Among the many benefits of international arbitration, one frequently overlooked is the parties’ ability to define the scope of interim measures that are available pending a final award in the arbitration. All too often, parties agree to boilerplate arbitration clauses without giving any thought to the need for, or availability of, interim measures — such as injunctions and attachments — to preserve the status quo and protect the arbitral panel’s ability to render an effective award.

The failure to consider interim measures when drafting international arbitration agreements may lead to unexpected and potentially devastating consequences. In some jurisdictions, parties who chose arbitration to avoid the expense and publicity of litigation may find their dispute in a very expensive and public court proceeding under the guise of an application for an injunction or order of attachment “in aid of” the arbitration proceeding. These “in aid of” litigations often take on a life of their own — complete with pleadings, discovery, briefs, affidavits, court arguments, and even evidentiary hearings. On the flip side, in other jurisdictions, parties may find themselves unable to obtain effective interim relief with the result that a victory in the arbitration is meaningless because the status quo is altered significantly or the assets at issue are dissipated before the award is rendered, confirmed, and enforced.

Fortunately, these consequences can be avoided by choosing the forum and procedures for interim relief at the time the arbitration agreement is drafted. The parties may define the scope of interim measures by providing for such relief in their arbitration agreement, by choosing arbitration rules that empower the arbitrators to award interim measures, or by choosing to exclude the issue of interim measures from the scope of their arbitration agreement and expressly-reserving the right to seek interim measures in local courts.¹

This article describes the default rules for interim measures under the principal international arbitration rules, the choices parties have to depart from these default rules, and some practical considerations when making those choices.
The International Litigation Committee has had a banner year and is gearing up for another.

Our Committee newsletter was selected by the ABA Litigation Section leadership as the best newsletter of the year within its category, reflecting the extraordinary efforts of Ed Mullins and Jim Loftis along with their terrific staffs (and, in particular, Stephanie Schwausch). Ed and Jim are always in search of new topics and authors so please let us know if you’d like to write an article or suggest a subject matter.

The Committee’s Darfur project represents some of the most important work currently being done by the ABA. At the annual meeting in Hawaii this past August, our Committee recognized the work of Salih Mahmoud Osman, a Sudanese lawyer recently elected to that country’s parliament, who has worked tirelessly on behalf of the victims of the genocide. The ABA House of Delegates approved the resolution drafted by our Committee and sponsored by the Section of Litigation, calling on the United States government to take increased action to halt the ongoing tragedy, including passage of pending legislation that had stalled at the house conference stage. Now, the Committee is working with Section leadership to establish a team of lawyers from around the U.S. who would travel to Africa to train Sudanese lawyers on best practices for locating, collecting, and presenting evidence of the genocide to the International Criminal Court, which has launched an investigation of the matter pursuant to a referral from the United Nations Security Council.

We have also planned a terrific set of MCLE panel discussions on international litigation topics. Our October teleconference on arbitration in China, organized by Brooks Allen and chaired by David Miyamoto, was a huge success with over 125 participants around the globe. Topics included the enforceability of arbitral awards in the PRC, including those awarded by Hong Kong tribunals, and limitations imposed by PRC law on the ability of companies, including foreign entities, to select arbitration. Future teleconferences are being planned on the issue of international class actions, particularly in the securities fraud field, the jurisdiction of American courts over alleged fraudulent conduct abroad, and discovery issues arising when documents or other information are in the possession of foreign subsidiaries or affiliates.

We are also continuing to increase our ties to other bar associations, including the ABA Section of International Law and the Union Internationale des Avocats. Both of us will be speaking on a panel regarding comparative class action issues at the UIA’s annual Congress in Brazil in early November. The Committee is co-sponsoring with the UIA a winter seminar in Sestriere, Italy in February 2007 on the topic of litigating representations and warranties in the M&A field (contact either of us for more information). The Committee is also working on programs for the UIA annual Congress to be held in Paris in November 2007 and a jury trial program to be held in Barcelona during 2007.

Please mark your calendars for the Section Annual Meeting to be held in San Antonio April 11-14, 2007 and let us know if you have any ideas for a program or breakfast meeting.

Most critically, we will be continuing to examine the key cutting edge issues that confront us as international litigators, both in the private and public sectors.

Co-Chairs’ Note

by Louis F. Burke and Jerome C. Roth
Interim Measures Under the AAA-ICDR, ICC, and UNCITRAL Rules

In recent years, the principal international arbitration rules have been amended to grant arbitrators specific authority to award interim measures pending final resolution of the parties’ dispute. Indeed, some rules procedures allow the parties to obtain interim relief before the arbitral panel is appointed. Arbitral panels now are empowered to award interim relief under all the major international arbitration rules: the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution of the American Arbitration Association (ICDR-AAA), the LCIA Arbitration International (LCIA), and the United Nations Commission on International Trade Law (UNCITRAL).

The ICDR-AAA, ICC, and UNCITRAL rules provide arbitrators with broad discretionary authority to order any interim measures the arbitrators deem “necessary” or “appropriate.” For example, Article 21 of the AAA-ICDR International Arbitration Rules, entitled “Interim Measures of Protection,” provides: “At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property . . . Such interim measures may take the form of an interim award, and the tribunal may require security for costs of such measures.”

The ICC Rules contain a similar grant of broad discretionary authority to the arbitral tribunal to award any interim measures it deems “appropriate.” Under the heading “Conservatory and Interim Measures,” Article 23(1) of the ICC Rules provides:

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving the reason, or of an award, as the Arbitral Tribunal considers appropriate.

Article 26 of the UNCITRAL rules contains similarly broad grant of authority to arbitrators to award interim measures: “At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of goods forming the subject matter of the dispute, such as ordering their deposit with a third person or the sale of perishable goods . . . Such interim measures may be established in the form of an interim award. The tribunal shall be entitled to require security for costs of such measures.”

Ambiguity: A Benefit or a Detriment?

While these rules authorize arbitral panels to award or order interim measures, they do not specify the type of interim relief that may be granted or the standard to be applied when granting such relief. The broad language “whatever interim measures it deems necessary” in the AAA-ICDR rules, “any interim or conservatory measure it deems appropriate” in the ICC rules, and “any interim measures it deems necessary” in the UNCITRAL rules leaves open the possibility that an arbitral panel could award not only traditional interim measures such as injunctions and attachments, but also creative measures not anticipated by the parties when they entered into their agreement to arbitrate.

This ambiguity, of course, could be a benefit or a detriment to the client depending upon the nature of the underlying agreement or relationship. The parties may want to provide the arbitrators with the broadest possible discretion to fashion interim measures appropriate to the particular circumstances that exist when a dispute arises. If that is the case, then parties may want to agree upon the broad, discretionary grants of authority in these international arbitration rules.

In other agreements or relationships, however, the parties may wish to limit the arbitrators to awarding standard interim measures — such as an injunction to preserve the status quo or an attachment to secure

Continued from page 1
The parties should consider whether it is in their best interests to leave the arbitrators with broad discretion to award interim measures.

Article 25.1 of the LCIA rules provides that the arbitral tribunal may order a party to provide security for all or part of a claim and preserve assets pending the arbitration. Under those circumstances, the parties can and should specify in their arbitration agreement the types of interim measures that may be awarded by the arbitrators.

Another issue left open by the various arbitration rules is the standard to be applied by the arbitrators when granting interim relief. Unlike the typical rules for granting interim relief in court, the AAA-ICDR, ICC, and UNCITRAL rules do not define the standard to be applied by the arbitral tribunal when considering a request for interim measures. Parties may argue that the same standards should apply as would apply in a court under the law governing their underlying agreement.

For example, parties may argue that arbitrators should award an interim injunction only upon a showing of a likelihood of success on the merits, irreparable harm, and a balance of the equities in favor of granting relief. This standard, however, is not expressly required by any of these rules.

Indeed, an equally plausible argument can be made that the only criteria for interim relief pursuant to these rules are whether the arbitrators deem a particular interim measure to be “necessary,” under the AAA-ICDR and UNCITRAL rules, or “appropriate,” under the ICC rules.

