, differ on the question of review of jurisdictional decisions by arbitral tribunals. Local law matters: the differences principally arise from varying definitions of "jurisdiction" and varying views on when and to what extent court review is appropriate. "Harmonization of arbitration laws and rules"—a primary goal of international arbitration practitioners—is unlikely to be achieved on this issue in the near future. Thus, on the important matter of review of arbitrators' jurisdictional decisions, the choice of the seat of arbitration has an enduring significance in international arbitration.

"Since the setting aside of arbitral awards at the seat of arbitration is not regulated by the New York Convention, it is not surprising that national arbitration acts, even of some of the most mature seats, differ on the question of review of jurisdictional decisions by arbitral tribunals."

Endnotes

1. Explanatory Notes accompanying the Model Law, paragraph 17, page 27 ("Explanatory Notes").
2. See DAC Report on Arbitration Bill 1996 at paragraph 143 (available online: <http://uk.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247726107062&ssbinary=true>).
3. See Merkin and Flannery, *Arbitration Act 1996*, fifth edition (Informa Law, Routledge, 2014), at page 296.
4. See Bermann, "Jurisdiction: Courts vs Arbitrators" in *International Commercial Arbitration in New York*, edited by Carter and Fellas (Oxford, 2010), at page 168.
5. See, e.g., *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002).
6. 508 F.2d 969, 974-77 (2d Cir. 1974).
7. *Id.*, at pages 171-183, for a discussion of the relevant case law.
8. 514 U.S. 938.
9. *Id.*, at page 171.
10. See, e.g., von Segesser and Schramm, "Swiss Private International Law Act (Chapter 12: International Arbitration) 1989," in *Concise International Arbitration*, edited by Mistelis (Kluwer 2010), at pages 957-58.
11. *Id.*, at page 957.
12. BGer – 4A_305/2013, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_305/2013 Case Date 2 October 2013, reported by von Segesser and Menz, ITA Arbitration Report, December 2013, available on [Kluwerarbitration.com](http://www.kluwerarbitration.com).

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The Corruption Defense Asserted in International Arbitration Disputes: A Look at *BSG Resources v. Guinea*

By Jonathan Greenblatt and R. Zachary Torres-Fowler

On September 10, 2014, Beny Steinmetz Group Resources (“BSGR”), a mining and resource extraction company with operations around the globe, announced that it had lodged a claim of expropriation against the Republic of Guinea before the International Centre for the Settlement of Investment Disputes. The case, *BSG Resources v. Republic of Guinea*, arose from a 2012 Guinean inquiry into the award of a lucrative iron ore mining concession to BSGR over rumors that BSGR bribed the former president of Guinea, Lansana Conté, a relative, and other members of the Guinean government. News of the Guinean inquiry appears to have triggered an investigation by U.S. authorities for violations of various U.S. criminal laws, including the U.S. Foreign Corrupt Practices Act, which allegedly uncovered additional evidence against BSGR. Based on the Guinean investigation’s findings and recommendation, which were supported in large part by the evidence procured by U.S. investigators, the Guinean government revoked BSGR’s mining rights, giving rise to the arbitration proceedings. Given the role that bribery and corruption have played in the dispute, *BSG Resources v. Guinea* may raise some of the lingering questions that arise in the context of international arbitration when one of the parties alleges that the underlying subject of the dispute was tainted by acts of corruption. This article discusses how these issues have been addressed by arbitral tribunals in the past and how they might be addressed by the tribunal in *BSG Resources v. Guinea*.

I. Introduction

On September 10, 2014, Beny Steinmetz Group Resources (“BSGR”), a mining and resource extraction company with operations around the globe, announced that it had lodged a claim of expropriation against the Republic of Guinea before the International Centre for the Settlement of Investment Disputes (“ICSID”).¹ The case, *BSG Resources v. Republic of Guinea*, stems from a 2012 Guinean inquiry into the award of a lucrative iron ore mining concession to BSGR amidst allegations that, to obtain the concession, BSGR bribed the former president of Guinea, Lansana Conté, a relative, and other members of the Guinean government.² News of the Guinean inquiry appears to have triggered a grand jury investigation in the Southern District of New York for violations of various U.S. criminal laws, including the U.S. Foreign Corrupt Practices Act (“FCPA”), which allegedly uncovered additional evidence.³ Based on the Guinean investigation’s findings and recommendations, which were supported in large part by the evidence procured by U.S. investigators, the Guinean government revoked BSGR’s mining rights. This prompted BSGR to file the arbitration proceedings.⁴ BSGR claims that the evidence compiled by Guinean authorities is unreliable because it was procured through a

non-transparent process purposefully aimed at canceling and reselling BSGR’s mining rights.⁵

This case is noteworthy because it provides an opportunity for an arbitral tribunal to lend clarity to an issue that has arisen from time to time for decades—how arbitral tribunals should address allegations of corruption involving the underlying subject of the dispute (e.g., the contract, project).

“[BSG Resources v. Guinea] is noteworthy because it provides an opportunity for an arbitral tribunal to lend clarity to an issue that has arisen from time to time for decades—how arbitral tribunals should address allegations of corruption involving the underlying subject of the dispute....”

As part of a litigation strategy that some have referred to as a “corruption defense,” proof of corruption may allow a respondent to escape responsibility for breaches of contracts or other international norms because the subject of the dispute was procured by, or intended to further, acts of corruption or bribery.⁶ For example, if a valuable contract is awarded to a company that paid bribes in exchange for the contract, a successful corruption defense may render the agreement void, even if the respondent breached the agreement or unlawfully deprived the claimant of the benefits of the contract. Likewise, in the context of consultancy or agency agreements, if the sole objective of a contract is the payment of a bribe, a corruption defense might render the contract unenforceable even if the respondent breached the agreement.⁷ *BSG Resources* appears to be another instance in which a respondent-state may press this argument.

II. Prior International Arbitration Cases in Which Corruption Tainted the Underlying Subject of the Dispute

Allegations that one of the parties to an international arbitration engaged in bribery of government officials are not new, dating back to at least 1963 and the award in ICC Case No. 1110.⁸ In that case, the tribunal declined jurisdiction over a dispute concerning an agency agreement between a British electrical manufacturing company and a well-connected Argentine engineer. Based upon the facts of the dispute, the tribunal concluded that the sole purpose of the contract was to enable the Argentine engineer to funnel bribes to government officials to procure

valuable contracts for the British electrical manufacturing company.⁹ In the award, the tribunal explained that parties who engage in such acts of corruption “have forfeited any right to ask for assistance of the machinery of justice...in settling their disputes.”¹⁰ In subsequent decades, tribunals have grappled with similar allegations but have demonstrated a general reluctance to delve into the murky world of bribery.¹¹

In the last fifteen years, however, the passage of multiple international conventions aimed at combatting global corruption and bribery, along with the aggressive enforcement of domestic anti-bribery laws like the FCPA, have increased the number and raised the profile of corruption investigations and prosecutions, which in turn has increased the number of arbitrations in which a corruption defense has been raised.¹² These anti-corruption efforts would eventually play a prominent part in an arbitral award rendered by an ICSID tribunal in *World Duty Free v. Kenya*, where, for the first time in an investor-state arbitration, a respondent-state successfully argued that acts of corruption in the procurement of a contract could serve as a defense to expropriation and other alleged violations of international treaty protections.¹³ Specifically, following the claimant’s admission that it paid \$2 million to the then-president of Kenya under circumstances that the tribunal concluded could only be characterized as a bribe to obtain the right to construct and operate a series of duty-free complexes in the Nairobi and Mombasa airports,¹⁴ the tribunal concluded that the respondent-state could void the underlying contract and that the claimant was not legally entitled to maintain any of its claims as a matter of *ordre public international* and domestic public policy.¹⁵

A corruption defense was upheld again seven years later in the ICSID case of *Metal-Tech Ltd. v. Uzbekistan* in 2013.¹⁶ There, relying in part on *World Duty Free*, the tribunal dismissed the case after having satisfied itself that there was sufficient evidence to conclude that the claimant bribed Uzbek officials in exchange for a valuable joint-venture project.¹⁷ The tribunal concluded that Uzbekistan had only consented to arbitration over disputes concerning “investments.” Investments were defined in the bilateral investment treaty under which the claim was asserted as “any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.”¹⁸ Having satisfied itself that sufficient evidence existed that Metal-Tech bribed Uzbek officials, the tribunal concluded that the joint-venture project was not an “investment” under the terms of the treaty.¹⁹

III. Potential Issues to Be Addressed in *BSG Resources*

BSG Resources is another opportunity for an arbitral tribunal to address some of the issues considered by ICC Case No. 1110, *World Duty Free*, and *Metal-Tech*. In partic-

ular: (A) at what stage of the arbitral proceedings should the tribunal hear allegations of corruption; (B) what standard of proof should apply to establish the existence of the corruption defense; (C) how should a tribunal balance evidence of shared culpability for the acts of corruption; and (D) to what extent should the arbitral proceedings be made accessible to the public?

A. Should Allegations of Corruption Play a Role in the Tribunal’s Determination on Jurisdiction or Liability?

As an initial matter, there is a question whether allegations of corruption should be treated as a jurisdictional or liability issue. How a tribunal addresses this issue could have a number of consequences.

For example, where a corruption defense might impact the tribunal’s jurisdiction over the dispute, it may be beneficial for the tribunal to bifurcate the arbitration into separate stages—one dealing with jurisdiction and the other with liability. In this way, the corruption evidence would be heard as part of the jurisdictional inquiry, while evidence concerning the alleged treaty or agreement violation would be heard subsequently and only to the extent that jurisdiction has been established. This approach could produce significant practical benefits, including cost savings and an early disposition of the dispute.

Whether the corruption defense might impact the tribunal’s determination of jurisdiction likely turns on the language of the treaty or agreement on which jurisdiction is based. In *Metal-Tech*, jurisdiction was predicated on treaty language requiring that an investment be made in “accordance with” national law. In *World Duty Free*, no such language was present. Similarly, in *BSG Resources*, no explicit legality requirement is present in the language of any contract, treaty, or law governing the dispute.²⁰

Although the procedural history of *BSG Resources* indicates that the tribunal did not bifurcate the proceedings, it will be interesting to see whether the tribunal addresses the allegations of corruption as a jurisdictional matter in its final award.

B. Standards of Proof: Establishing Acts of Corruption and Bribery

Tribunals have struggled to decide questions associated with the appropriate standard of proof and the type of evidence required to prove allegations of corruption, often avoiding the question. This is a critical issue as to which tribunals have taken different approaches.²¹ The most common competing standards of proof are the relatively high standard of “clear and convincing evidence,” and lesser standards such as “preponderance of the evidence” or “balance of the probabilities.”²²

Those advocating for the higher “clear and convincing evidence” standard have argued that, in light of the seriousness of the allegations, corruption and bribery must meet the highest standard of proof.²³ However,

other practitioners and scholars have argued that such a heightened standard of proof is inappropriate in a civil case, where the threat of criminal or punitive sanctions is not present.²⁴ They argue further that, in the murky world of alleged bribery and corruption where the actors actively attempt to conceal their conduct and where evidence of such activities is rarely obtainable, imposing such a high evidentiary bar as the “clear and convincing evidence” standard may unduly disadvantage a party attempting to prove an act of corruption.²⁵

As was the case in *World Duty Free* and *Metal-Tech*, tribunals have trended towards utilizing a more flexible standard. In those cases, where credible evidence of corruption was presented, tribunals have demanded credible responsive evidence demonstrating that corruption did not occur. They did so, however, without formally specifying a standard of proof or explicitly shifting the burden of proof to the party fighting the corruption allegation. This issue is particularly relevant to *BSG Resources* and will likely require significant attention from the tribunal in light of BSGR’s argument that the evidence collected as part of the Guinean investigation is fundamentally flawed and untrustworthy.²⁶

C. Consequences of Corruption

In the event that the tribunal in *BSG Resources* concludes that bribery took place, it will have to address the question of what consequences should flow from the wrongdoing. While it is undoubtedly the case that acts of corruption and bribery are contrary to accepted norms of international and domestic laws, some have pointed out that a corruption defense may not be properly calibrated to actually deter bribery in the context of investor-state arbitration.²⁷ By punishing a claimant for acts of bribery and excusing acts of unlawful expropriation, a tribunal may actually establish incentives for host state officials to facilitate and demand illicit payments.

