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INTERNATIONAL LITIGATION & ARBITRATION

International litigation can only exist by virtue of the rules of Private International Law. Those national laws and international treaties define how private acts—such as contracts, claims in litigation, or court judgments and arbitration awards—will be treated in a foreign jurisdiction. Indeed, it is through these rules that each sovereign country puts out the “welcome mat” for private business activity.

These rules provide the backdrop to all private international litigation and arbitration claims, and define the type and scope of assistance, relief and enforcement available in every jurisdiction, and which often seem, at first glance, to tend toward simplification and transparency.

But just as the march of globalization does not follow a straight and inexorable line, so we are regularly reminded of the difficulties that private parties can encounter in seeking the enforcement abroad of a U.S. court judgment, or in obtaining evidence abroad for use in a U.S. proceeding, or in obtaining injunctive relief in one jurisdiction in aid of a court order in another jurisdiction.

This issue revolves around these practical examples of clashing legal cultures.

ABOUT THIS ISSUE

International Litigation and Arbitration

By Alexander Blumrosen, Deputy Editor

From my perspective as cochair, along with Steven Richman, of the Section of International Law's International Litigation Committee, the choice of international litigation and arbitration as the focus of this issue was a natural, as these topics reflect, perhaps more than any other, the clash of legal and cultural norms that comes from the globalization of the economy.

Investment arbitration matters take a prominent place in this *ILN* issue, and for good reason. What started as a small, specialized area of practice 40 years ago has become, thanks in large part to the 1965 Washington Convention (that created the International Centre for Settlement of Investment Disputes, ICSID) and the thousands of bilateral investment treaties that have been ratified in recent years, one of the richest and most innovative areas of arbitration practice.

Maria Vicien-Milburn and Yulia Andreeva discuss recent decisions by ICSID ad hoc annulment committees involving a series of cases in which Argentina has vigorously opposed enforcement of ICSID awards.

In contrast, Guang Hong discusses important developments in the scope of arbitration in Chinese Bilateral Investment Treaties that demonstrate an increasing openness by the Chinese government to broad grants of authority to ICSID and ad hoc panels in its most recent investment treaties.

Katlyn Thomas raises many of the difficulties that can be encountered in both investment and commercial arbitration in the Middle East, and identifies some of the reasons why Middle Eastern countries continue to lag behind their Western counterparts in implementing favorable international arbitration policies.

Don Wallace and Hal Burman address the consequences of the entry into force of the Lisbon Treaty on existing Bilateral Investment Treaties with EU Member States, and the revision of the UNCITRAL Arbitration Rules currently underway.

Carly Toepke discusses a recent U.S. case on obtaining evidence located abroad under 28 U.S.C. §1782, which allows U.S. courts to order the production of documents and witness testimony within its jurisdiction in aid of a foreign tribunal, and the ever-present issue of whether this discretionary discovery tool is available to private litigants in international arbitration matters.

Finally, international litigation requires international lawyers, but Sumeet H. Chugani and Xingjian Zhao report that the free movement of services that allows lawyers to ply their trade across jurisdictions has been defeated in India, in a recent and alarming decision limiting transnational legal practice in India.

We hope you enjoy this issue of the *ILN*, and welcome your submission of articles, casenotes, and suggestions for upcoming issues. ♦

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arbitration in London was beyond the scope of § 1782, and under its discretion, the court could not compel the deposition to be taken. *Id.* at 885–86. The court found that because the arbitration was held in a private arbitral tribunal, the court did not have the authority to order the relief the Companies sought. Although only a minority of courts have held that private arbitrations are outside of the scope of § 1782, the court in *Norfolk Southern* determined that the very definition of “arbitral tribunal” described by the Supreme Court in *Intel* did not cover the private arbitral tribunal in the present case.

It will be interesting to see how this decision affects future litigation due to the split opinion across courts. If legislative intent shows a trend toward broadening the scope of § 1782 to

better assist in “foreign or international tribunals,” it would be assumed that the scope may eventually include all arbitral tribunals, including private ones. To date, Congress has made no distinction between governmental tribunals and private tribunals in § 1782, although when Congress amended § 1782 to include “foreign administrative and quasi-judicial agencies” as tribunals, it showed the legislative intent to expand discovery beyond conventional courts. See *Republic of Kazakhstan v. Biedermann Int’l.*, 168 F.3d 880 (5th Cir. 1999).

Even though the court in *Norfolk Southern* made the distinction between the arbitral tribunal in *Intel* and its own case, these distinctions do not seem to warrant barring federal courts from ordering discovery for private arbitral tribunals. The factors used by the Intel

court to determine whether discovery was compellable for a foreign tribunal are discretionary. In *re Heraeus Kulzer*, 2009 WL 2058718 (N.D. Ind. Jul. 9, 2009). A court should not treat the omission of “private arbitral tribunals” in § 1782 as a blanket decision governing each discovery request for the proceedings in such a tribunal. On the contrary, precedent shows that the majority of courts deliberating on the same issue made the opposite distinction. The holding in *Norfolk Southern* does not resolve the problem of determining which tribunals are covered under § 1782. Instead, it exacerbates the problem because it follows the minority view, contradicting legislative intent.

Submitted by
Carly M. Toepke, Chicago, Illinois

BRIEFLY NOTED

Prolonging the Battle for Open Legal Markets in India

By Sumeet H. Chugani and Xingjian Zhao

A decision by the Mumbai High Court has further limited the scope of legal practice by international law firms in India. On December 17, 2009, the court held that India’s central bank may not license foreign law firms to practice, even in a non-litigious advisory capacity, unless members fulfill the requirements of India’s Advocates Act of 1961 (1961 Act).