Once again, the parties should consider when they are drafting their arbitration agreement whether it is in their best interests to leave the arbitrators with broad discretion to award interim measures based on nothing more than a determination that such relief is “necessary” or “appropriate,” or whether the parties would be better served by agreeing upon a specific standard for granting interim relief. If the latter, then the parties should set forth the standard in their agreement to arbitrate, for example, by agreeing that the arbitrators will apply the law of a particular jurisdiction to any claim for interim measures.

**More Specificity in the LCIA Rules**

The LCIA Arbitration International rules provide a more detailed description of the arbitral tribunal’s authority to order interim relief, including a more specific description of the types of interim measures that may be awarded, but also leave open the same question of the standard to be applied. Article 25.1 of the LCIA rules provides that the arbitral tribunal may order a party to provide security for all or part of a claim, to preserve, store, or dispose of property related to the subject matter of the dispute, and to order any other remedy on a provisional basis that the tribunal would have the power to order in a final award:

The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

(a) to order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by a way of deposit or bank guarantee or any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such a manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing such security. The amount of any losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;

(b) to order the preservation, storage, sale, or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and

(c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

As with the other international arbitration rules, the LCIA rules also authorize the arbitrators “to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate.”
The LCIA rules provide greater guidance on the types of interim measures that may be awarded by an arbitral tribunal than is provided in the other international arbitration rules, but the LCIA rules suffer from the same ambiguity on the standard to be applied when the tribunal considers applications for interim measures. Accordingly, if the parties choose the LCIA rules to govern their dispute, they should also consider whether they want to define in their agreement the standard the arbitral tribunal must apply when deciding an application for interim measures.

Timing Is Everything

When choosing international arbitration rules, parties also should consider the practical issue of timing. Under ordinary circumstances, it is not unusual for several weeks or even months to pass between the time arbitration is commenced and the arbitral tribunal is formed and ready to meet to consider an application for interim measures.

The AAA international arbitration rules provide in Article 37 for the appointment of a single, emergency arbitrator to decide applications for interim measures before the arbitral tribunal is constituted. This provision may be of little assistance, however, if one party asserts that the dispute is not within the scope of the agreement to arbitrate. Under those circumstances, the arbitral tribunal must first decide whether the dispute is properly before it before it can award any relief, interim or otherwise. While that issue is being decided, assets can be dissipated or the status quo can otherwise be altered beyond repair.

These practical considerations may force parties into a judicial forum to obtain interim measures. As described below, however, local courts are not always eager or willing to intervene in a dispute that the parties have agreed would be resolved through arbitration.

Going to Court for Interim Measures and the New York Convention

The principal international arbitration rules also contemplate that the parties may apply to a court for interim measures, particularly during the period of time when the arbitration has been commenced but the arbitral panel is not yet in a position to consider interim relief.

The ICC arbitration rules provide in Article 23(2) that “the parties may apply to any competent judicial authority for interim or conservatory measures” before the file is transmitted to the arbitral tribunal and at other times if appropriate. The AAA-ICDR international arbitration rules provide in Article 21(3) that “[a] request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”

U.S. courts, however, are divided over whether a court may order interim measures when the parties have agreed to arbitrate a dispute and their agreement falls within the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention. This international treaty is designed to ensure that signatory nations will enforce provisions for arbitration in international commercial agreements and will recognize and enforce arbitral awards made in other signatory nations.

Under the New York Convention, once a court determines that the parties have entered into a valid and enforceable agreement to arbitrate an international commercial dispute, the court “shall . . . refer the parties to arbitration.” Some courts have interpreted this mandatory language as prohibiting it from taking any action other than compelling the parties to arbitrate their dispute, including arbitration of any provisional remedies. These courts reason that when the parties include a standard arbitration clause in their contracts requiring arbitration of “any dispute arising out of [their] agreement, it would violate both the New York Convention and the parties’ agreement to allow one party to litigate the issue of interim measures in a court.”

These courts conclude that “the very purpose behind the Convention is to bring about the settlement of appropriate disputes solely through arbitration proceedings, and to allow a resort to [courts for interim measures] would seem to put an unnecessary and counterproductive pressure on a situation which could otherwise be
The parties easily can avoid any confusion caused by these decisions by addressing the issue of interim measures in their agreement to arbitrate. It is advisable to include agreements on forum selection, choice of law, personal jurisdiction, and service of process as well.

Settled expeditiously and knowledgeably in an arbitration context.

Other courts disagree, holding that, while the New York Convention requires that a court direct the parties to arbitration for the underlying dispute, “[t]here is no indication in either the text or the apparent policies of the Convention that resort to [interim measures in a court] was to be precluded.”

The parties easily can avoid any confusion caused by these decisions by addressing the issue of interim measures in their agreement to arbitrate. Even in those jurisdictions where courts have held that the New York Convention prevents courts from ordering interim measures in aid of an international arbitration, courts have held that parties to an arbitration agreement may preserve their right to seek interim relief from the courts by expressly excluding the issue of interim relief from the scope of the disputes they have agreed to arbitrate or expressly agreeing that disputes over interim relief will be heard by a court. These courts reason that the New York Convention applies only to disputes that the parties have agreed to submit to arbitration. To the extent the parties have decided not to submit a dispute to arbitration, the New York Convention does not apply.

This interpretation of the New York Convention is supported by Article V of the New York Convention itself, which provides that it does not apply to “matters beyond the scope of the submission to arbitration” or to matters “not contemplated by or not falling within the terms of the submission to arbitration.” When the parties expressly choose to have the interim relief portion of their dispute resolved in a court, even though the dispute will be resolved on the merits in arbitration, the New York Convention does not apply.

Parties to an international arbitration agreement may reserve their right to seek interim measures in a court by stating that right in their agreement. In a recent case, this was accomplished by stating in the arbitration agreement that either party could apply “to any court in the State of New York to seek injunctive relief to maintain the status quo until the arbitration award is rendered or the controversy is otherwise resolved.”

It is important to consider, however, that such language merely preserves a party’s right to seek interim relief in a court. In international arbitration agreements, it is advisable to include agreements on forum selection, choice of law, personal jurisdiction, and service of process as well. Otherwise, a party seeking interim relief in aid of an international arbitration could spend weeks or months arguing over procedural and jurisdictional issues, including the complicated issue of serving a person or entity that may be outside the U.S., when a primary purpose of reserving the right to seek interim relief in a court was to avoid delays in obtaining relief before the arbitral panel is constituted.

Conclusion: The Power to Choose

Parties to arbitration agreements have a number of choices to make when it comes to ensuring that appropriate interim measures will be available in the event of a dispute. They should look carefully at the provisions authorizing interim measures when choosing the arbitration rules to govern any dispute. They also should consider whether they want the issue of interim measures decided by the arbitral tribunal or by a court. If they choose to have the arbitrators decide the issue of interim measures, the parties should consider describing in their arbitration agreement the types of interim measures the arbitrator may award and the standard the arbitrators must use when deciding whether interim measures should be awarded. If the parties choose to have interim measures decided by a court, they should expressly reserve the right to make an application to a court in their arbitration agreement. And, regardless of which forum or rules the parties choose, they should set forth in their agreement appropriate provisions governing choice of forum, choice of law, consent to jurisdiction, and service of process to ensure that the desire for interim measures to preserve the status quo is not frustrated by disputes over procedure and jurisdiction.

Continued on page 26
Must a lawyer who appears as counsel in an arbitration proceeding be licensed to practice in the jurisdiction where the arbitration takes place? This issue has surged to life in the United States in the past ten years and presents a potential conflict between two important public policy interests: a jurisdiction’s interest in regulating the legal profession versus the national and international interest — reflected in national arbitration law and international conventions — of encouraging private alternative dispute resolution.