This is evident, for example, in the case of *World Duty Free*, where the claimant was alleged to have paid the bribes because the then-president of Kenya demanded a \$2 million “personal donation.”²⁸ The Kenyan government never prosecuted its former president for the acts of bribery.²⁹ Furthermore, Kenya’s rationale for expropriating the duty-free complexes (the event giving rise to the arbitration) was later determined to be unjustified.³⁰ These facts suggest that the respondent-state was able to secure a windfall by the expropriation of the claimant’s assets. It can be argued that the respondent-state in *World Duty Free* was at least equally culpable for facilitating the acts of bribery and should not have obtained a reward through the assertion of the corruption defense. The tribunal in *World Duty Free* considered this argument and rejected it on the grounds that “the law protects not the litigating parties but the public; or in this case, the mass taxpayers and other citizens making up one of the poorest countries in the world.”³¹

If the allegations of bribery are proven, time will tell whether the tribunal in *BSG Resources* follows the holding in *World Duty Free* or adopts a different approach premised on shared culpability that takes into account the level of government involvement in the scheme, whether prosecutions of government officials implicated in the scheme have taken place, and the degree to which the government initiated the bribery scheme.

D. Promoting Transparency

Finally, the question of how to improve transparency within international arbitration, especially in investor-state disputes, is not a new debate; however, in cases where allegations of corruption have been lodged against public officials, the desire for greater transparency may take on additional significance. In 2014, the UNCITRAL Rules of Transparency (“Transparency Rules”) went into effect broadly setting out a series of measures aimed at increasing the public’s access to written submissions (e.g., memorials, witness statements, expert reports) and hearings (e.g., broadcasting the hearings over the internet) in international arbitration proceedings.³² Because the Transparency Rules are relatively new, only two arbitrations to date have applied their terms—one of which is *BSG Resources*.³³ Although it is unclear what motivated the parties and the tribunal to apply the Transparency Rules, the application of these rules in *BSG Resources* could establish a precedent in cases concerning allegations of corruption against public officials.³⁴

In addition, and more importantly, the application of the Transparency Rules in *BSG Resources* should permit nonparties to the arbitration to gain a greater understanding of the manner in which this tribunal elects to address many of the issues raised in this article. Thus, *BSG Resources*, possibly even more so than ICC Case No. 1110, *World Duty Free*, and *Metal-Tech*, has the potential to influence the application of the corruption defense for many years to come.

IV. Conclusion

There seems to be little doubt that evidence of corruption will play an increasingly important role in future arbitrations. As *World Duty Free* and *Metal-Tech* make clear, respondent-states have very strong incentives to raise allegations of corruption in arbitration. Furthermore, as long as countries such as the United States continue to make anti-bribery law enforcement a priority, it is likely that the corruption defense will be increasingly asserted in arbitration proceedings. It will be important for tribunals to develop a clear framework for addressing these issues in order to promote consistency and inspire confidence in arbitration. *BSG Resources* presents another opportunity to further that goal.

Endnotes

1. See, e.g., BSG Resources Limited, *BSGR Files Arbitration Claim Against Guinea* (Sep. 10, 2014) available at <http://www.bsgresources.com/media/bsgr-files-arbitration-claim-against-guinea>.
2. Douglas Thomson, *Guinea bribery case reaches ICSID*, GLOBAL ARBITRATION REV. (Sep. 10, 2014); Tom Burgis, *Guinea Reignites \$2.5bn Mining Tussle*, FINANCIAL TIMES (Nov. 2, 2012).
3. Criminal Complaint, *United States v. Cilins*, No. 13-CR-00315, ¶¶ 8-10 (S.D.N.Y. 2013).
4. Request for Arbitration, *BSG Resources Limited v. Republic of Guinea*, ¶¶ 57-74 (1 Aug. 2014); Douglas Thomson, *Guinea bribery case reaches ICSID*, GLOBAL ARBITRATION REV. (Sep. 10, 2014).
5. Request for Arbitration, *BSG Resources Limited v. Republic of Guinea*, ¶¶ 54-87 (1 Aug. 2014).
6. See, e.g., Jason Webb Yackee, *Investment Treaties & Investor Corruption: An Emerging Defense for Host States*, 52 VA. J. INT'L L. 723 (2012).
7. The issue of whether a corruption defense would be successful in the event the objective of a consultancy agreement was for both legitimate and illegitimate services (such as bribery) remains an open question.
8. ICC Case No. 1110 of 1963, 10 INT'L ARB. 282 (1994).
9. *Id.* at 291.
10. *Id.*
11. See, e.g., Cecily Rose, *Questioning the Role of International Arbitration in the Fight Against Corruption*, 31 J. OF INT'L ARB. 183 (2014) (providing extensive list of all publicly available arbitral awards discussing allegations of bribery).
12. See, e.g., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DO. NO. 105-43, 37 I.L.M. 1 (entered into force Feb. 15, 1999); Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DO. NO. 105-39, 35 I.L.M. 724 (entered into force by the U.S. on Oct. 29, 2000); Criminal Law Convention on Corruption, Jan. 27, 1999, EUROP. T.S. 173 (entered into force Jan. 7, 2002); Civil Law Convention on Corruption, Apr. 11, 1999, EUROP. T.S. 174 (entered into force Nov. 1, 2003); African Union Convention on Preventing and Combating Corruption, Jul. 14, 1999 (entered into force on Dec. 6, 2002); United Nations Convention against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003); Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (1999)).
13. World Duty Free v. Kenya, ICSID Case No. ARB/00/7 (4 Oct. 2006).
14. *Id.* at ¶¶ 66, 130-131.
15. *Id.* at ¶ 188.
16. Metal-Tech Ltd. v. Uzbekistan, ICSID Case No. ARB/10/3 (4 Oct. 2013).
17. *Id.* at ¶ 372.
18. *Id.* ¶¶ 130, 164, 375-88 (emphasis added).
19. *Id.* ¶¶ 375-90.
20. Request for Arbitration, *BSG Resources Limited v. Republic of Guinea*, ¶¶ 88-112 (1 Aug. 2014).
21. See, e.g., Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 10 TRANSNATIONAL DISPUTE MANAGEMENT (2013); S. Wilske & T.J. Fox, *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence*, 10 TRANSNATIONAL DISPUTE MANAGEMENT (2013); Florian Haugeneder & Christoph Liebscher, *Chapter V: Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards of Proof*, AUSTRIAN ARB. YEARBOOK 539 (2009).
22. See, e.g., Florian Haugeneder & Christoph Liebscher, *Chapter V: Investment Arbitration—Corruption and Investment Arbitration: Substantive Standards of Proof*, AUSTRIAN ARB. YEARBOOK 539, 546 (2009).
23. EDF (Services) Limited v. Romania, ICSID Case No. Arb/05/13, ¶221 (8 Oct. 2009).
24. See, e.g., Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 10 TRANSNATIONAL DISPUTE MANAGEMENT (2013); S. Wilske & T.J. Fox, *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence*, 10 TRANSNATIONAL DISPUTE MANAGEMENT (2013).
25. *Id.*
26. Request for Arbitration, *BSG Resources Limited v. Republic of Guinea*, ¶¶ 54-82 (1 Aug. 2014).
27. See, e.g., Yackee, *supra* note 6; A.P. Llamzon, *State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration*, 10 TRANSNATIONAL DISPUTE MANAGEMENT (2013).
28. World Duty Free v. Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 66, 120, 130 (4 Oct. 2006).
29. *Id.* at ¶ 180.
30. See, e.g., *id.* at ¶ 70.
31. *Id.* at ¶ 181.
32. See generally UNICTRAL Rules of Transparency (Apr. 1, 2014).
33. The other case being *Iberdrola, S.A. and Iberdrola Energía, S.A.U. v. Plurinational State of Bolivia*, Perm. Ct. Arb. 2015-05 (2015).
34. See Procedural Order No. 1, *BSG Resources Ltd. v. Republic of Guinea*, ¶ 26.1 (May 13, 2015); Procedural Order No. 2, *BSG Resources Ltd. v. Republic of Guinea*, ¶¶ 4-8 (Sep. 17, 2015) (indicating the parties' agreement to apply the Transparency Rules in the course of the proceedings).

Muddy Waters in the Land of Section 1782

By Lawrence W. Newman and David Zaslowsky

Regular readers of this column will recall that, over the years, we have closely followed the development of the law under Section 1782 of Title 28 of the U.S. Code (Section 1782).¹ In this article, we use the occasion of the 10th anniversary of the Supreme Court's lone Section 1782 decision to discuss the significant uncertainty that remains concerning an issue spawned by that decision.

To start, a reminder about the statute. Section 1782 authorizes a district court to grant a petition for judicial assistance—ordering the production of documents, as well as depositions of witnesses—if three statutory requirements are met: (1) the request for discovery is made “by a foreign or international tribunal” or “any interested person”; (2) the discovery requested is “for use in a proceeding in a foreign or international tribunal”; and (3) the person from whom the discovery is sought resides, or is found, in the district of the district court where the request has been made. If these statutory requirements are met, the district court may—although it is not required to—exercise its discretion and grant the petition.

Section 1782 authorizes a federal district court to order the production of documents, as well as depositions of witnesses. The Section 1782 application is typically initiated through an ex parte application and does not require that the foreign proceeding even be pending at the time of the application.

In Aid of Arbitration

The Supreme Court's only treatment of Section 1782 is that in *Intel Corp. v. Advanced Micro Devices*.² Prior to that decision, the question of whether Section 1782 could be used in aid of international arbitration—that is, whether an “arbitral tribunal” qualified as an “international tribunal” for purposes of the statute—had been answered in the negative. See *Nat'l Broad. Co. v. Bear Stearns & Co.*³ and *Republic of Kazakhstan v. Biedermann International*.⁴ But the Intel opinion appeared to open the door on that issue when it included the following quotation from an article written by the primary draftsman of the revised version of the statute:

[T]he term “tribunal”...includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional...courts.⁵

As a result, after *Intel*, whether Section 1782 could be used in aid of international arbitration became the subject of debate, with the courts rendering varying decisions.

One of the earliest decisions to hold that Section 1782 could be used in aid of arbitration was *In re Application of Oxus Gold*.⁶ There, a district court in New Jersey

reasoned that “[t]he international arbitration at issue is being conducted by the United Nations Commission on International Law [UNCITRAL], a body operating under the United Nations and established by its member states.” This important part of the decision was clearly in error. In fact, the UNCITRAL Rules are a set of rules that can be used in non-administered arbitrations, but neither the United Nations nor UNCITRAL plays a role in arbitrations conducted under those rules. Nevertheless, *Oxus Gold* was frequently cited and numerous other decisions also held that Section 1782 could be used in aid of private, commercial arbitration.⁷

There were also many district court decisions that went the other way. In *In re Operadora DB Mexico*,⁸ for example, a district court held that Section 1782 does not apply to an arbitration conducted under the arbitration rules of the International Chamber of Commerce.⁹ Adding to the confusion, some decisions held that Section 1782 could be used in “state-sponsored” arbitration but not private arbitration, without indicating whether “state-sponsored” meant investor-state arbitration or something else.¹⁰ Another decision quoted from the misguided language of the *Oxus Gold* decision in concluding that private arbitrations do not fall under Section 1782 although “state-sponsored” (such as those “under” UNCITRAL) do.¹¹

With such uncertainty at the district court level, might the circuit courts provide clarity? An inquiry on this score begins sensibly with the Second and Fifth Circuits, to see whether they adhered to their pre-*Intel* decisions. The Second Circuit has not, since *Intel*, taken up the issue of the use of Section 1782 in aid of arbitration. The Fifth Circuit, in contrast, had occasion to consider the issue in 2009. The court declined to reconsider its earlier *Biedermann* decision regarding the non-application of Section 1782 to private international arbitration because, it said, *Intel* did not deal with any of the concerns that were at issue in *Biedermann*. *Biedermann*, therefore, remained good law.¹²

More recently, the Fifth Circuit addressed the issue again.¹³ In one of the many Chevron-related Section 1782 cases, the Republic of Ecuador sought 1782 discovery from a non-party named Connor. Chevron, despite, having used 1782 against Ecuador in many cases across the country, opposed the request. The district court denied the request, believing that *Biedermann* controlled its decision. On appeal, the Fifth Circuit reversed, relying on the principle of judicial estoppel. Because, in its own efforts to obtain 1782 discovery to use against Ecuador, Chevron had argued that 1782 may be used to seek discovery in aid of a bilateral investment treaty (BIT) arbitration, it was estopped from arguing that the same BIT arbitration could not support Ecuador's request for 1782 discovery.