The decision by the High Court of Judicature in Mumbai rendered existing licenses for foreign law firms invalid if their members failed to follow certain regulatory prerequisites. As a result, the affected law firms may neither litigate, nor advise clients in India without conforming to onerous local certification. For example, the 1961 Act effectively blocks bar membership to graduates of foreign law schools. Moreover, Indian bar membership requires passage of India’s articulated clerks examination. Previously,

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international lawyers were permitted to draft contracts, advise business clients, and perform transactional tasks without fear of breaching Indian laws. This is no longer the case. The High Court decision has extended the reach of the 1961 Act to transactional practitioners—imposing the same requirements as litigators. The court found that the legislators’ intent in enacting the 1961 Act was to create one class of lawyers for both “litigious and non-litigious matters.” Therefore, according to the High Court, previous deregulation of the non-litigious legal sector was misguided.

For years, lawyers at foreign firms have looked for opportunities to tap into the multibillion dollar Indian market. They understand the impact that open markets will have for this growing democracy. Set to be the third largest economy by 2035, India’s artificial barriers to the influx of legal professionals, and consequently international business, continues to be criticized by both domestic and foreign corporate interests as a major hindrance to India’s economic development. This new High court decision further constrains the influx of international capital.

By opening its legal market, India will undoubtedly benefit from market liberalization, pull more investment into the South Asian region, and foster better trade relations with international partners. The presence of internationally recognized legal service providers will help mitigate the risks associated with investment in India.

Such was the case in China when it opened its legal sector on July 1, 1992. The Indian High Court's rationale disallows the replication of this seemingly win-win situation in India. Law firms still eagerly await the liberalization of India's legal sector—this decision will undoubtedly prolong the battle. ♦

Chair's Column

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Conference of Private International Law. The Special Commission addressed the practical operation of the Hague Service and Evidence Convention.

- The International Arbitration Committee is working with the ABA's "Ethics 20/20 Commission" to address counsel ethics in international arbitration proceedings, which are often seated in a jurisdiction other than where the attorney is licensed. Further, opposing counsel are often licensed in different jurisdictions from one another, and the law of yet another jurisdiction may govern the dispute. Which set(s) of ethics rules should apply, and is an unlevel playing field created if the conduct of opposing counsel is governed by different rules of the road?

The Section provides more cutting-edge programming on commercial dispute resolution than any other organization in the world. Each of our seasonal meetings features a track dedicated solely to dispute resolution. Here's a sampling from the upcoming Spring Meeting in New York (April 13–17): "Common Law Summary Judgment in International Arbitration?"; "So You Want to Be an Arbitrator? A How-To for Would-Be Arbitrators"; "International Investment Arbitration Procedural Roundtable"; "Rules of Engagement: Avoiding the Pitfalls in Cross-Border Electronic Discovery"; "A Debate on Stolt-Nielsen Class Arbitration and International Parties"; "Case Law Under the Brussels I Regulation: An Update and Thoughts About Alignment with U.S. Jurisdiction"; "The Art of Cross Examination in International Arbitrations"; "Personal Liability for Directors and Officers: The Next Wave in 'Economic Melt-down' Litigation"; "Cutting Red Tape and Unlocking Blocked Assets: ADR as a Strategic Vehicle in Developing Countries"; "Analyzing Legitimate Expectations in the Context of Fair and Equitable Treatment Claims: Does the Glamis Gold Award Signal a Restoration in the Law of State Responsibility?"; "Choice of Law/Forum: U.S., UK, Singapore or Hong Kong"; "Libel Tourism' Litigation: Should the United States Be Exporting the First Amendment?"; "The Fundamentals of Cross-Border Litigation and Arbitration"; and "Regulating Attorney Conduct in Arbitration: The Search for Transnational Standards." No other conference offers such an embarrassment of riches for

the international dispute resolution practitioner.

There's also plenty of programming in between seasonal meetings. This February, the Section's fledgling International Mediation Committee partnered with the International Chamber of Commerce to present a conference in Paris on "Managing Risks and Getting Results: How to Use Mediation Effectively in International Business Disputes." During the same week, on the other side of the world in Sydney, Australia, the Section presented a program on the "Art of Persuading Judges" featuring moot court arguments based on hypothetical parallel proceedings in the United States and Australia. U.S. Supreme Court Justice Antonin Scalia and a comparably distinguished panel of Australian justices served as the judges. Last September's conference on "The Resolution of Russia-Related Disputes: The Next Wave" was so successful that we are going back to Moscow for another dispute resolution conference on September 14. In June 2009, the Section partnered with the International Bar Association to present a conference in Vienna on "The Future of Transnational Litigation." It was the third in a series of such conferences, with the prior events being staged in Rome and Miami. Dispute resolution topics also feature prominently in our teleconference series, including recent offerings on the enforcement of foreign arbitral awards in India and Russia.

And then there are publications. For several years, the International Arbitration Committee has published *The International Arbitration News*, featuring practice-oriented articles and case notes. This year, the scope of that publication has expanded to cover litigation and mediation topics as well. The Section also offers many fine books in this area, including the bestselling *International Litigation Strategies and Practice*, edited by Barton Legum. The stellar Year-in-Review submissions of our disputes committees keep practitioners up to date on recent developments.

We're working hard to provide our members with tools to help them continue to become better lawyers, and like our members, we, too, are always striving to improve. If you have an idea for a policy initiative, program, publication, or other project, take it to one of our committees. You will find an environment that is welcoming to new members and fresh ideas. ♦