The issue has high stakes. Parties have claimed that a non-admitted lawyer’s participation in an arbitration constitutes a basis for striking the pleadings filed by the lawyer or even for vacating the resulting arbitration award. Non-admitted lawyers may also be unable to recover fees for work done in arbitrations outside their own jurisdictions. The unauthorized practice of law may lead to disciplinary measures or — in some jurisdictions — criminal prosecution. If nothing else, the presence of a non-admitted lawyer in an arbitration may lead to protracted litigation in local courts to determine what consequences, if any, should follow.

The current trend, both in the United States and in foreign jurisdictions, favors allowing non-admitted lawyers to appear as arbitration counsel on a temporary basis. But the law in this area is far from uniform and offers many potential traps for an unwary arbitration lawyer.

The Arbitral Tradition of Freedom of Representation

The law of commercial arbitration generally seeks to honor the parties’ agreement as much as possible, including giving great flexibility to the parties to craft their own arbitral procedures. This preference generally includes a party’s right to be represented by counsel of choice or, for that matter, by no counsel at all. Indeed, lawyers were the exception, not the rule, in business arbitrations in the United States in the early 20th century. As one court put it in 1925, “[t]o permit participation by counsel as a matter of right would be fatal to the efficacy of arbitration.”

As arbitration grew in popularity as a method for resolution of commercial disputes, parties invariably saw the advantage of being represented by attorneys in arbitration just as they did in litigation. Most modern arbitration rules expressly provide that parties may be represented by whomever they wish, either by legal counsel or by nonlawyers.

The principle of freedom of representation came to be viewed as part of the “common law” of international commercial arbitration. While it was formalized by statute in some countries, practitioners simply took it for granted in the United States and many other jurisdictions.

Before the late 1980s, parties to arbitrations rarely questioned their opponents’ right to be represented by a lawyer who was not admitted in the jurisdiction where the arbitration happened to be sited. When such challenges were raised, they were usually unsuccessful. For instance, a U.S. court held in 1982 that a New Jersey lawyer did not engage in the unauthorized practice of law by acting as counsel in a New York arbitration, citing the fact that an arbitration is “not a court of record,” is of “an informal nature,” and “has no provision for the admission pro hac vice of local or out-of-state attorneys.” And a court in Barbados concluded that the national regulation of the legal profession “did not affect . . . the common law right of a party, if permitted by the arbitrator, to be represented by someone chosen by him.”
The ABA's Model Rule 5.5 generally prohibited lawyers from engaging in the practice of law in a jurisdiction where doing so violated that jurisdiction's regulation of the legal profession.

**Bombshells: Turner and Birbrower**

Two judicial decisions from opposite sides of the world made major ripples in what appeared to be the settled calm of freedom of representation.

In a 1988 decision called *Turner (East Asia) Pte Ltd v. Builders Federal (Hong Kong) Ltd.*, the High Court of Singapore ruled that foreign lawyers could not represent parties in arbitrations sited in Singapore. While the decision may have been partly motivated by a desire to maximize the opportunities for Singapore's local bar to participate in international arbitrations, it ironically had the opposite effect of encouraging parties to site their arbitrations outside Singapore in jurisdictions more friendly to freedom of representation.

The Singapore Parliament recognized this weakness and amended the law in 1992 to allow foreign counsel to appear in arbitrations sited in Singapore, although it still required foreign lawyers to associate Singapore counsel for matters involving Singapore law. Even this restriction was eliminated in 2004, because it was found to be unnecessarily detrimental to Singapore's attractiveness as an arbitration venue.

Today, most major arbitration jurisdictions outside the United States place no limits whatsoever on representatives in international arbitrations, and many others require representation by lawyers but do not require that the lawyers be admitted to the local bar.

The situation in the United States is less uniform. The controversy erupted in 1998 with the notorious decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, in which the Supreme Court of California ruled that a New York law firm violated California's ban on the unauthorized practice of law because its lawyers performed legal work in California, including preparing for an arbitration, without being licensed in California. The court held that the firm's client was not required to pay for the firm's "illegal local services." Interestingly, the Birbrower court expressly stated that the case did not involve out-of-state arbitration counsel, because none of the Birbrower firm's work actually occurred in arbitration (the parties settled the case before any arbitration was necessary). However, the court hinted strongly (albeit in a footnote) that it would not be inclined to treat arbitration any differently absent legislative direction. Thus, even though Birbrower itself did not involve an arbitration, it was roundly viewed as articulating the position that, at least in California, freedom of representation in arbitration was limited by local bar regulations.

Because the practice of law in the United States is regulated by the several states, not by the federal government, arbitration practitioners faced the uncertainty that other state courts or bar regulators might follow the course charted by Birbrower. There was, however, no certainty in the matter. Most states' rules of professional conduct — many of which tracked the Model Rules of Professional Conduct promulgated by the American Bar Association — did not address the issue clearly. Although the ABA's Model Rule 5.5 generally prohibited lawyers from engaging in the practice of law in a jurisdiction where doing so violated that jurisdiction's regulation of the legal profession, it provided no guidance as to whether appearance in an arbitration would constitute such a violation. Thus, as of 1998, there was a significant risk that the law would not be settled until each state's high court had decided its own version of Birbrower.

**One Response — ABA Model Rule 5.5**

In an effort to encourage uniformity and transparency, the ABA formed a task force of experts to study several issues raised by the multijurisdictional nature of modern U.S. law practice, including the prevalence of out-of-state counsel in arbitrations. After receiving extensive testimony and written submissions and conducting an exhaustive review of literature, the ABA Task Force recommended, and the ABA adopted, amendments to Model Rule 5.5.

The amended Model Rule 5.5 sets forth certain specific circumstances in which a lawyer admitted and in good standing in one U.S. jurisdiction may provide legal services on a temporary basis in another. One of the permitted situations is where the temporary services are in or reasonably related to a pending or potential arbitration, mediation, or other
The ABA Model Rule represents an effort to craft a middle ground between pure freedom of representation and strict adherence to local bar requirements. The proviso that the services “arise out of or [be] reasonably related to” the lawyer’s practice in the lawyer’s own jurisdiction places an outside limit on the extent of a lawyer’s out-of-state arbitration work and echoes a similar limitation in the American Law Institute’s Restatement of the Law Governing Lawyers. It is unclear how restrictive such a limitation actually is, since a lawyer with a reputation as skilled arbitration counsel will doubtless be able to argue that every arbitration engagement “arises out of” practice in the home jurisdiction.

The ABA’s Model Rule has made significant progress in achieving clarity in state regulation of out-of-state counsel appearing in arbitrations. Sixteen states have adopted the Rule’s arbitration provision essentially unchanged: Arkansas, Delaware, Georgia, Indiana, Iowa, Louisiana, Massachusetts (effective January 1, 2007), Minnesota, Missouri, Nebraska, New Mexico, Ohio (effective February 1, 2007), Oregon, Pennsylvania, Utah, and Washington.

Some other states have adopted the Rule but imposed their own additional requirements. For instance, Arizona requires out-of-state attorneys to inform their clients that they are not admitted to practice in Arizona and to obtain “informed consent” to the representation. Both Florida and North Dakota require payment of a fee to the state bar, and South Dakota requires payment of state sales tax. North Dakota limits practice by a nonresident attorney to five years, and Florida also limits an out-of-state lawyer to three Florida arbitrations per year. However, none of Florida’s restrictions applies to international arbitrations.

A minority of states has rejected the Model Rule or adopted it with major substantive limitations. California, for instance, adopted a statute after Birbrower that permitted out-of-state counsel to appear in arbitrations, but required the association of a California-admitted attorney as “attorney of record.” Furthermore, the California statute is scheduled to sunset on January 1, 2007; unless renewed, California will presumably revert to the restrictive regime heralded by Birbrower. Maryland also requires that out-of-state counsel associate local counsel for arbitrations. While the involvement of locally-admitted counsel may make eminent sense where the litigation is governed by local law, parties may view it as an unnecessary expense and inconvenience if the substantive issues are to be decided under the law of another state or a foreign country.