Significantly, however, the Fifth Circuit did not decide the issue of whether the *Biedermann* decision applied to BIT or other investor-state arbitration: “[W]e need not and do not opine on whether the BIT arbitration is an ‘international tribunal.’”¹⁴ Therefore, even in the Fifth Circuit, there is uncertainty as to whether that court will ultimately distinguish between commercial and investor-state arbitrations for purposes of deciding whether to permit discovery under Section 1782.

One other circuit that has weighed in on this issue was not as reserved as the Fifth Circuit. When a Chevron-related Section 1782 case came before the U.S. Court of Appeals for the Third Circuit, it observed that use in a BIT arbitration of evidence uncovered through a section 1782 application “unquestionably would be ‘for a use in a proceeding in a foreign or international tribunal.’”¹⁵ The conclusion was unsupported by any analysis, yet remains as circuit court authority in support of the argument that 1782 discovery may be obtained in aid of an investment arbitration.

On the issue of using Section 1782 in aid of a commercial arbitration, the Eleventh Circuit stands (or, more properly, stood) alone at the circuit court level as endorsing the practice. The dispute in *Consortio Ecuatoriano de Telecomunicaciones v. JAS Forwarding (USA)*¹⁶ arose out of a foreign shipping contract billing dispute between CONECEL and Jet Air Service Ecuador S.A. (JASE). CONECEL filed an application in the Southern District of Florida under Section 1782 to obtain discovery for use in a foreign proceeding in Ecuador—namely, a pending arbitration brought by JASE against CONECEL for non-payment under the contract, as well as contemplated civil and private criminal suits that CONECEL was considering bringing against two of its former employees. The district court relied on the contemplated suits in Ecuador to justify the Section 1782 discovery, referring to the holding in *Intel* that it is sufficient if the foreign proceedings are “reasonably contemplated.” The Eleventh Circuit sidestepped this reasoning and held that the private arbitration case then underway qualified as an “international tribunal.” This decision was the only appellate level decision to support the argument that 1782 could be used in aid of private, commercial arbitration and it quickly became the main authority in support of those advocating for the use of Section 1782 in aid of commercial arbitration.

What the Eleventh Circuit giveth, however, the Eleventh Circuit also taketh away. Just a few weeks ago, the Eleventh Circuit, *sua sponte*, issued a new decision to replace its 2012 decision. In its new decision, the court adopted the reasoning of the district court and held that the Section 1782 application was justified based on the suits that CONECEL was contemplating bringing. In footnote 4 of the decision, the court hinted that it might in the future hold that Section 1782 discovery is available in aid of arbitration. Significantly, though, because of the “sparse” record on the issue before the court, the

Eleventh Circuit explained that “we leave the resolution of the matter for another day.”

The Waters Remain Muddied

To recap, when Justice Ginsburg included in the *Intel* decision the excerpt quoted above from the article by Professor Hans Smit—her former Columbia Law School colleague and the primary draftsman of the current version of Section 1782—thoughtful followers of Section 1782 practice recognized immediately that the statement, albeit in dictum, would be fodder for those wanting to try again to use Section 1782 in aid of arbitration. Not surprisingly, some courts have gone one way and some the other on the issue of whether *Intel* indeed authorized the use of Section 1782 in aid of arbitration. Other courts ruled that the statute could be used in support of “state-sponsored” arbitrations only, without defining that term.

Within the past 12 months, matters have been made even less clear. The Fifth Circuit called into question whether its limitation on the use of Section 1782 in aid of arbitration would apply to investment arbitration. And the Eleventh Circuit voluntarily withdrew its opinion that had held that Section 1782 could be used in aid of commercial arbitration.

Consider this as well: A recent Seventh Circuit case concerned the issue of whether a district judge had authority to allow discovery in a federal court case to proceed when the fruits of that discovery might be relevant to, and might even be used as evidence in, a pending commercial arbitration proceeding in Germany. In a comment that is clearly dictum, Judge Richard Posner remarked about the possibility that, independent of any discovery in the lawsuit, the party to the German arbitration could have used Section 1782 to obtain discovery in aid of the arbitration. He wrote:

Flex-N-Gate could have asked the district judge to provide evidence to “a foreign or international tribunal,” as district judges are authorized to do by 28 U.S.C. §1782. The German panel conducting the arbitration between GEA and Flex-N-Gate might be considered such a tribunal. (Or might not—the applicability of section 1782 to evidence sought for use in a foreign arbitration proceeding is uncertain.)¹⁷

Yes, this was dictum. But when a jurist as prominent as Posner notes the uncertainty around the issue of the use of Section 1782 in aid of arbitration, it is telling.

Perhaps the next 10 years will bring more clarity than the first 10 years after *Intel*. It should not, however, be surprising if such clarity will be achieved only through another visit to the Supreme Court.

Endnotes

1. For example, "Recent Developments Under Section 1782," *New York Law Journal*, Oct. 13, 2011; "Intel §1782: Discovery in International Arbitration," *New York Law Journal*, Jan. 29, 2007.
2. 542 U.S. 241 (2004).
3. 165 F.3d 184 (2d Cir. 1999).
4. 168 F.3d 880 (5th Cir. 1999).
5. 542 U.S. at 258 (emphasis added).
6. No. MISC 06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006).
7. See, e.g., *In re Babcock Borsig*, 583 F.Supp.2d 233, 240 (D. Mass. 2008); *In re Application of Winning (HK) Shipping*, No. 09-22659-MC, 2010 U.S. Dist. LEXIS 54290, (S.D. Fla. April 30, 2010); *Ghana v. Proenergy Services*, 2011 U.S. Dist. LEXIS 75029 (W.D. Mo. June 6, 2011).
8. No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *8-12 (M.D. Fla. Aug. 4, 2009).
9. See also, *In re Arbitration in London, England*, 626 F.Supp.2d 882 (N.D. Ill. 2009).
10. *In re Application of Prabhat K. Dubey*, 2013 U.S. Dist. LEXIS 83972 (C.D. Cal. 6-7-13).
11. *In Re Norfolk Southern*, 626 F.Supp.2d 882, (N.D. Ill 2009).
12. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 2009 U.S. App. LEXIS 17596 (5th Cir. Aug. 6, 2009).
13. *Ecuador v. Connor*, 708 F.3d 661 (5th Cir. 2013).
14. *Id.* at 658.
15. *In re Chevron*, 633 F.3d 153 (3d Cir 2011).
16. 685 F.3d 987 (11th Cir. 2012).
17. *GEA Group v. Flex-N-Gate*, No. 13-2135 (7th Cir. Jan. 10, 2014).

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Effectuating International Arbitration Through Judicial Preliminary Relief in New York

By Julie Bédard and Christopher Pavlacka

I. Introduction

Effective international arbitration sometimes requires action by courts to support the functioning of the arbitration process and ensure that arbitral awards may be recovered. New York courts can assist in the arbitral process by granting preliminary relief, such as compelling arbitration, enjoining attempts to circumvent arbitration, attaching property in anticipation of an arbitral award and preserving the status quo between parties.

This article surveys court-granted preliminary relief jurisprudence in New York. Courts sitting in New York—both state and federal—possess a powerful toolkit of preliminary relief measures to assist in the arbitration process when the arbitration “may be rendered ineffectual” in the absence of court intervention. For instance, when a party uses litigation in an attempt to evade its obligation to arbitrate, courts may enjoin that litigation and compel the parties to arbitrate. Likewise, when a party’s potential arbitral award may be rendered ineffectual in the absence of judicial intervention, courts may attach another party’s assets to secure the potential award’s effectiveness. And, at least in some New York courts,¹ when a party threatens another party with irreparable injury before arbitration can commence, courts may enjoin the threatening party to preserve the status quo.

Although New York courts may fashion preliminary relief measures to aid in the arbitration process, they balance the need for preliminary relief with a concomitant concern for protecting the rights of parties against whom preliminary relief is being sought. New York courts may refuse to compel a party into arbitration when deemed unjustified if an insufficient showing is made concerning the existence of an arbitration agreement or on equitable grounds. They will tailor injunctions to the specific parties and issues covered by the arbitration. And both New York and federal law require the party requesting an injunction or attachment to post a security bond from which the other party may recover if the injunction or attachment was wrongfully granted.

While arbitrators may be empowered to grant interim relief, there are important reasons why parties may seek preliminary relief from courts rather than arbitrators. Court-granted preliminary relief is available before an arbitration tribunal has been constituted or where emergency arbitrators are unavailable or undesirable.² Courts may bind third parties to the arbitration agreement through the granting of provisional relief (so long as personal jurisdiction has been satisfied).³ Furthermore, provisional relief provided by courts, more so than arbi-

trators, can be granted quickly, sometimes on an ex parte basis.⁴ And, certainly not least, court-ordered preliminary measures enjoy immediate effect, unlike their tribunal-granted analogues.⁵ Thus, while parties may often seek provisional measures from arbitral tribunals, there are circumstances where the parties may choose to, or have no alternative but to, seek such relief directly from courts. As a result, the importance of jurisprudence surrounding court-granted provisional measures in New York cannot be overstated.

II. The New York Convention and Federal Laws Are Silent on Judicial Preliminary Relief

There is no manifest source of the court’s power to grant preliminary relief in arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or “Convention”) and Federal Arbitration Act (the “FAA”). Nonetheless, such power should be (and generally has been) implied under both the New York Convention and the FAA. Additionally, the New York legislature has amended the New York Civil Practice Laws and Rules (the “CPLR”) to endow courts with the power to grant preliminary relief.

A. Preliminary Relief Under the New York Convention

The New York Convention governs the enforcement of international arbitration agreements and awards among Contracting States (including the United States).⁶ In particular, Article II(3) of the Convention states:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁷

The Convention, however, is otherwise silent on provisional relief. Nonetheless, most courts and commentators around the world have found that court-ordered preliminary relief is warranted under the New York Convention.⁸ Article II(3) of the Convention is properly interpreted to empower courts to grant provisional measures in circumstances where there is a valid arbitration agreement (and the other requirements for granting preliminary relief are satisfied).⁹ Of course, the corollary of this is that provi-

sional measures may not be granted in the absence of a valid arbitration.

Consistent with this interpretation, the Second Circuit in *Borden, Inc. v. Meiji Milk Products Co.* has recognized that “[f]ederal courts are charged with enforcing the Convention” and “entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court’s powers [in enforcing the Convention].”¹⁰ Indeed, the court in *Borden* found that providing courts with subject matter jurisdiction over provisional measures in aid of arbitration is “not precluded by the Convention but rather is consistent with its provisions and its spirit.”¹¹

The Second Circuit has read the FAA, which implements the Convention in the United States, to provide federal courts jurisdiction over actions to “compel, confirm, or vacate” an arbitral award.¹² Although the FAA does not explicitly endow federal courts with jurisdiction to grant preliminary relief, such a power has been implied. Thus, courts in the Second Circuit have held that they possess jurisdiction over requests for preliminary relief that effectuate the international arbitration process.¹³ Arbitral parties may seek preliminary relief even when the motion is not accompanied by a request to compel arbitration or confirm an award.¹⁴

B. Preliminary Relief Under the New York CPLR

Similarly, New York law affords state courts the ability to provide preliminary relief in support of international arbitration.¹⁵ Initially, in *Cooper v. Ateliers de la Motobecane, S.A.*, the New York Court of Appeals declined to attach property in aid of an international arbitration.¹⁶ In 2005, the New York legislature amended the applicable statute, CPLR 7502(c), to overrule *Cooper* and allow state courts to use all preliminary relief measures in aid of international arbitration.¹⁷

The text of CPLR 7502(c) provides that “the sole ground for the granting of the remedy”—that is, “an order of attachment or...a preliminary injunction in connection with an arbitration”—is “that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.”¹⁸ Courts in New York have split on how CPLR 7502(c) should be interpreted.

Federal courts sitting in New York and courts in New York’s Second and Third Departments require a party seeking either an injunction or an attachment in aid of an international arbitration to satisfy both CPLR 7502(c) and CPLR Article 63, under which the party must show that: (1) it will likely succeed on the merits in the arbitration; (2) it will suffer irreparable harm in the absence of preliminary relief; and (3) the balance of equities between the parties supports the preliminary relief.¹⁹ Recent decisions from the First Department, however, have held that the *only* relevant factor is whether the award in the

arbitration “may be rendered ineffectual” in the absence of the injunction, thereby disclaiming the propriety of taking other considerations, including CPLR Article 63, into account.²⁰

III. New York Courts Grant Preliminary Measures When Appropriate and Conditions Are Satisfied

A. Courts Will Enforce Valid Agreements to Arbitrate Under the New York Convention

New York courts have been especially concerned with parties to arbitration agreements attempting to escape from their arbitral obligations. To protect the international arbitration process, courts have enforced contractual agreements to arbitrate and enjoined parties’ attempts to circumvent arbitration.

1. Determining Whether an Agreement to Arbitrate the Dispute Exists

Courts are charged with “recogniz[ing] and enforc[ing] qualifying arbitration agreements between and among parties of [New York Convention] signatory states, without the traditional jurisdictional limits.”²¹ The New York Convention and the FAA, which codified the United States’ Convention obligations, empower courts to compel arbitration if a valid arbitration clause exists.²² If courts find a valid arbitration clause under the Convention, they have honored the parties’ binding obligations by compelling the parties to arbitrate and staying the litigation in New York unless the court found countervailing equitable considerations.²³

Nonetheless, as the Second Circuit has explained, it is axiomatic that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”²⁴ Accordingly, as a mandatory prerequisite to ordering of preliminary relief in aid of arbitration, New York courts must be satisfied there is a valid arbitration agreement.

To determine whether a dispute is subject to arbitration, New York courts have examined two issues: “whether there exists a valid agreement to arbitrate,” and “whether the particular disputes sought to be arbitrated fall within the scope of the arbitration agreement.”²⁵ The court must answer both questions in the affirmative before determining that a dispute is subject to arbitration.²⁶

Because “it is axiomatic that arbitration is a matter of contract,” ordinary state contract law governs the existence of a valid agreement to arbitrate.²⁷ Further, under the New York Convention, the parties must have entered into an “agreement in writing,” which “shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”²⁸

Accordingly, New York courts have refused to find an agreement to arbitrate when there is no agreement in writing that satisfies ordinary contract law. In *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, for instance, Kahn Lucas attempted to compel Lark to arbitrate based on purchase orders not signed by Lark.²⁹ Kahn Lucas provided these purchase orders after the parties' agreement.³⁰ The Second Circuit reversed the district court, which held that there was a valid arbitration agreement, and found that there was "no 'agreement in writing' sufficient to bring this dispute within the scope of the Convention."³¹

Sarhank Group v. Oracle Corp. confirmed that when the parties are before U.S. courts, U.S. law governs whether the parties have agreed to arbitrate their dispute, even when the parties have designated other law to govern the substantive claims.³² Sarhank petitioned the Southern District of New York to confirm an arbitral award against Oracle, a nonsignatory.³³ The arbitration clause at issue was executed by Sarhank and Oracle Systems, an Oracle subsidiary, and required any disputes to be arbitrated under Egyptian law.³⁴ The Egyptian arbitration panel, purportedly applying Egyptian law, found that the arbitration clause bound Oracle because it was the parent of Oracle Systems, the signatory.³⁵ In reversing the district court's grant of the petition to confirm, the Second Circuit noted that "whether a party has consented to arbitrate is an issue to be decided by the Court in which enforcement of an award is sought."³⁶ As Sarhank had not demonstrated that Oracle, as nonsignatory, could be nonetheless forced to arbitrate under "an articulable theory based on American contract law or American agency law," the Second Circuit remanded to the district court so that Sarhank could attempt to make that showing.³⁷

Where there is an agreement in writing to arbitrate, however, New York courts do not hesitate to enforce that agreement. The Southern District of New York, for instance, held that "Arbitration: If required in New York City" constituted a valid arbitration clause.³⁸ Similarly, "General average and arbitration in London—York/Antwerp rules as amended 1990 to apply, English law to apply" sufficed.³⁹ Courts have also found that a broad arbitration clause in a subcharter was incorporated by reference into bills of lading.⁴⁰

In addition, under certain circumstances, courts sitting in New York will also enforce arbitration agreements against nonsignatories.⁴¹ For instance, in *Best Concrete Mix Corp. v. Lloyd's of London Underwriters*, the Eastern District of New York held that the plaintiff was a party to an arbitration agreement even though it did not sign the agreement.⁴² As the plaintiff sought to "enforce its indemnification rights as an additional insured under [an insurance] policy" that contained an arbitration clause, it was "bound by [the] arbitration clause."⁴³

Similarly, in *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, the Southern District of New York held that the plaintiff was a party to an arbitration agreement even though he did not sign the agreement.⁴⁴ Instead, the parties executing the contract containing the arbitration agreement executed the contract for the plaintiff's benefit.⁴⁵ Insofar as the plaintiff was a beneficiary to the contract, he was also required to arbitrate any disputes arising under the contract.⁴⁶

Where the arbitration agreement limits the parties who can initiate arbitration, however, courts have not allowed other beneficiaries to initiate arbitration.⁴⁷ Nor have courts compelled a nonsignatory to arbitrate when the party seeking to compel arbitration fails to demonstrate "an articulable theory based on American contract law or American agency law" that binds the nonsignatory to the arbitration clause.⁴⁸

Once a New York court determines that the parties entered into a written agreement to arbitrate, the court then must determine whether their dispute is subject to the arbitration agreement.⁴⁹ The Supreme Court has counseled that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁵⁰

Accordingly, New York courts have generally read potential arbitration clauses broadly, manifesting the United States' and New York's public policy goals of supporting international arbitration.⁵¹ The broad reading of arbitration agreements has created a presumption that disputes are subject to arbitration, a presumption that may be overcome only "if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."⁵² For instance, courts have held that broad arbitration agreements in main contracts may be held to apply to collateral agreements.⁵³

When determining whether to compel arbitration, New York courts have recognized that "to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present."⁵⁴ Where parties did not agree to arbitrate, courts have not coerced the parties into arbitration.⁵⁵ For instance, in *Thomson-CF, S.A. v. American Arbitration Association*, the Second Circuit reversed and remanded a Southern District of New York order compelling arbitration.⁵⁶ The Second Circuit found that the party against whom the motion to compel was sought did not fall within the traditional requirements for compelling nonsignatories to an arbitration agreement to arbitrate.⁵⁷ The Eastern District of New York considered a similar situation in *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, in which a signatory tried to confirm an arbitral award against a nonsignatory.

The nonsignatory had only signed an addendum to the contract containing the arbitration clause; the addendum did not “purport[] to obligate [the nonsignatory]...to all the other provisions contained” in the contract, including the arbitration clause.⁵⁸ Because, under these facts, the nonsignatory could not have been compelled to arbitrate a dispute with a signatory, the court denied the signatory’s petition to confirm the award.⁵⁹

Courts apply a list of requirements for establishing a valid arbitration agreement; if the party requesting arbitration cannot satisfy those requirements, courts have dismissed motions to compel.⁶⁰ Further, courts have examined equitable factors and may refuse to compel arbitration when those factors counsel against it.⁶¹ Especially concerned about fraudulent inducements to arbitrate, courts have held hearings and ordered limited discovery to determine the validity of purportedly fraudulent arbitration clauses.⁶² And when federal courts compel a party to arbitrate and dismiss the related judicial proceedings, a party may appeal the court’s decision.⁶³

In some situations, the parties’ contract envisions arbitration of disputes arising under the contract but either fails to designate any arbitral body or designates a nonexistent arbitral body. When this occurs, there is no specified instrumentality through which their disputes will be resolved. If the parties expressed a clear desire to arbitrate, however, courts have designated substitute bodies to potentiate parties’ agreements.⁶⁴

2. Determining Whether the New York Convention Governs the Agreement to Arbitrate

Even if the court is satisfied that the parties agreed to arbitrate the dispute, federal courts sitting in New York must also establish subject matter jurisdiction to enforce the arbitration agreement. The FAA provides a grant of subject matter jurisdiction for “action[s] or proceeding[s] falling under the [New York] Convention.”⁶⁵ The Second Circuit has established “four basic requirements for enforcement of arbitration agreements under the Convention: (1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope.”⁶⁶

Accordingly, New York federal courts have refused to compel arbitration even though, at first glance, there appears to be a valid arbitration clause. Federal courts generally have not compelled arbitration in foreign states not party to the New York Convention.⁶⁷ Similarly, federal courts have not enforced, under the New York Convention, “international” arbitration agreements that are either noncommercial or entirely domestic in scope.⁶⁸ And federal courts have dismissed or remanded cases based on arbitration proceedings not covered under the New York Convention.⁶⁹

3. Compelling Parties to Arbitrate

Once a New York court is satisfied that the parties have agreed to arbitrate the dispute and the court has jurisdiction, the FAA explicitly grants courts the power to compel the parties to arbitrate in the location designated by the arbitration agreement.⁷⁰ Additionally, courts may appoint arbitrators pursuant to the terms of the arbitration agreement.⁷¹ Accordingly, where appropriate, New York courts have given effect to the expressed contractual agreements between the parties by compelling the parties to arbitrate.

The Second Circuit, in *Smith/Enron Cogeneration Ltd. Partnership v. Smith Cogeneration International, Inc.*, compelled arbitration in a dispute arising out of power plant partnership agreements.⁷² Appealing to the New York Convention, the contract between the parties, and the parties’ subsequent behavior, the court determined that the parties entered into a valid arbitration agreement and compelled the parties to arbitrate their dispute.⁷³

While the *Smith/Enron* contract concerned partnership agreements, New York courts have also compelled parties to arbitrate in other scenarios. In *Usinor Steel Corp. v. M/V Koningsborg*, the Southern District of New York found and enforced a valid international arbitration agreement in a shipping contract.⁷⁴ Similarly, in *Amaprop Ltd. v. Indiabulls Financial Services Ltd.*, the Southern District of New York compelled a Cayman Islands company and two Indian companies to arbitrate, as the parties earlier agreed to arbitrate any disputes arising under a put-option contract.⁷⁵ And in *Filanto, S.p.A. v. Chilewich International Corp.*, the Southern District of New York enforced an arbitration clause between an Italian plaintiff and an American defendant in a contract for the sale of goods.⁷⁶

Occasionally, New York courts have looked to equitable considerations when deciding whether to compel. If the court finds that the party requesting arbitration prejudiced the other party through undue delay, the court may decline to compel arbitration.⁷⁷ If the court determines the motion to compel is an attempt to bypass a dispute currently in arbitration, the court may refuse to compel arbitration.⁷⁸ Similarly, when the arbitration agreement affords a party a choice between resolving a dispute through either litigation or arbitration, courts have held that a party may not compel arbitration to circumvent unfavorable results in litigation on the same dispute.⁷⁹ By contractual provisions, parties may even decide to let courts, rather than arbitrators, consider the application of statute of limitations defenses.⁸⁰

B. Courts May Enjoin Attempts to Circumvent Arbitration

On rare occasions, one party will attempt to circumvent a legitimate international arbitration by using another country’s courts to file duplicative claims or enjoin

the pending arbitration. When the moving party shows that the parallel foreign proceedings were commenced as a tactic to avoid arbitration, New York courts may use anti-suit injunctions to compel that party to cease the litigation that may undermine the arbitration.⁸¹

In determining whether to issue anti-suit injunctions, New York courts use a similar analysis when they determine whether to compel arbitration.⁸² *Paramedics Electro-medica Comercial Ltda. v. GE Medical Systems Information Technologies, Inc.* established the test for issuing international arbitration-based anti-suit injunctions: The present parties must be the same as in the arbitration, and the resolution of the present issue before the court must be dispositive of the action to be enjoined.⁸³ Since the injunctive action before the court does not concern the merits of the arbitral dispute, the court's judgment "disposes of the foreign action by determining the arbitrability of the issues."⁸⁴

If these two criteria are satisfied, New York courts may engage in a multifactor test, examining whether: (1) the foreign suit threatens the jurisdiction of the New York court; (2) strong public policies of the enjoining forum are threatened by the foreign suit; (3) the foreign suit is vexatious; (4) the foreign suit prejudices equitable considerations (such as preventing forum shopping); and (5) the adjudication of the same issues in separate suits will result in delay, inconvenience, expense, inconsistency, or a race to judgment.⁸⁵ Additionally, where a judgment has already been rendered on the validity of the arbitration agreement and the arbitrability of the claims, the court may be more inclined to grant an anti-suit injunction.⁸⁶ Following this analysis, New York courts may issue anti-suit injunctions when the party against whom arbitration is sought attempted to sidestep the arbitration process or when duplicative proceedings threaten to undermine the arbitration.