Other states are even more restrictive. For instance, where the Model Rule requires that the out-of-state arbitration relate only to the lawyer’s practice in a jurisdiction where the lawyer is admitted, Idaho, North Carolina, and South Carolina require that the arbitration relate to the lawyer’s representation of an existing client in such a jurisdiction. New Jersey has a similar requirement, although it may also be satisfied if the dispute itself originates in a state where the lawyer is admitted to practice.

Until this year, Nevada appeared to exemplify one of the most restrictive approaches of all, with Nevada bar regulators taking the view that no unadmitted lawyer could appear as arbitration counsel. The Supreme Court of Nevada appeared to relax this position with a new rule effective May 1, 2006, which permits occasional practice by an out-of-state attorney in certain situations, including in a matter incident to work being performed in a jurisdiction in which the lawyer is admitted and in a matter in which the out-of-state attorney is associated with Nevada counsel who actively participates in the representation.

This varied landscape is also affected by the fact that many states have different rules for international arbitrations. Such rules are generally more hospitable to the party’s choice of representative. Thus, some states that place restrictions on the appearance of out-of-state counsel in arbitrations — most notably California — expressly waive those restrictions in the case of international arbitrations.
[M]any U.S. jurisdictions still have no express rule addressing out-of-state arbitration counsel.

Similarly, the annual limit of three arbitrations for out-of-state counsel does not apply to international arbitrations.

**Other Responses — Recent Judicial Decisions**

While the ABA Model Rule offers welcome clarity for arbitrations sited in states that have adopted it, many U.S. jurisdictions still have no express rule addressing out-of-state arbitration counsel. In those states, an out-of-state lawyer appearing as arbitration counsel still faces a potential risk of a Birbrower-style challenge.

In 2003, an intermediate appellate court in Illinois rejected an effort to vacate a Chicago arbitration award on the grounds that the victor was represented by a California attorney not licensed in Illinois. Even though Illinois has not adopted ABA Model Rule 5.5, the court viewed it as persuasive “in that it reflects the modern trend in the law of multijurisdictional practice.” The Illinois court declined to follow Birbrower, finding that it created “too harsh a result.”

The Supreme Judicial Court of Massachusetts recently addressed a similar challenge in Superadio Limited Partnership v. Winstar Radio Productions, LLC. Superadio, which lost an arbitration sited in Massachusetts, moved to vacate the award on two grounds, arguing, among other things, that the victorious party was represented by an attorney who was not admitted to practice in Massachusetts. Superadio claimed that an award obtained through representation by an out-of-state lawyer was procured by “undue means” and should therefore be vacated under Massachusetts’ state arbitration act. The Massachusetts court also decided a companion case, Mscisz v. Kashner Davidson Securities Corp., in which plaintiffs in a securities arbitration sited in Boston sought a declaratory judgment that the defendants’ attorneys, who were admitted in New York but not Massachusetts, would engage in the unauthorized practice of law if they appeared in the arbitration and that any resulting award would be procured by undue means.

The Massachusetts court resolved the cases by holding that, even assuming arguendo that an out-of-state lawyer engaged in the unauthorized practice of law by appearing in a Massachusetts arbitration, such a violation would not constitute “undue means” warranting vacatur of an arbitration award. The court, therefore, did not decide whether appearance by out-of-state counsel in a Massachusetts arbitration constituted the unauthorized practice of law. The court’s brief discussion of the issue, however, suggested sympathy with the Model Rule approach and skepticism toward the position ascribed to Birbrower. The Massachusetts court cited the ABA Model Rule approvingly, noting that it was under consideration by the court’s advisory Committee, and rightly observed that Birbrower was inapposite because it did not involve arbitration. Shortly before this article went to press, the court issued notice that it was adopting the ABA Model Rule verbatim, effective January 1, 2007.

Two other decisions are also worth mentioning. In 2004, the Supreme Court of Ohio upheld a disciplinary action against a respondent who “regularly” represented claimants in securities arbitrations sited in Ohio, finding that the respondent’s actions constituted the unauthorized practice of law. However, it is not clear from the opinion whether the respondent was even a lawyer, or whether his arbitration work in Ohio would have been permissible had it arisen out of or related to a lawful practice in another state.

The Supreme Court of Arizona also held in 2000 that a disbarred attorney violated his disbarment order by appearing as arbitration counsel. The continuing relevance of these decisions to the situation of out-of-state arbitration counsel appears to be limited, however, because Arizona and Ohio have since adopted versions of the ABA Model Rule addressing the issue squarely.

**Do Arbitration Representatives “Practice Law” at All?**

An interesting wrinkle in the recent Massachusetts decisions is that the court left open the possibility that representing a party at arbitration might not constitute “the practice of law” at all, even though none of the parties made that argument. The court may have found it prudent to suggest this possibility in light of a Massachusetts statute, enacted in 1935,
that provides that “[n]o individual, other than a member, in good standing, of the bar of this commonwealth shall practice law” unless authorized to appear pro hac vice in court.37 Certainly, the easiest way to reconcile freedom of representation in arbitration with the plain text of such a statute would be to hold that arbitration counsel does not “practice law.” But such an approach would be doctrinally questionable in light of established definitions of the practice of law, which are generally broad enough to include the activities of arbitration counsel.38 Indeed, the ABA’s new Model Rule 5.5 is clearly drafted on the assumption that arbitration counsel engages in the “practice of law”; if it were otherwise, an exception for temporary practice by arbitration counsel would be unnecessary. Exempting arbitration proceedings from the definition of the “practice of law” may well create practical difficulties in other aspects of legal practice, such as professional insurance coverage and the applicability of legal ethics requirements.

The obvious advantage of contending that representation in arbitration is not the “practice of law” is that it saves the traditional right of parties to be represented by nonlawyers at arbitration. There may be other ways to reach this desirable result without holding that lawyers do not practice law when they appear in arbitrations. For instance, there are some activities, such as negotiating commercial contracts, that clearly constitute the “practice of law” when performed by a lawyer applying legal training and expertise, yet that are not off limits to nonlawyers, provided that the nonlawyers do not hold themselves out as licensed attorneys and do not purport to render legal advice. Whether a particular activity constitutes the “practice of law” might be determined not solely by the nature of the activity, but also by other factors, such as the professional qualifications and background of the person performing the task and the expectations of the client. One state high court appeared to draw this distinction when it noted that “some actions which may be taken with impunity by persons who have never been admitted to the practice of law, will be found to be in contempt if undertaken by a suspended or disbarred attorney.”39

**Representation by Lawyers Admitted Outside the United States**

A separate issue arises when parties wish to be represented by counsel licensed in another country in a U.S.-sited arbitration. Research has not disclosed a judicial decision addressing this issue. The ABA has recommended a rule that would authorize the temporary practice of law by foreign lawyers in arbitration proceedings in circumstances similar to those set forth in ABA Model Rule 5.5, provided the lawyer is “a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.” Only four U.S. jurisdictions — Florida, Georgia, Pennsylvania, and the District of Columbia — have adopted this rule or a similar policy specifically allowing temporary practice by foreign lawyers.