In *Storm LLC v. Telenor Mobil Communications AS*, the Southern District of New York faced a dispute between Telenor, a Norwegian company, Storm, a Ukrainian company, and Alpen, a 49.9% owner in Storm.⁸⁷ When a business deal between Telenor and Storm fell apart, Telenor commenced arbitration proceedings. Storm and Alpen sued in Ukrainian courts, which enjoined the arbitration and threatened Telenor with criminal sanctions if it continued with the arbitration.⁸⁸ Finding that Storm had proceeded "in the most vexatious way possible," the court enjoined the Ukrainian proceedings.⁸⁹

In scenarios where allowing parallel proceedings neither undermines nor threatens arbitration, however, New York courts have been reticent to issue anti-suit injunctions. Courts have not enjoined foreign proceedings where the party against whom the injunction is sought already "submitted itself to the arbitral forum" and is not trying to circumvent the arbitration process.⁹⁰ Similarly, if the foreign proceeding "is not in itself a failure, neglect,

or refusal to arbitrate," courts have not issued anti-suit injunctions.⁹¹ Further, in some New York courts a party may find obtaining an anti-suit injunction difficult if fails to show irreparable harm from failure to issue the injunction.⁹² Finally, courts may decline to issue an anti-suit injunction where foreign courts have a compelling interest in determining questions of that country's law.⁹³

For instance, in *LAIF X SPRL v. Axtel, S.A. de C.V.*, the Second Circuit found that the party against whom the anti-suit injunction was sought continued to participate in the arbitration: "It has thus submitted itself to the arbitral forum, exercised its right in that forum to assert a procedural defense, and invoked the discretion of the arbitral forum to stay proceedings...."⁹⁴ The court held that the company's conduct was neither "an evasion of the arbitral forum" nor "an attempt to sidestep arbitration."⁹⁵ Further, the court found that Mexican courts had a legitimate interest in deciding questions of Mexican corporate law, which governed the arbitration.⁹⁶ With these holdings in mind, the court denied the anti-suit injunction.

Similarly, the Southern District of New York refused to issue an injunction in *Comverse, Inc. v. American Telecommunications, Inc.*⁹⁷ The court determined that the party against whom the anti-suit injunction was sought had neither failed nor refused to participate in the arbitration; indeed, the party's actions "had actively furthered the arbitration."⁹⁸

Further, New York courts narrowly tailor anti-suit injunctions to the parties and factual issues at hand. While recognizing that anti-suit injunctions support international arbitrations, courts also understand that they "effectively restrict[] the jurisdiction of the court of a foreign sovereign," which counsels against issuing unnecessary or improper anti-suit injunctions.⁹⁹ The injunction should be preliminary in nature, expire at the conclusion of the arbitration, be issued only against the offending parties, and specify the activities to be enjoined.¹⁰⁰

Following these guidelines, in *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, the Second Circuit affirmed the general issuance of an anti-suit injunction by the Southern District of New York but remanded with instructions for the lower court to rework the injunction to both include only the parties at issue and expire at the completion of the arbitration.¹⁰¹

C. Courts May Attach Property to Ensure the Effectiveness of an Arbitral Remedy

Recognizing that effective international arbitration requires that parties hold confidence in their ability to collect arbitral awards, New York law allows state courts to attach an opposing party's assets in anticipation of an international arbitration when "the award to which the applicant may be entitled may be rendered ineffectual without" the attachment.¹⁰² Because federal courts are re-

quired to use the attachment criteria of the state in which the federal court sits,¹⁰³ both federal courts sitting in New York and New York state courts consider the same international arbitration attachment criteria.

Courts in New York may attach assets where the party requesting the attachment can demonstrate that the other party engaged in fraudulent or deceptive behavior. In *Daye Nonferrous Metals Co. v. Trafigura Beheer B.V.*, the Chinese plaintiffs produced evidence suggesting that the Dutch defendant fraudulently altered contractual documents, circumvented a restraining order and avoided another attachment order by rerouting funds;¹⁰⁴ the court held that these actions justified an attachment order against the defendant.¹⁰⁵

In rare instances, courts in New York may also attach the property of shell corporations that are parties to arbitrations to ensure that the shell's parent cannot hide assets behind the corporate veil. Because New York courts recognize that "corporate independence and limited shareholder liability serve[] to encourage...development," they strongly enforce the corporate form,¹⁰⁶ and "[t]hose seeking to pierce a corporate veil...bear a heavy burden of showing that the corporation was dominated...and that such domination was the instrument of fraud otherwise resulted in wrongful or inequitable consequences."¹⁰⁷

Where a party satisfies that heavy burden, however, New York courts may pierce the corporate veil to attach assets in aid of arbitration against the dominated corporation. In *Alvenus Shipping Co. v. Delta Petroleum (U.S.A.) Ltd.*, for instance, Alvenus commenced an arbitration under the Convention against Delta in London.¹⁰⁸ Delta had received an award in a parallel arbitration, which was held in escrow pending the outcome of *Alvenus*.¹⁰⁹ Alvenus demonstrated that Delta was a shell of Ionian, its parent company and sole shareholder.¹¹⁰ "Delta ha[d] no assets, no cash in its one bank account, [did] no business... ha[d] no employees and no office of its own."¹¹¹ Further, deposition testimony "establishe[d] that Delta's insolvency [was] not unintentional," as Ionian funneled all Delta revenue directly to Ionian.¹¹² Recognizing that Delta would immediately transfer the award to Ionian, the court found that "Alvenus ha[d] demonstrated that absent equitable relief..., a money judgment in the London Arbitration will go unsatisfied."¹¹³ Accordingly, the court placed the award in escrow with Delta's lawyer and enjoined Delta from transferring that award until resolution of the current arbitration.¹¹⁴

Further, if the party requesting attachment demonstrates likely success in arbitration, New York courts may also attach the assets of companies facing potential insolvency. In both *SiVault Systems, Inc. v. WonderNet, Ltd.*¹¹⁵ and *Sojitz Corp. v. Prithvi Information Solutions Ltd.*,¹¹⁶ the court attached property of nearly insolvent parties; without the attachment, any future arbitral award likely would have remained unsatisfied and ineffective.

While showing that an arbitral party engaged in fraud or is near insolvency generally satisfies the requirement for irreparable harm, New York courts may also attach a party's property to provide security for a potential arbitral future award. In *Sierra USA Communications, Inc. v. International Telephone & Satellite Corp.*, the New York Supreme Court extended a temporary restraining order freezing one party's assets pending an arbitral hearing to ensure that the arbitration remedy "would not be rendered ineffectual."¹¹⁷

Similarly, New York courts may enforce an arbitrator's pre-arbitration security-bond requirement or attachment order if that order will help effectuate a future award. In *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, for instance, the Second Circuit affirmed two arbitration panel preliminary decisions requiring a state-owned Uruguayan corporation to post security pending a full arbitral hearing.¹¹⁸ The Second Circuit held that because the parties' "arbitration clause was broad...[their] arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself."¹¹⁹ Further, the parties had "expected the Panel to rule on the issue of pre-hearing security," as the issue was fully briefed and presented to the panel.¹²⁰

Similarly, in *CE International Resources Holdings LLC v. S.A. Minerals Ltd. Partnership*, the Southern District of New York enforced an arbitrator's pre-arbitral order requiring a Thai corporation, a British Virgin Islands company, and a Thai individual to post a \$10,000,000 security bond and, if they failed to post the bond, issuing a *Mareva* injunction "enjoin[ing] [them] from transferring any assets located anywhere in the world up to the amount of \$10 million."¹²¹ The court, agreeing with *British Insurance Co. of Cayman v. Water Street Insurance Co.*,¹²² held that an arbitrator's temporary equitable relief, such as security or an injunction, "was separable from the merits of the arbitration, and thus subject to federal review."¹²³ While the parties' arbitration agreement did not provide for pre-arbitral security, the court enforced the security bond because the parties expressly chose to arbitrate under American Arbitration Association (the "AAA") rules that provided for pre-arbitral security.¹²⁴ While the court recognized that the *Mareva* injunction "present[ed] a thornier issue," as federal and New York state courts are without power to issue those injunctions,¹²⁵ the court also enforced the arbitrator's grant of the *Mareva* injunction for much the same reason: By adopting the AAA rules, which allow an arbitrator to issue a *Mareva* injunction, the court could also enforce an arbitrator's pre-arbitral issuance of a *Mareva* injunction.¹²⁶

D. Courts May Preserve the Status Quo to Prevent Irreparable Harm to the Parties

Between the time when one party requests international arbitration and when the arbitration begins, one of the parties may threaten irreparable harm on another

party. New York law allows courts to issue injunctions preserving the status quo and aiding international arbitration when the award in the arbitration “may be rendered ineffectual” in the absence of the injunction.¹²⁷ Although the First Department recently disclaimed the propriety of taking additional considerations into account,¹²⁸ some New York courts may issue pre-arbitration preliminary injunctions to maintain the status quo where the moving party can show both likely success in an arbitration and the imminent threat of irreparable harm before the arbitration begins.

Preliminary injunctions may prevent parties from altering the structure of a business. In *CanWest Global Communications Corp. v. Mirkaei Tikshoret Ltd.*, a Canadian company, CanWest, and an Israeli company, Mirkaei, entered into an agreement to purchase various media groups in Israel.¹²⁹ The agreement fell apart, and Mirkaei took control of the disputed media groups. In aid of a pending international arbitration, the court enjoined Mirkaei from, among other acts, merging with, altering the corporate structure of, or terminating the employment of any executives of the media group.¹³⁰

The injunctions may also require parties to continue to perform under a contract for the sale of goods. In *AIM International Trading, L.L.C. v. Valcucine S.p.A.*, an Italian company, Valcucine, sought to end a distributorship contract with an American company, AIM, and commenced arbitration proceedings.¹³¹ AIM’s business was based almost entirely on the distribution of Valcucine’s products.¹³² Finding that AIM would both suffer irreparable harm in the absence of a preliminary injunction in aid of arbitration and likely succeed in the arbitration, the Southern District of New York preliminarily enjoined Valcucine from terminating the contract.¹³³

Additionally, the injunctions may enjoin foreclosure of loans. In *Invar International, Co. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi*, two American companies sought a preliminary injunction against a Turkish company, Zorlu.¹³⁴ The three companies jointly operated two power plants in Russia.¹³⁵ The parties sought additional financing, which was provided—on Zorlu’s suggestion—by Bundoran, a supposedly neutral third party. At the time of the arbitration and the suit, the parties disputed whether the Bundoran was actually neutral at the time of the loan’s execution; it had subsequently been acquired by Zorlu.¹³⁶ Bundoran threatened to foreclose on the American companies’ loan, which would have transferred full control of the power plants to Zorlu. The court enjoined the foreclosure, which would have destroyed the interest in the plants that the American companies were trying to protect in the arbitration.¹³⁷

In some circumstances, both parties to an international arbitration may be subject to a preliminary injunction to preserve the status quo. In *Blom ASA v. Pictometry International Corp.*, the Western District of New York

required an American company to continue to perform its contractual obligations while restraining the opposing Norwegian party from performing under a later contract with a third party.¹³⁸

In most New York courts, parties seeking attachment orders in aid of international arbitrations must demonstrate that they will likely succeed on the merits in arbitration and will suffer irreparable harm.¹³⁹ Additionally, the property to be attached must be within the jurisdiction of the New York courts.¹⁴⁰ If the moving party fails to demonstrate any of these criteria, courts have denied requests for preliminary relief.¹⁴¹

Several federal courts sitting in New York elected not to issue preliminary injunctions in aid of international arbitration where the party requesting the injunction has not demonstrated that it will likely succeed on the merits. In *Anwar v. Fairfield Greenwich Ltd.*, for instance, the Southern District of New York refrained from enjoining ongoing discovery because the party requesting the injunction had failed to either convince the arbitration panel to enjoin discovery or show that it would likely prevail in the arbitration.¹⁴²

Similarly, some New York courts have not issued preliminary injunctions in aid of international arbitration when the party requesting the injunction has not demonstrated that it will likely face irreparable harm in the absence of judicial intervention. In *Andersen Consulting Business Unit Member Firms v. Andersen Worldwide Societe Cooperative*, several of Arthur Andersen’s member firms commenced arbitration against Arthur Andersen.¹⁴³ The member firms also requested a preliminary injunction from the Southern District of New York, contending that Arthur Andersen had passed a resolution threatening some of the member firms with breach and requesting that implementation of that resolution be enjoined.¹⁴⁴ In rejecting that argument, the court focused on irreparable harm, holding that the member firms neither showed that the mere threat of termination caused irreparable harm nor demonstrated that they would lack satisfactory recourse through the international arbitration process.¹⁴⁵

Importantly, a New York federal court has held that the mere fact that an international arbitration is ongoing may defeat a claim of irreparable injury. In *Emirates International Investment Co. v. ECP Mena Growth Fund, LLC*, ECP declared Emirates International a defaulting shareholder because of a supposedly late payment.¹⁴⁶ The parties submitted their dispute to an arbitration panel.¹⁴⁷ Emirates International sought a preliminary injunction preventing ECP from selling Emirates International’s portion of the fund until the conclusion of the arbitration.¹⁴⁸ In denying the injunction, the court noted that the parties were already engaged in an arbitration, precluding Emirates International from demonstrating irreparable harm.¹⁴⁹

Further, even when a party to arbitration can establish the prerequisites for a preliminary injunction or an attachment in aid of arbitration, the moving party must itself post security.¹⁵⁰ In both *AIM International Trading, L.L.C. v. Valcucine, S.p.A.*¹⁵¹ and *Alvenus Shipping Co. v. Delta Petroleum (U.S.A.) Ltd.*,¹⁵² for instance, the courts considered the amount of the security bond that the moving parties were required to post. Should a party be wrongfully enjoined or have property wrongfully attached, that party may receive damages up to the amount of the security bond, even if it was ultimately unsuccessful in the arbitration.¹⁵³

IV. Conclusion

New York courts possess a powerful toolkit of preliminary relief measures to aid in international arbitration. To support the United States' and New York' public policy in favor of international arbitrations, New York state courts and federal courts sitting in New York have been willing to use preliminary relief when doing so helps potentiate parties' desires to arbitrate their dispute and assists the international arbitration process. On the other hand, when preliminary relief fails to effectuate international arbitrations and unduly burdens other involved parties, courts have refused to issue preliminary relief. At the heart of New York courts' decisions to issue preliminary relief remains a careful consideration of whether that relief would aid the international arbitration process.

Endnotes

1. The recent case of *Kadish v. First Midwest Securities, Inc.* in the First Department casts significant doubt on whether inquiry into irreparable harm and other CPLR Article 63 injunctive standards are appropriate in the context of injunctions in aid of arbitration. 981 N.Y.S.2d 525, 526 (App. Div. 2014); see also *Camilli v. Meyers Assocs., L.P.*, No. 650341/15, 2015 WL 1623803, at *3 (N.Y. Sup. Ct. Apr. 13, 2015) (applying only the "rendered ineffectual" standard); *H.I.G. Capital Mgmt., Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (App. Div. 1996) ("[CPLR 7502(c)] is the sole applicable standard, and we find that it was correctly applied. Even were standards of CPLR article 63 applicable, we would find that the relief granted was within the court's discretion." (citations omitted)). See generally *infra* Section II.B. Nonetheless, because there appears to be disagreement on this point among New York courts, case law discussing injunctive standards such as irreparable harm in the context of arbitration is included in this article.
2. Although tribunal-granted preliminary relief is generally permitted in New York, provided such authority is consistent with the arbitration agreement, arbitration rules, and governing law, the availability of such relief generally assumes that a tribunal has already been constituted or that there are provisions allowing for the appointment of an emergency arbitrator in the applicable rules. See, e.g., ICC Rules of Arb. art. 29 (2012). And even when emergency arbitrators are available, parties may instead prefer to seek relief from courts for various reasons, including cost, inability to choose the identity of the arbitrator, lack of precedent in the use of emergency arbitrators and uncertainty in enforcement. For a discussion of issues related to the ICC emergency arbitrator provisions, see Baruch Baigel, *The*

Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis, 31 J. INT'L ARB. 1, 1–18 (Kluwer Law International 2014).

3. For instance, courts may exercise jurisdiction over nonparties to the arbitration agreement where property to be attached in aid of arbitration is held by a third party. See, e.g., *Alvenus Shipping Co.*, 876 F. Supp. at 488 (enjoining defendant Fleet Bank, a nonparty to the arbitration agreement, from releasing funds held in escrow to defendant Delta Petroleum to ensure that plaintiff's English arbitration award could be satisfied).
4. Historically, New York state courts have been more willing to grant injunctive relief on an ex parte basis than their federal counterparts. In 2006, however, the Uniform Rules for the Trial Courts applicable to New York state courts were amended to require "an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice" in the case of ex parte applications. 22 N.Y.C.R.R. § 202.7(f) (2015). Thus, the requirements for the issuance of preliminary relief on an ex parte basis are now similarly stringent in New York state and federal court, and accordingly such relief may be more difficult to obtain than historically.
5. Tribunal-granted provisional relief does not immediately come into effect. Rather, the party seeking enforcement must apply to a court for judicial review and enforcement of the provisional measure. New York courts will generally enforce an order for preliminary relief provided that it can be properly characterized as an "award" or "order," the procedure complied with due process requirements, and the award or order is considered "final." See, e.g., *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982) (holding that the arbitrator's order regarding placing a letter of credit in escrow pending a final determination of the dispute was "a final Award on a clearly severable issue, [and therefore] it is clearly subject to confirmation by this Court").
6. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I, June 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter "New York Convention"].
7. *Id.* at art. II(3).
8. See, e.g., *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) (holding that "[e]ntertaining an application" for preliminary relief "is not precluded by the Convention but rather is consistent with its provisions and its spirit"); *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 921 N.Y.S.2d 14, 17 (App. Div. 2011) (noting that CPLR 7502(c) allows New York courts to grant preliminary relief in support of international arbitrations); Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 299, 317 (2006).
9. See Davies, *supra* note 8, at 309 (approving of courts that "grant injunctions and provisional remedies in the context of pending arbitrations, including international arbitrations") (citing *Bahrain Telecomm. Co. v. Discoverytel, Inc.*, 476 F. Supp. 2d 176, 178 (D. Conn. 2007)).
10. 919 F.2d at 826 (citations omitted).
11. *Id.*
12. *Holzer v. Mondadori*, 12 Civ. 5234, 2013 U.S. Dist. LEXIS 37168(NRB), at *19 (S.D.N.Y. Mar. 14, 2013); see also *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012) ("[The FAA] provides federal jurisdiction over actions to confirm or vacate an arbitral award that is governed by the Convention...." (citation omitted)).
13. See *Goel v. Ramachandran*, 823 F. Supp. 2d 206, 215–16 (S.D.N.Y. 2011) (discussing the Second Circuit's liberalization of international arbitration subject matter jurisdiction).
14. See *Venconsul N.V. v. Tim Int'l N.V.*, No. 03 Civ. 5387 (LTS)(MHD), 2003 WL 21804833, at *3 (S.D.N.Y. Aug. 6, 2003) ("*Borden* has been interpreted as recognizing a court's power to entertain requests for provisional remedies in aid of arbitration even where the request