**Conclusion: Be Careful Out There**

Lawyers preparing to represent a party in an arbitration sited in a jurisdiction in which they are not admitted to practice must be careful not to run afoul of local bar requirements. While the practice in many countries other than the United States appears to favor freedom of representation in arbitrations, the practice in U.S. jurisdictions is far from settled or uniform. Where the jurisdiction has adopted Model Rule 5.5 or a similar rule, compliance should be straightforward. Where no clear rule is in place, counsel would be well advised to associate a locally-admitted attorney for the arbitration. Counsel might also consider seeking express permission from the arbitrator to appear in the proceeding, as reviewing courts will occasionally treat such determinations as discretionary where there is no applicable statute or rule. Ultimately, however, the landscape in the United States is subject to change until all states have either a rule or a high court decision squarely addressing the issue, and caution remains the best approach for counsel not licensed in the jurisdiction where the arbitration is sited.
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See, e.g., AAA, Comm. Arb. R., R-24 (Sept. 15, 2005) (“Any party may be represented by counsel or other authorized representative.”); JAMS Comprehensive Arb. R. & Proc. & Pro., R. 12 (Feb. 19, 2005) (“The Parties may be represented by counsel or any other person of the Party's choice.”); Securities Industry Conference on Arb., Arb.'s Manual 9 (May 2005) (“Parties need not be represented by an attorney in arbitration. They may choose to appear pro se or be represented by a person who is not an attorney, such as a business associate, friend, or relative.”); Rules of the LCIA, art. 18.1 (Jan. 1, 1998) (“Any party may be represented by legal practitioners or other representatives.”). The arbitration rules of the UNCITRAL, which are frequently adopted in ad hoc international arbitrations, also provide that “[t]he parties may be represented or assisted by persons of their choice.” UNCITRAL Arb. R., art. 4, adopted by G.A. Res. 31/98 (Oct. 21, 1976) (“The parties may appear in person or through duly authorized representatives.”). The arbitration rules of the UNCITRAL, which are frequently adopted in ad hoc international arbitrations, also provide that “[t]he parties may be represented or assisted by persons of their choice.” UNCITRAL Arb. R., art. 4, adopted by G.A. Res. 31/98 (Oct. 21, 1976) (“The parties may appear in person or through duly authorized representatives.”).


See, e.g., David W. Rivkin, Restrictions on Foreign Counsel in International Arbitrations, XVI Y.B. Comm. Arb. 402, 404 (1991); Julian D. M. Lew et al., Comp. Int'l Arb. Arb. 543 (2003); Michael J. Moser, Managing the Enforcement of Legal Claims and the Establishment of the Legal Rights of Others: The Court Phrased the Issue as Whether “representation of a party by an out-of-State licensed attorney at a Massachusetts arbitration proceeding constitutes the practice of law.” Id. at 250 (emphasis added); see also米 Silva, 844 N.E.2d at 616.

See, e.g., Lew, supra note 8.


See Michael Polkinghorne, More Changes in Singapore Appearance Rights of Foreign Counsel, 22 J. Int'l Arb. No. 1, at 75-79 (2005); Rivkin, supra note 8, at 412.

494 P.2d 1 (Cal. 1978).

Id. at 13.

See id. at 9 n.a.

ABA Mod. R. for Prof. Conduct 5.5(c)(3).
Using Pre-Arbitration Forum Contacts in Determining Long-Arm Jurisdiction in Post-Arbitration Proceedings

by Kenneth I. Schacter, Susan Kim, and Brian R. Hole

In June, the Second Circuit Court of Appeals decided an issue of first impression: whether pre-arbitration contacts can be used to establish personal jurisdiction in post-arbitration litigation. In Solé Resort, S.A. de C.V. v. Allure Resorts Management, LLC, the Second Circuit held that the parties' pre-arbitration contacts with New York that led to the formation of the contract at issue in an arbitration were relevant to deciding whether New York had long-arm jurisdiction over the parties in post-arbitration litigation, even though the arbitration had taken place in Miami, Florida. Surprisingly, prior to the Second Circuit's decision, no court in the country squarely had addressed, let alone decided, this important issue. As litigation relating to international arbitration expands in the United States, the Solé decision likely will become the benchmark for future litigation on this significant issue.

The Enforcement Conundrum

Post-arbitration litigation in many arbitrations is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1, et seq. Specifically, sections 9 and 10 of Title 9, which govern confirmation and vacatur of an arbitral award, respectively, provide that an "application may be made to the United States district court in and for the district within which the award was made." The FAA itself applies to arbitral awards rendered in the United States in cases involving solely domestic parties (where interstate commerce or commerce with foreign nations is involved). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention"), codified at 9 U.S.C. §§ 201-208, applies to arbitral awards rendered (1) abroad; (2) in the United States where the arbitration was between two foreign parties; or (3) where the dispute has some other nexus to foreign states. The domestic FAA (chapter 1 of the FAA) is applicable to actions brought under the New York Convention (chapter 2 of the FAA) to the extent they are not in conflict. 9 U.S.C. § 208. The FAA thus fills in the interstices in the New York Convention.

9 U.S.C. § 202, one of the provisions implementing the New York Convention, provides that "an agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the New York Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." The Seventh Circuit has interpreted § 202 to mean that "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the New York Convention." The Second Circuit has held similarly.

Both the FAA and the New York Convention provide limited bases for refusing to enforce an award. Although not without some controversy, some courts, including the Second Circuit, have applied the "manifest disregard of law" standard that many courts have found to be implied in the FAA to New York Convention awards.

While both the FAA and the New York Convention set forth procedures for post-arbitration litigation, they do not provide the court with personal jurisdiction over the parties or subject matter jurisdiction over the action. Instead, there must be an independent basis for the court to exercise such jurisdiction.

In the ordinary case, personal jurisdiction is not an issue because the post-arbitration litigation most frequently takes place where the arbitration occurred — and where the parties have consented to jurisdiction — or it occurs in a forum in which the parties are subject to general personal jurisdiction.
What is the scope of the relevant contacts for determining long-arm jurisdiction in post-arbitration litigation?

The jurisdictional conundrum arises, however, when, as in Solé, one party wishes to litigate the award's validity in a forum other than that in which the arbitration occurred and contends that the court has jurisdiction over the opposing party under the forum state's long-arm statute. In that case, the following question presents itself: what is the scope of the relevant contacts for determining long-arm jurisdiction in post-arbitration litigation?

That is the precise question answered by the Second Circuit in Solé.

The Solé District Court Decision

The Solé case involved two foreign entities, Allure Resorts Management, LLC, a Turks & Caicos company, and Solé Resort, S.A. de C.V., a Mexican company. Solé and Allure had entered into a hotel management agreement pursuant to which Allure managed Solé's resort in the Riviera Maya area of Mexico. After approximately one year of poor results, Solé terminated the agreement. As required by the contract, Allure commenced an arbitration proceeding in Miami alleging that the contract had been wrongfully terminated. Allure sought in excess of $9 million in the arbitration, and Solé counterclaimed for fraud.

A majority of a three-arbitrator panel found in favor of Allure and awarded it approximately $2 million in damages for alleged lost profits. The third arbitrator dissented from the damages award. Because both entities were foreign, and the dispute involved a hotel property located in Mexico, the arbitration was subject to the New York Convention.

Solé petitioned the district court in New York to vacate the damages award on the ground that the arbitrators had manifestly disregarded applicable law by engaging in speculation in awarding Allure future lost profits. In its petition, Solé asserted that the New York court had personal jurisdiction over Allure under New York's long-arm statute, CPLR § 302, because the underlying hotel management agreement between the parties had been solicited, negotiated, performed, and terminated in New York. Solé also argued that its fraudulent inducement counterclaim provided a jurisdictional basis because the alleged fraud occurred in New York, although it did not challenge the arbitrators' finding against it on this tort claim.

Allure moved to dismiss the petition on the ground that the New York court did not have personal jurisdiction over it, arguing that the claim made in the petition itself, which sought to vacate the award, did not arise out of its New York contacts. That is, Allure contended that, because Solé's petition challenged only the actions of the arbitrators, Allure's pre-arbitration contacts with New York were immaterial, and the only relevant fact for long-arm jurisdiction purposes was the place where the arbitration occurred. Because the arbitration occurred in Florida, Allure asserted, it was not subject to long-arm jurisdiction in New York. Allure also argued that the fraudulent inducement counterclaim could not form the basis for personal jurisdiction because the arbitration panel had ruled against Solé on this claim, and thus, according to Allure, determined that no fraud occurred.

The District Court for the Southern District of New York (Hon. Jed S. Rakoff) agreed with Allure and granted its motion to dismiss. The district court found that, since Solé was complaining only of the actions of the arbitrators, the claims in the petition did not "arise out of" Allure's pre-arbitration transaction of business in New York within the meaning of New York's long-arm statute. The district court reasoned that "the claim that Solé now seeks to lodge with this court relates to the allegedly unlawful actions of the arbitrators themselves — and none of Solé's alleged New York contacts has anything to do with the allegedly arbitrary and capricious determinations and allegedly manifest disregard of the law, which occurred entirely in Florida."