- for remedies does not accompany a motion to compel arbitration or to confirm an award.”).
15. CPLR 7502(c) (Consol. 2015).
 16. 57 N.Y.2d 408 (1982).
 17. See Davies, *supra* note 8, at 317 (noting that CPLR 7502(c) “reverses the effect of Cooper”).
 18. CPLR 7502(c).
 19. See, e.g., *SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 83–84 (2d Cir. 2000) (“Section 7502(c) was intended to provide preliminary relief in state court that had previously been unavailable but to condition that relief—when available under the criteria set out in Article 63—to cases where an arbitration award might otherwise be rendered ineffectual.”); *Advanced Dig. Sec. Sols., Inc. v. Samsung Technwin Co., Ltd.*, 862 N.Y.S.2d 551, 552 (2d Dep’t 2009) (“[A] party seeking relief under CPLR 7502(c) ‘must also make a showing of the traditional equitable criteria for the granting of temporary relief under CPLR article 63’” (citation omitted)); *Thornton & Naumes, LLP v. Athari & Nixon, LLP*, 829 N.Y.S.2d 248, 249 (3d Dep’t 2007) (“In granting an order of attachment in aid of arbitration, petitioners were required to show that there is a viable cause of action, a probability of success on the merits, that the award may be rendered ineffectual without the relief sought and that the amount demanded exceeds all counterclaims known to petitioners.”).
 20. See, e.g., *Kadish v. First Midwest Sec., Inc.*, 115 A.D.3d 445, 446 (1st Dep’t 2014) (rejecting application of CPLR Article 63 and applying only “the ‘rendered ineffectual’ standard with regard to a CPLR 7502 (c) attachment in aid of arbitration”); *Camilli v. Meyers Assocs., L.P.*, No. 650341/15, 2015 WL 1623803, at *3 (N.Y. Sup. Ct. Apr. 13, 2015) (applying only the “rendered ineffectual” standard); *H.I.G. Capital Mgmt., Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (App. Div. 1996) (“[CPLR 7502(c)] is the sole applicable standard, and we find that it was correctly applied. Even were standards of CPLR article 63 applicable, we would find that the relief granted was within the court’s discretion.” (citations omitted)).
 21. *Energy Transp., Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 197 (S.D.N.Y. 2004).
 22. See *id.* at 197–98 (“The codification of the New York Convention was designed to empower federal courts to recognize and enforce qualifying arbitration agreements between and among parties of signatory states, without the traditional jurisdictional limits based on the citizenship of the parties to the agreement and the locus of the matter in dispute.”).
 23. See *infra* notes 77–80 and accompanying text.
 24. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986)); see also *Thomson-CSF, S.A. v. Am. Arb. Assoc.*, 64 F.3d 773, 776 (2d Cir. 1995) (“Arbitration is contractual by nature—a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit” (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))).
 25. *Energy Trans.*, 348 F. Supp. 2d at 202 (quoting *Hartford Accident & Indem. Co v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001)).
 26. See *Hartford Accident & Indem. Co v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (requiring both questions to be answered in the affirmative before compelling arbitration).
 27. *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 848 F. Supp. 2d 410, 420 (S.D.N.Y. 2012); see also *id.* at 423 (“[T]he party must show a binding agreement under ‘ordinary state-law principles that govern the formation of contracts.’” (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))).
 28. New York Convention, *supra* note 6, art. II § 2; see also *Glencore Ltd.*, 848 F. Supp. 2d at 423 (“However, in a non-domestic case, to accord with the standards set by the New York Convention, the prevailing theory of contract formation must also entail an agreement or an arbitral clause that is either ‘signed by the parties’ or ‘contained in an exchange of letters or telegrams.’” (quoting *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999)); *Gabriel Capital, L.P. v. CAIB Investmentbank Aktiengesellschaft*, 814 N.Y.S.2d 66, 68 (App. Div. 2006) (reversing trial court decision denying motion to stay pending arbitration because trial court failed to apply the New York Convention’s definition of “written agreement”).
 29. 186 F.3d 210, 213 (2d Cir. 1999), *abrogated on other grounds by Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005).
 30. See *Glencore Ltd.*, 848 F. Supp. 2d at 437 (analyzing *Kahn Lucas* and noting that the arbitration clause there was “included in a form unilaterally supplied by one party following the parties’ agreement”).
 31. *Kahn Lucas*, 186 F.3d at 218.
 32. See 404 F.3d 657 (2d Cir. 2005).
 33. *Id.* at 658.
 34. *Id.*
 35. See *id.* at 662.
 36. *Id.* at 661.
 37. See *id.* at 662–63. For a discussion of the theories under which a nonsignatory can be bound to an arbitration clause, see *infra* note 41.
 38. *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75, 77–78 (S.D.N.Y. 1985) (holding that the phrase “evidenced [the parties’] intention to arbitrate disputes arising under that contract”).
 39. *Standard Tallow Corp. v. Kil-Management A/S*, 901 F. Supp. 145, 148, 151 (S.D.N.Y. 1995) (lower case letters added) (applying the provision because the preamble of the contract states that the part containing the provision controlled over other language).
 40. *Cont’l Ins. Co. v. M/V Nikos N*, 00 Civ. 7985(RLC), 2002 U.S. Dist. LEXIS 6029, at *9 (S.D.N.Y. Apr. 8, 2002) (finding the arbitration clause was incorporated by reference where the bills of lading referenced “all terms and conditions” in the subcharters).
 41. See *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) (“In this circuit, we have repeatedly found that non-signatories to an arbitration agreement may nevertheless be bound according to ‘ordinary principles of contract and agency.’ These principles include ‘(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.’” (citations omitted)); *MAG Portfolio Consultant, GmbH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 61 (2d Cir. 2001) (same); *Belzberg v. Verus Invs.*, 21 N.Y.3d 626, 630–33&n.3 (2013) (applying *MAG Portfolio*, 268 F.3d at 61).
 42. 413 F. Supp. 2d 182, 187 (E.D.N.Y. 2006).
 43. *Id.*
 44. 974 F. Supp. 293, 302 (S.D.N.Y. 1997).
 45. *Id.*
 46. *Id.*
 47. See *Republic of Iraq v. ABB AG*, 769 F. Supp. 2d 605, 601–11 (S.D.N.Y. 2010) (refusing to allow Iraq to initiate arbitration when the arbitration agreement expressly provided that only the UN or BNP could initiate), *aff’d sub nom. Republic of Iraq v. BNP Paribas USA*, 472 F. App’x 11 (2d Cir. 2012).

48. *Sarhank Grp.*, 404 F.3d at 662; *see also infra* notes 54–59 and accompanying text.
49. “[A]rbitrability questions are presumptively to be decided by the courts, not the arbitrators themselves.” *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 406 (2d Cir. 2009). Parties may defeat this presumption “only by ‘clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.’” *Id.* (quoting *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002)).
50. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983), *superseded by statute on other grounds* by 9 U.S.C. § 16(b)(1); *see also Telenor Mobile Commc’ns AS*, 584 F.3d at 406 (same); *Highland HC, LLC v. Scott*, 978 N.Y.S.2d 302, 305–06 (App. Div. 2014) (same).
51. One case, *Hoogovens Ijmuiden Verkoopkantor B.V. v. M.V. Sea Cattleya*, 852 F. Supp. 6 (S.D.N.Y. 1994), fails to follow the liberal construction of arbitration clauses of the cases in this Subsection. Perhaps for this reason, *Hoogovens* has been roundly criticized. *See, e.g., Usinor Steel Corp. v. M/V Koningsborg*, No. 03 Civ. 4301 (AKH), 2004 U.S. Dist. LEXIS 1615, at *4–5 (S.D.N.Y. Feb. 4, 2004); *Standard Tallow Corp. v. Kil-Mgmt. A/S*, 901 F. Supp. 147, 151 n.4 (S.D.N.Y. 1995).
52. *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) (quoting *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997)).
53. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 251–52 (2d Cir. 1991).
54. *Copape Produtos de Pétroleo Ltda. v. Glencore Ltd.*, No. 11 Civ. 5744 (LAK), 2012 U.S. Dist. LEXIS 15990, at *14 (S.D.N.Y. Feb. 8, 2012) (quoting *Société Générale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981)).
55. *Cf. Copape Produtos de Pétroleo*, 2012 U.S. Dist. LEXIS 15990, at *14 (“[A]rbitration is a matter of consent, not coercion.” (alteration in original) (quoting *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010))).
56. 64 F.3d 773 (2d Cir. 1995).
57. *See id.* at 780.
58. No. 11 Civ. 0198 (MGC), 2014 U.S. Dist. LEXIS 141036, at *5 (E.D.N.Y. Oct. 2, 2014), *aff’d* 605 F. App’x 59 (2d Cir. 2015).
59. *Id.* at *7.
60. *See Dapuzzo v. Globalvest Mgmt. Co., L.P.*, 263 F. Supp. 2d 714, 725–26 (S.D.N.Y. 2003).
61. *See Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda.*, No. 09 Cv. 6417 (BSJ), 2009 U.S. Dist. LEXIS 131360 (S.D.N.Y. Nov. 14, 2009); *Astro Vencedor Compania Naviera, S.A. v. Gen. Org. for Supply Goods, Cairo*, No. 94 Civ. 3429 (AGS), 1996 U.S. Dist. LEXIS 602 (S.D.N.Y. Jan. 23, 1996); *see also infra* Subsection III.A.3.
62. *See Linon Imps., Inc. v. Tehnoforestexport*, No. 92 Civ. 9407 (LAP), 1993 U.S. Dist. LEXIS 6530, at *6 (S.D.N.Y. May 18, 1993).
63. *See Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002), *abrogated on other grounds* by *Katz v. Cellco P’ship*, 794 F.3d 341 (2d Cir. 2015). *Salim Oleochemicals* overruled *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 984 F.2d 58 (2d Cir. 1993). Between *Filanto* and *Salim Oleochemicals*, the Supreme Court issued *Green Tree Financial Corp.-Alabama v. Randolph*, which held that an order dismissing a suit with prejudice and compelling arbitration is appealable under the Federal Arbitration Act. 531 U.S. 79, 88–89 (2000). Because the Second Circuit has held that “dismissals with and without prejudice are equally appealable as final orders,” *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, 393 F.2d 441, 444 (2d Cir. 1968), any court order dismissing a suit and compelling arbitration is appealable. *Salim Oleochemicals*, 278 F.3d at 93. Orders staying a suit and compelling arbitration, however, are not appealable. *Id.*
64. *See Travelport Glob. Distribution Sys. B.V. v. Bellview Airlines Ltd.*, No. 12 Civ. 3483 (DLC), 2012 U.S. Dist. LEXIS 128604, at *12–14 (S.D.N.Y. Sept. 10, 2012); *HZI Research Ctr., Inc. v. Sun Instruments Japan Co.*, No. 94 Civ. 2146 (CSH), 1995 U.S. Dist. LEXIS 13707, at *8–9 (S.D.N.Y. Sept. 19, 1995).
65. 9 U.S.C. § 203 (2015); *see also Goel v. Ramachandran*, 823 F. Supp. 2d 206, 217 (S.D.N.Y. 2011) (noting that in “cases involv[ing] a request to arbitrate, or an already ongoing arbitration,” the Second Circuit has held that § 203 grants subject matter jurisdiction for “requests for remedies that aid arbitration”). Even if a federal court lacks subject matter jurisdiction under the Convention and FAA, parties can allege some other basis for subject matter jurisdiction. *Cf. Dapuzzo*, 263 F. Supp. 2d at 721& n.26 (holding that the court could exercise diversity jurisdiction over the parties despite the Convention not governing the arbitration clause); *Frydman v. Cosmair, Inc.*, No. 94 Civ. 3772 (LAP), 1995 U.S. Dist. LEXIS 9333, at *22 (S.D.N.Y. June 30, 1995) (dismissing case for lack of subject matter jurisdiction because the “action [did] not relate to an arbitration falling under the Convention, and because no other basis for federal subject matter jurisdiction ha[d] been alleged”).
66. *Smith/Enron Cogeneration Ltd. P’ship*, 198 F.3d at 92; *see also Ogden Power Dev.—Cayman, Inc. v. PMR Ltd. Co.*, No. 14-cv-8169 (PKC), 2015 U.S. Dist. LEXIS 66417, at *7 n.1 (S.D.N.Y. May 21, 2015) (applying the four *Smith/Enron Cogeneration* requirements to the arbitration agreement *sub judice*).
67. *Dapuzzo*, 263 F. Supp. 2d at 721 n.6, 726–27 (refusing to compel arbitration in the Bahamas, a nonsignatory state, because an order to compel “would contravene congressional policy explicitly conferring federal jurisdiction to compel arbitration in foreign states only in connection with arbitration agreements encompassed by the Convention and the [FAA]”).
68. *Id.* at 725 (citing *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001)). The Federal Arbitration Act considers agreements to be domestic in scope when they are entirely between U.S. citizens and do not involve foreign property, foreign performance, or some other close relationship to a foreign state. *See* 9 U.S.C. § 202.
69. *See, e.g., Frydman*, 1995 U.S. Dist. LEXIS 9333, at *22 (remanding a case to state court for lack of subject matter jurisdiction, as the parties jointly terminated the arbitration governed by the New York Convention, and the remaining arbitration fell outside of the New York Convention’s ambit).
70. “A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.” 9 U.S.C. § 206.
71. *See id.*
72. *See* 198 F.3d 88, 98 (2d Cir. 1999) (enforcing broad arbitration agreement that requires arbitration agreement “[i]n the event of any dispute, disagreement, controversy or claim arising under or relating to...this [a]greement”).
73. *Id.* at 97–99.
74. *See* No. 03 Civ. 4301 (AKH), 2004 U.S. Dist. LEXIS 1615, at *7 (S.D.N.Y. Feb. 4, 2004) (determining agreement’s “if any” language “simply means that if any sort of dispute arises, resolution by arbitration becomes mandatory”).
75. *See* No. 10 Civ. 1853 (PGG), 2010 WL 1050988, at *4 (S.D.N.Y. Mar. 23, 2010) (enforcing agreement requiring any dispute to be “settled by arbitration in the State of New York”).
76. *See* 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992) (compelling arbitration where the American defendant had incorporated a previous contract, containing an arbitration clause, into the contract at issue and the Italian plaintiff failed to object until litigation ensued). Other cases have also involved the sale of goods. *See, e.g., Hart Enters. Int’l, Inc. v. Anhui Provincial Imp. & Exp. Corp.*, 888 F. Supp. 587 (S.D.N.Y. 1995) (compelling arbitration over a contract on a sale of textiles).