The only case that the district court cited in so holding was Crow Construction Co. v. Jeffrey M. Brown Assocs., Inc., a venue case that did not concern personal jurisdiction. Because the parties had arbitrated their dispute in Florida, the district court concluded that it did not have personal jurisdiction over Allure in New York.

The district court also held that Solé's fraudulent inducement counterclaim in the arbitration, which concerned activities in New York, could not form the basis for personal jurisdiction in the post-arbitral proceeding because, according to the court, "the arbitration panel already determined that Allure was not guilty of" fraudulently inducing the contract.
The Second Circuit Reverses

On appeal, the Second Circuit disagreed with the district court’s reasoning and vacated its order dismissing the case for lack of personal jurisdiction. It concluded that Allure’s pre-arbitration contacts with New York were pertinent to the personal jurisdiction analysis in post-arbitration litigation. The court reasoned:

We think that New York contacts underlying a contract that provides for arbitration have the requisite relationship under [CPLR] section 302(a)(1) to a claim challenging the results of that arbitration. Arbitration is entirely a creature of contract . . . Any arbitration proceeding is thus an extension of the parties’ contract with one another, a mechanism through which they attempt to ensure compliance with the terms of that contract. Without the contract, the arbitration, and its resultant judgment, a subsequent challenge to that judgment never could exist. There is therefore a substantial relationship between a challenge to the arbitrators’ decision and the contract that provided for the arbitration.14

Based on this reasoning, the circuit court held that “any transaction of business in New York in connection with a contract as to which there is an arbitration provision bears an ‘articulable nexus’ to a challenge to the arbitrators’ disposition of a dispute pursuant to that arbitration provision.”15 Thus, the court concluded, pre-arbitration contacts with a forum state are relevant to determining long-arm jurisdiction in post-arbitration litigation.

The Second Circuit observed that “[w]hile the question has not been directly addressed in the context presented by this appeal, there is case law supporting our position.”16 The court referenced several cases in which courts in fact examined the parties’ pre-arbitration forum contacts (without explaining why this was appropriate), and then held that such contacts were insufficient to support personal jurisdiction. “By implication, these cases assume that such contacts are germane to the question of post-arbitration personal jurisdiction under New York’s long-arm statute.”17 The Second Circuit rejected the district court’s reliance on Crow Construction, observing that that case involved “a motion to transfer, which requires consideration of the convenience of the parties and the location of witnesses . . . In such an inquiry, the location of an arbitration itself might be a determining factor.”18

In sum, the court held, “while New York’s long-arm statute does not extend to the full reach permitted by the United States Constitution, it is not constrained by convenience. Instead, it simply asks whether the parties’ activities in New York and the asserted claim are substantially related. And while the arbitrators’ actions themselves took place outside New York, those actions necessarily bear a substantial relationship to the events underlying the contract that created the arbitration.”19

The court also disagreed with the district court’s conclusion that the arbitrators’ finding against Solé on its fraudulent inducement claim meant that New York contacts related to that claim were not relevant for jurisdiction purposes. It held that, by “confining its decision to the facts as determined by the arbitrators,” the district court had erred:

Like Allure’s breach of contract claim, Solé’s fraudulent inducement claim arose out of events surrounding the formation and performance of the contract with Allure and formed a part of the arbitration proceedings. And while Solé does not challenge the arbitrators’ determination of the merits of either of these claims in its petition, all of the facts underlying that contract are substantially related to Solé’s claim that the arbitrators’ judgment is infirm. Thus, just as the district court should have looked to all of Allure’s contacts with New York underlying the management agreement with Solé when considering jurisdiction under section 302(a)(1), it should have looked beyond the arbitrators’ decision to that same set of facts when considering jurisdiction under section 302(a)(3).20

The Second Circuit vacated the district court’s decision and remanded the case for further consideration of Allure’s motion to dismiss for lack of jurisdiction, including Allure’s pre-arbitration contacts with New York.21
The Second Circuit's decision in the Solé Resort case represents the first time that a federal court has explicitly addressed the significance of pre-arbitration contacts with the forum state in determining long-arm jurisdiction in a post-arbitration proceeding. Its holding that such contacts must be considered in weighing long-arm jurisdiction provides a potentially wider choice of forums to those challenging, or seeking to confirm, arbitral awards.

Conclusion

The Second Circuit's decision in the Solé Resort case represents the first time that a federal court has explicitly addressed the significance of pre-arbitration contacts with the forum state in determining long-arm jurisdiction in a post-arbitration proceeding. Its holding that such contacts must be considered in weighing long-arm jurisdiction provides a potentially wider choice of forums to those challenging, or seeking to confirm, arbitral awards.

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2450 F.3d 100 (2d Cir. 2006).
3The New York Convention provides that it will “apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” Convention art. I(1) (emphasis added).
4Jain v. de Mere, 51 F.3d 686, 689 (7th Cir. 1995).
6In Toys“R”Us, the Second Circuit held that the implied “manifest discretion” standard applied to New York Convention cases, where the award was made in the United States. Other courts, however, have disagreed. E.g., Industrial Risk v. M.A.N. Gutehoffnunghutte, 141 F.3d 1434 (11th Cir. 1998); Nicor Int’l Corp. v. El Paso Corp., 318 F. Supp. 2d 1160 (S. D. Fla. 2004).
8Several weeks after Allure filed a petition to vacate, Allure filed a petition to confirm the award in the United States District Court for the Southern District of Florida. O n Solé’s motion, the Florida court stayed the proceeding based on the “first-filed” doctrine pending the outcome of Solé’s New York petition. Following the Second Circuit’s decision, Allure consented to personal jurisdiction in New York and to the transfer of its Florida action to the New York federal court, where the parties’ respective petitions to vacate and to confirm are being litigated at the time this article is written.
9Under the New York long-arm statute, CPLR § 302(a)(1), a court may exercise personal jurisdiction over any non-resident defendant if the defendant “transacts any business” in New York and the claim arises from that transaction of business. Sunward Elecs., Inc. v. McDonal, 362 F.3d 17, 22 (2d Cir. 2004). Under CPLR §
International Arbitration — A Primer for the Young Lawyer
by Michael A. Roche

Although the use of arbitration has increased in many areas of the law, its growth is particularly notable in the context of international disputes. Indeed, all of the primary benefits of arbitration in general, i.e., avoidance of the uncertainties, delays, and expense of the judicial system, are heightened with respect to international arbitration.

In the words of William K. Slate II, President and CEO of the American Arbitration Association (AAA), “[p]arties to complex disputes arising from international commercial transactions — who seek to avoid the delays, cost and capriciousness of litigation in foreign courts — are increasingly turning to international arbitration for the following benefits: neutrality, process control, enforceability, cost-effectiveness and confidentiality.” Thus, as globalization increases the number of cross-border business and personal disputes, it is important for young lawyers to understand at least the basics of the international arbitration process. This article seeks to offer some fundamental tips to help young lawyers as they encounter issues involving international arbitration.

Examine the Parties’ Arbitration Agreement

Since arbitration is a “matter of contract,” it is well-established that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” Thus, attorneys must first carefully examine whether their clients have agreed to arbitrate in the first place, and, if they have, exactly which disputes are covered by their agreement.

Although arbitration is intended to avoid the costs and hassles of litigation, parties often find themselves in court even before they begin to arbitrate, arguing whether arbitration is truly required in their case. Indeed, unless the parties “clearly and unmistakably provide otherwise . . . [t]he question of arbitrability . . . is an issue for the courts, not the arbitrator.”

However, it is important to realize that the U.S. Supreme Court has expressed a particular desire to construe arbitration agreements expansively in the international context. Thus, out of concern for “international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes,” the Supreme Court has stated that agreements that are silent or ambiguous as to arbitration should be interpreted in favor of arbitrability.