77. See, e.g., *Rafferty v. Xinhua Fin. Ltd.*, No. 11 Civ. 133 (CM), 2011 U.S. Dist. LEXIS 9628, at *22–23 (S.D.N.Y. Jan. 31., 2011) (holding that the petitioner waived arbitration against Chinese company by litigating arbitrable issues in the courts for eighteen months); *Astro Vencedor Compania Naviera, S.A. v. Gen. Org. for Supply Goods, Cairo (In re Gen. Org.)*, No. 94 Civ. 3429 (AGS), 1996 U.S. Dist. LEXIS 602, at *25 (S.D.N.Y. Jan. 23, 1996) (denying a motion to compel on statute-of-limitations grounds where the party requesting arbitration failed to move on the claim for eighteen years and the other party had originally consented to arbitration).
78. See *Andersen Consulting Bus. Unit Member Firms v. Andersen Worldwide Societe Coop.*, No. 98 Civ. 1030 (JGK), 1998 WL 122590, at *7 (S.D.N.Y. Mar. 18, 1998) (declining to compel arbitration where, among other things, respondent had not resisted arbitration).
79. See *Satcom Int'l Grp. PLC v. Orbcom Int'l Partners, L.P.*, 49 F. Supp. 2d 331, 338 (S.D.N.Y. 1999) (denying petitioner's attempt to "make the choice between litigation and arbitration a second time for the same dispute"), *aff'd*, 205 F.3d 1324 (2d Cir. 1999).
80. See *Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda.*, No. 09 Cv. 6417 (BSJ), 2009 U.S. Dist. LEXIS 131360 (S.D.N.Y. Nov. 14, 2009) (staying arbitration and holding that the combination of a provision providing that New York law governed the contract and a provision providing that New York law governed the procedure and administration of the arbitration allowed the court to adjudicate a statute of limitations defense before the commencement of arbitration).
81. See Julie Bédard & Shannon T. Lazzarini, *Anti-Suit Injunctions in International Arbitration*.
82. See *id.*
83. 369 F.3d 645, 652 (2d Cir. 2004); see also Bédard & Lazzarini, *supra* note 81, at ___.
84. *Storm LLC v. Telenor Mobile Commc'ns AS*, No. 06 Civ. 13157 (GEL), 2006 WL 3735657, at *7 (S.D.N.Y. Dec. 15, 2006) (citing *Paramedics Electromedicina Comercial, Ltda.*, 369 F.3d at 653).
85. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987) (quoting *Am. Home Assurance Co. v. Ins. Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984)); see also *Ibeto Petrochemical Industry Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007) (noting that preventing forum shopping is one equitable consideration to be considered); *Stolt Tankers BV v. Allianz Seguros, S.A.*, No. 11 Civ. 2331 (SAS), 2011 U.S. Dist. LEXIS 67755, at *17–19 (S.D.N.Y. June 16, 2011) (applying the *China Trade* and *Paramedics Electromedicina* factors in granting an anti-suit injunction).
86. See *Paramedics Electromedicina Comercial, Ltda.*, 369 F.3d at 654; *T-jat Sys. 2006 Ltd. v. Amdocs Software Sys. Ltd.*, No. 13 Civ. 5356 (HB), 2013 WL 6409476, at *3–4 (S.D.N.Y. Dec. 9, 2013) (enjoining Amdocs' action in Israel because court had previously granted a motion to compel arbitration).
87. *Storm LLC*, 2006 WL 3735657, at *2.
88. *Id.* at *1–4.
89. *Id.* at *9.
- Similarly, in *Amaprop Ltd. v. Indiabulls Financial Services Ltd.*, the Southern District of New York granted the request of Amaprop, a Cayman Island company, to compel arbitration against Indiabulls, two Indian companies. No. 10 Civ. 1853 (PGG), 2010 WL 1050988, at *1 (S.D.N.Y. Mar. 23, 2010). While initially participating in the arbitration, Indiabulls obtained *ex parte* orders against Amaprop in India that purported to prohibit Amaprop from continuing with the arbitration. *Id.* at *2. In issuing the anti-suit injunction, the Southern District of New York found that Indiabulls proceeded in bad faith and created considerable inconvenience and expense for Amaprop. *Id.* at *6.
90. *LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 200 (2d Cir. 2004); see also *SH Tankers Ltd. v. Koch Shipping Inc.*, No. 12 Civ. 00375 (AJN), 2012 U.S. Dist. LEXIS 85729, at *10 (S.D.N.Y. June 19, 2012) (denying an anti-suit injunction where the moving party "cast the first litigation stone by filing this action protesting [the other party's] decision to *abide* by the Panel's Ruling" and the other party neither refused to arbitrate nor commenced litigation.).
91. *Comverse, Inc. v. Am. Telecomms., Inc.*, No. 06 Civ. 6825 (PKL), 2006 WL 3016315, at *3 (S.D.N.Y. Oct. 23, 2006).
92. See *Empresa Generadora De Electricidad Itabo, S.A. v. Corporación Dominicana De Empresas Eléctricas Estatales*, No. 05 Civ. 5004 RMB, 2005 WL 1705080, at *8–9 (S.D.N.Y. July 18, 2005); see also *supra* Section II.B.
93. See *LAIF X SPRL*, 390 F.3d 194, 200 (2d Cir. 2004).
94. *Id.*
95. *Id.* (citation omitted).
96. See *id.* at 200.
97. No. 06 Civ. 6825 (PKL), 2006 WL 3016315, at *3 (S.D.N.Y. Oct. 23, 2006).
98. *Id.*
99. *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004) (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1985)).
100. *Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd.*, No. 10 Civ. 1853 (PGG), 2010 WL 1050988, at *9 (S.D.N.Y. Mar. 23, 2010).
101. See 475 F.3d 56, 65 (2d Cir. 2007).
102. CPLR 7502(c) (Consol. 2013).
103. See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 330–31 (1999).
104. No. 96 Civ. 9740 (RWS), 1997 U.S. Dist. LEXIS 9661, at *6–9 (S.D.N.Y. July 7, 1997).
105. *Id.* at *17; see also *Sojitz Corp. v. Prithvi Info. Sols. Ltd.*, 921 N.Y.S.2d 14 (App. Div. 2011) (attaching funds in aid of arbitration because, *inter alia*, the Indian company had misappropriated escrow funds likely owed to a Japanese company).
106. *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1052 (2d Cir. 1997); see also *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993) ("[A] corporation exists independently of its owners, as a separate legal entity, [and] the owners are normally not liable for the debts of the corporation, and...it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners.").
107. *TNS Holdings, Inc. v. MKI Secs. Corp.*, 92 N.Y.2d 335, 339 (1998) (refusing to pierce the corporate veil to require a nonsignatory to arbitrate); see also *Freeman*, 119 F.3d at 1053 ("Unless the control is utilized to perpetrate a fraud or other wrong, limited liability will prevail.").
108. 876 F. Supp. 482, 484 (S.D.N.Y. 1994).
109. See *id.* at 483.
110. See *id.* at 485.
111. *Id.* at 487.
112. *Id.* at 486.
113. *Id.* at 487.
114. See *id.* at 488.
115. No. 05 Civ. 0890, 2005 U.S. Dist. LEXIS 4635, at *13 (S.D.N.Y. Mar. 28, 2005) (attaching shares in aid of arbitration where defendant "possesse[d] no assets in the United States other than the shares at issue here,...had a negative net worth as of the end of 2002, and... ha[d] borrowed \$1,000,000 from a bank in Israel, a loan secured by all of [defendant's] assets[,] which suggest[ed] [defendant's] potential insolvency").
116. 921 N.Y.S.2d 14, 15, 19 (App. Div. 2011) (affirming attachment in aid of arbitration where defendant admitted that it diverted money meant to go into an escrow "because it had 'cash flow problems'").

117. 824 N.Y.S.2d 560, 561 (Sup. Ct. 2006).
118. 344 F.3d 255, 264 (2d Cir. 2003).
119. *Id.* at 262.
120. *Id.* at 263.
121. See 12 Civ. 8087, 2012 U.S. Dist. LEXIS 176158, at *1–2 (S.D.N.Y. Dec. 10, 2012) (emphasis added). “A Mareva injunction is an interlocutory (normally ex parte) injunction restraining a defendant in civil litigation from disposing of assets so as to render itself judgment proof.” David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2162 (2005). Neither federal nor New York courts may entertain Mareva injunctions in aid of pending litigations. See *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 333 (federal); *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 550–51 (Ct. App. 2000) (New York).
122. 93 F. Supp. 2d 506, 514 (S.D.N.Y. 2000) (“[A]n award of temporary equitable relief such as a security award, separable from the merits of arbitration, is subject to federal review.”).
123. *CE Int’l Res. Holdings*, 2012 U.S. Dist. LEXIS 176158, at *7.
124. See *id.* at *10–11.
125. *Id.* at *11; see also *supra* note 121.
126. See *CE Int’l Res. Holdings*, 2012 U.S. Dist. LEXIS 176158, at *13 (“But where, as here, the parties have agreed that the arbitrator has the power to issue what is, in effect, an extra-legal remedy, the policies underlying *Grupo Mexicano* and *Credit Agricole* are not implicated. Furthermore, in the arbitral context, there is a strong countervailing policy of enforcing arbitral awards in accordance with the terms, as long as the arbitrators have not exceeded their powers.”).
127. CPLR 7502(c) (Consol. 2013).
128. *Kadish v. First Midwest Sec., Inc.*, 981 N.Y.S.2d 525 (memo) (1st Dep’t. 2014); see also *H.I.G. Capital Mgmt., Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (1st Dep’t 1996) (“[CPLR § 7502(c)] is the sole applicable standard, and we find that it was correctly applied. Even were standards of CPLR article 63 applicable, we would find that the relief granted was within the court’s discretion.” (citations omitted)).
129. See 804 N.Y.S.2d 549 (Sup. Ct. 2005).
130. *Id.* at 556, 571.
131. 02 Civ. 1363, 2002 U.S. Dist. LEXIS 10373, at *7–8 (S.D.N.Y. June 11, 2002).
132. *Id.* at *12–13.
133. *Id.* at *20–21.
134. 934 N.Y.S.2d 34 (table) (Sup. Ct. 2010).
135. *Id.*
136. *Id.* The American companies claimed that Zorlu had controlled the financier when Zorlu suggested it. *Id.*
137. *Id.* For another example of a New York court issuing a preliminary injunction in similar circumstances, see *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, 03 Civ. 4148, 2004 U.S. Dist. LEXIS 1427 (Feb. 3, 2004).
138. 757 F. Supp. 2d 238 (W.D.N.Y. 2010).
139. See *supra* Section II.B.
140. See *Int’l Legal Consulting Ltd. v. Malabu Oil & Gas Ltd.*, 950 N.Y.S.2d 723 (table) (Sup. Ct. 2012) .
141. See *id.* (denying a preliminary injunction and an attachment order where, *inter alia*, the moving party could not demonstrate likely success on the merits and the property was located in London, outside of the court’s jurisdiction).
142. 728 F. Supp. 2d 462, 473 (S.D.N.Y. 2010).
143. No. 98 Civ. 1030(JGK), 1998 WL 122590, at *1 (S.D.N.Y. Mar. 18, 1998).
144. *Id.*
145. *Id.* at *8–9.
146. 11 Civ. 9227, 2012 U.S. Dist. LEXIS 83616, at *1 (S.D.N.Y. June 14, 2012).
147. *Id.* at *4–5.
148. *Id.* at *1.
149. *Id.* at *18–19; see also *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462 (S.D.N.Y. 2010); *Lintjes Bischoff GmbH v. Joy Evtl. Techs., Inc.*, 986 F. Supp. 183, 187–88 (S.D.N.Y. 1997) (determining that the preliminary injunction requested—the extension of a new letter of credit—could be issued by the arbitral panel in months, while the damage caused by the lack of the injunction would not be felt for years).
150. See FED. R. CIV. P. 65(c); N.Y. CPLR 6212(b), 6312(b) (Consol. 2015).
151. No. 02 Civ. 1363 (PKL), 2002 U.S. Dist. LEXIS 10373, at *20–26 (S.D.N.Y. June 11, 2002).
152. 876 F. Supp. 482, 488 (S.D.N.Y. 1994).
153. See *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990) (allowing wrongfully enjoined party to recover against Merrill Lynch’s security bond, even though the arbitration panel had ultimately ruled for Merrill Lynch).

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