Additionally, even when a client has not signed a separate arbitration agreement, he can still be bound by an arbitration clause contained in, or incorporated by reference into, another contract between the parties. In some cases, clients also can be bound by agreements to arbitrate entered into by their parent or subsidiary, or wherever “the ordinary principles of contract and agency so dictate.” Thus, attorneys must carefully investigate all potential sources of an agreement to arbitrate before deciding whether to challenge arbitrability.

Determine the Appropriate Arbitral Institution and Procedural Rules

Once the decision to arbitrate has been made either willingly, or ordered by the court, it is important to determine which arbitral institution and set of procedural rules will govern the proceedings. In this respect, attorneys must differentiate between ad hoc and institutional arbitrations.

In an ad hoc arbitration, the parties write their own procedural rules to govern the proceedings. Normally, parties to an ad hoc arbitration agreement rely on the United Nations Commission on International Trade Law (UNCITRAL) Rules in drafting their agreement.

Because it is difficult to foresee all of the issues that may arise under a given international agreement, and
Approximately 77 percent of parties’ contracts pre-specify the substantive law to be applied by the arbitrators. Because dealing with all of these matters in advance would make contracts “lengthy and unwieldy,” parties often choose institutional arbitration. Institutional arbitrations make use of an administrating body that oversees the arbitration process from the filing of a claim through the issuance of an award by the tribunal. Most major institutions promulgate their own specific procedural rules. Some institutions do not require use of their own rules, and in these cases the parties are free to choose any set of rules they wish to control their proceedings. However, this could lead to problems as it could result in an institution interpreting unfamiliar rules.

Even when given the option not to do so, most parties prefer to arbitrate under the procedural rules of the arbitral institution they have selected. Moreover, as with most aspects of international arbitration, when the parties have chosen an arbitral institution but have not specifically selected a set of procedural rules, the arbitration will be conducted under the procedural rules of the institution itself. As such, parties and their attorneys must carefully consider these issues when entering into an arbitration agreement.

While the International Chamber of Commerce (ICC) administers the bulk of international arbitrations under either its own rules or the UNCITRAL Rules, other regional and international institutions also play an important role. These bodies include the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the China International Economic and Trade Commission (CIETAC), and the Commercial Mediation & Arbitration Center for the Americas (CAMCA).

Don’t Forget About Choice of Law

Another important consideration for parties entering into an international arbitration agreement is choice of law. Although approximately 77 percent of parties’ contracts pre-specify the substantive law to be applied by the arbitrators, choice of law remains a neglected aspect of international arbitration agreements. In those cases in which the parties have failed to make a choice of law determination, the arbitrators are usually afforded wide latitude to select the appropriate substantive law. Although the procedural rules chosen by the parties may influence the arbitrators’ choice-of-law determination, arbitrators historically have made this decision by: applying the substantive law of the place of the arbitration; applying the choice-of-law rules of the place of the arbitration; applying the choice-of-law rules of the various locations connected to the dispute to see if one single substantive law predominates; applying the choice-of-law rules of another jurisdiction, such as the location where the award will likely be enforced or the jurisdiction which would have heard the dispute but for the arbitration clause; or applying general principles of private international law.

Given that the parties’ failure to make a preliminary choice-of-law determination divests them of control over such an important aspect of the arbitration process, it is crucial for attorneys to advise their clients to contemplate this issue in advance.

Selecting a Proper Forum

While some parties seek to avoid controversy by using only general language in their arbitration agreements, they are not doing themselves any favors by failing to deal with significant issues upfront. Indeed, “anything not stipulated to in the arbitration clause . . . will be decided upon by the institution according to its rules.”

In choosing a forum for the arbitration of any potential disputes, parties should consider factors of both convenience and practicality. From a convenience standpoint, parties should select a forum which is geographically convenient to the parties and the likely witnesses to a potential dispute. The parties should also consider “[other aspects, such as travel expenses, office and communication facilities and the availability of a pool of qualified arbitrators]” when making this decision. Additionally, clients should be informed that, once they have agreed to arbitrate in a particular forum, federal courts in the United States will later enforce that decision absent extenuating circumstances.

In terms of practicality, parties should increase the likelihood that their arbitral awards will be enforced by choosing to arbitrate only in countries that have
ratified either the New York or Panama Conventions (discussed below). Similarly, given that the parties likely have chosen arbitration to increase their own autonomy, they should avoid forums "whose courts have wide latitude for judicial intervention." In this respect, parties should examine how the desired forum characterizes important issues as either substance or procedure. While the parties’ choice-of-law determination usually will cover substance, the procedure of the forum is applied unless the parties have otherwise stipulated in their arbitration agreement. As such, parties wishing to arbitrate in a forum that classifies an important issue as procedural should specify in their arbitration agreement exactly how this issue is to be decided by the arbitrators. Additionally, parties should avoid forums which reduce the efficacy of their prior choice-of-law determinations by imposing excessive mandatory laws on the arbitrators.

Selecting the Arbitrators

Attorneys must also take into account how arbitrators will be chosen. Although most arbitrators respect the choice-of-law and other determinations made by the parties in the arbitration agreement, "the arbitrator's 'omnipotence' [nonetheless] allows the third-party neutral to apply mandatory law that was meant to be circumvented by contracting for arbitration." Thus, it is important for attorneys to remind their clients that "[o]nce a decision to refer a dispute to arbitration has been made, nothing is more important than choosing the right arbitral tribunal."

Parties normally specify both the number of arbitrators and the manner in which they will be chosen in their arbitration agreement. Parties can either provide for the use of a sole arbitrator, or an arbitration panel comprised of three or more individuals. When three arbitrators are chosen, parties are normally allowed to interview their prospective arbitrator in order to determine whether they find them acceptable.

In ad hoc arbitrations, the parties often designate an appointing authority to select one or more arbitrators in the event of a dispute requiring arbitration. Parties to ad hoc agreements also frequently use a list procedure, either in conjunction with, or in the absence of, an appointing authority. Under the list procedure, the parties rank various arbitrators in order of preference in an attempt to convene an acceptable arbitration panel. Additionally, when the parties have chosen to use an arbitration panel, each side may be given the opportunity to directly appoint an equal number of arbitrators. In the case of an odd-numbered panel, each side appoints an equal number of arbitrators, with the party-appointed arbitrators choosing the remaining individual.

In institutional arbitrations, parties normally surrender some of their ability to appoint the arbitrators. In these cases, the institution acts as "another layer" in the appointment process. As always, unless the parties otherwise have provided in their arbitration agreement, the individual procedural rules of the chosen arbitral institution determine how the arbitrators are to be appointed. Although the institution normally makes the ultimate determination as to the appointment of the arbitrators, parties are sometimes given an opportunity to nominate individuals who are then considered by the institution.

Besides contemplating the size and selection of the arbitration panel, attorneys also should advise their clients to include in their agreement some general selection criteria for the individual arbitrators. Recommended issues that should be addressed include: the requisite expertise, skill, and qualifications of the arbitrators; the availability of the arbitrators; the language spoken by the arbitrators; and the nationality of the arbitrators, especially where one party to the arbitration proceeding is a foreign state.

Enforcement of Arbitral Awards

The ever-increasing popularity of international arbitration is largely a result of courts’ readiness to enforce arbitral awards. Indeed, in the United States, "the federal courts today play a subdued role [in international arbitration] by essentially rubber-stamping arbitral agreements, proceedings and awards."

International arbitral awards are largely enforced under two conventions: the Convention on the Recognition and Enforcement of Foreign Arbitral
The United States did not ratify the New York Convention, which was created in 1958, until 1970. In contrast, the United States affords great deference to arbitrators' decisions in general. This is especially true when the arbitrations are international. The New York Convention, which was adopted in 1958, is incorporated into the Federal Arbitration Act (FAA). The United States did not ratify the New York Convention, which was created in 1958, until 1970, although it ratified the Panama Convention the same year it was adopted, in 1975. The New York Convention has specified that courts must comply with both Conventions into the FAA at Chapter 9 U.S.C. Chapter 2, while the Panama Convention is incorporated at Chapter 3.

Courts in the United States have provided four basic requirements for the application of the New York 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. Moreover, Congress has specified that courts must comply with both Conventions. With respect to the New York Convention, 9 U.S.C. § 207 states that "[t]he court shall confirm the [international arbitral] award unless it finds one of the grounds for refusal of recognition or enforcement of the award specified in the said Convention." Additionally, 9 U.S.C. § 302 incorporates by reference many of the provisions applicable to the New York Convention, including Section 207, to also apply to the Panama Convention. Where both Conventions apply, however, 9 U.S.C. § 305(1) states that, unless the parties have agreed otherwise, the Panama Convention will apply "[i]f a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the [Panama Convention]." Otherwise, the New York Convention applies.

While courts in the United States afford great deference to arbitrators' decisions in general, this is even more accurate in the international context. Indeed, U.S. circuit courts generally agree that "Article V of the [New York] Convention lists the exclusive grounds justifying refusal to recognize an [international] arbitral award." Because Article V does not include non-statutory, common law grounds like mistake of fact or manifest disregard of the law, both of which are occasionally used by U.S. courts to vacate domestic arbitral awards, most courts have agreed that these grounds are inapplicable in the international arbitration context. Still, at least one U.S. circuit has held that "the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought." With respect to awards rendered under the Panama Convention, however, it has been held that manifest disregard of the law "is not a basis for vacating arbitration awards under the Panama Convention or for refusing to recognize or execute arbitration awards under the Panama Convention, even if those awards were rendered in the United States."

Finally, it is important for parties seeking to vacate an international arbitral award under the public policy exception of the Conventions to realize that this possibility is remote at best. Indeed, this ground is usually interpreted as being available "only where enforcement would violate the forum state's most basic notions of morality or justice." As such, it is clear that once an international arbitral award has been rendered, parties face an uphill battle in attempting to convince a court to disturb the decision of the arbitrators.

Conclusion

In light of the rapid expansion of international law in general, it is essential for practitioners to familiarize themselves with the international arbitration process. As demonstrated by the foregoing sections, international arbitration is an incredibly nuanced area of the law that requires much advance deliberation on the part of both attorneys and their clients. By considering the topics discussed in this article, however, practitioners can ensure that their clients take the necessary steps to obtain advantageous arbitral awards which will be readily enforced by courts in both the United States and abroad.
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Id. at 13.

Id. at 17-18.


Id. at 17-18.

See Filanto, S.P.A. v. Chliewich International Corp., 789 F. Supp. 1229, 1241 (S.D.N.Y. 1992) (requiring parties, in “the interests of justice,” to arbitrate in Moscow pursuant to arbitration agreement, even though conditions in Russia remained “unsettled”); Pauly v. Biotronik, 738 F. Supp. 1332, 1335-36 (D. Or. 1990) (requiring parties to arbitrate in Bern, Switzerland, under German substantive and procedural law even though plaintiffs complained that they didn’t speak German, given that plaintiff Pauly had not demonstrated proper standard that arbitration in Europe would “be so gravely difficult and inconvenient that [Pauly] for all practical purposes would be deprived of his day in court”). But cf. National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 331-34 (5th Cir. 1987) (holding that court could not compel parties to arbitrate in Iran, pursuant to arbitration clause contained within parties’ contracts, given that Iran was not then a signatory of the New York Convention. Additionally, given that the parties had chosen Iran as the desired situs of arbitration, the court could not order them to arbitrate in any other jurisdiction, including Mississippi, no matter that it was inconvenient, if not impossible, for parties to arbitrate in Iran as originally agreed.

See Holland, supra note 10, at 465.
International arbitration is a practice area that young litigators should keep in mind when molding their careers.

This quarter's article introduces us to Vikki Rogers, an Associate at Mazur Carp & Rubin in New York. Vikki also teaches international arbitration as an adjunct professor at Villanova Law School. Vikki has worked as a case manager at the International Centre for Dispute Resolution (ICDR), at the American Arbitration Association, and practiced international arbitration in Germany and New York at a prestigious international law firm.

International business disputes inherently involve dispute resolution in a foreign jurisdiction, under foreign laws and procedures, and to a large extent, in a foreign language. As a result, multinational corporations concerned with foreign proceedings, issues of confidentiality, and lack of familiarity with the foreign jurisdiction, often reject international litigation as a viable dispute resolution mechanism in their contracts in favor of international dispute resolution. Notably, there has been an ongoing debate over which system is more accessible, promotes trust and respect, and leaves the parties more satisfied with the outcome. In an attempt to introduce empirical data and statistics to the issue, PricewaterhouseCoopers, in association with the School of International Arbitration, Queen Mary, University of London, has published a study examining the corporate attitudes and practices surrounding international arbitration (“PricewaterhouseCoopers study”). The results show that international arbitration is a practice area that young litigators should keep in mind when molding their careers.

Expounding on the increasingly sophisticated nature of international dispute resolution as a result of the growth and complexity of international trade and investment, the results of the PricewaterhouseCoopers study indicate an upward trend of more corporations opting for international arbitration to resolve disputes as opposed to litigation through the national courts. The results indicate as well that, while international arbitration can provide distinct advantages over litigation through more flexible processes and the wide enforceability of awards, some of the major disadvantages include expenses and the time required to bring the matter to full resolution. Below are some of the significant findings from the study:

- 73 percent of respondent corporations stated a preference for international arbitration to resolve their cross-border disputes;
- The most cited advantages to international arbitration are flexibility of procedure, enforceability of awards, the privacy afforded by the process, and the ability of parties to select the arbitrators;
- The tactical significance of some features of international arbitration, e.g., the choice of seat of arbitration may not be fully appreciated;
- A clear dispute resolution policy provides an important strategic advantage when negotiating dispute resolution clauses for cross-border contracts, and 17 percent of the respondents stated that a dispute resolution policy directly produces cost savings, while a further 69 percent indicated that a dispute resolution policy helps to minimize escalation of disputes;
- There is widespread support for regional arbitration institutions;
- Corporations are looking for arbitrators with an established reputation in the international arbitration community, and, currently, there is a relatively small pool of experienced arbitrators;
- Although international arbitration can sometimes be at least as expensive as transnational litigation, it may represent better value for the money;
With increasing awareness of international arbitration as a dispute resolution process, there is growing demand from corporations for more education on the tools and tactics of international arbitration; and

- 95 percent of corporations expect to continue using international arbitration.

A Career in International Arbitration

In light of the results of the PricewaterhouseCoopers study, particularly that 95 percent of the corporations surveyed indicated that they expect to continue using international arbitration, and added to that, the small pool of experienced arbitrators available, a career in international arbitration may prove to be a lucrative option in the long-run for a young lawyer.

It is also worth noting that, as different countries compete for economic strategic positioning on a global scale, increased traffic is generated in the area of international trade. With that comes the realization of dealing with the different legal systems of the global players.

Frequently, there is a lack of familiarity with each country’s legal process, which breeds uncertainty, and to some extent, distrust. This adds exponentially to the appeal of arbitration as a means of resolving disputes. However, as with any worthwhile career investment, the level of interest generated may be higher than the positions available, so grades usually become the critical determining factor; and as surmised by Vikki Rogers in an interview with the author, entrance to the international arbitration practice is inherently competitive as the practice is generally dominated by the larger law firms.

One possible way to enter is to go overseas and practice in an international arbitration group, largely found in London, Paris, or Frankfurt. Some firms are receptive to Americans willing to live and practice overseas for a few years. Because very few U.S. law firms make arbitration a separate practice group, the typical route would be through litigation and then try and pick up arbitration work. Knowledge of, or proficiency in, a foreign language or particular international experience is an advantage.

In addition, Rogers noted that, because the international arbitration field is a very small community, early preparation — such as attending relevant conferences and publishing a substantial piece in the field — is an advantage. Thus, the young lawyer should hone down on international arbitration as the practice area of choice early in his or her career. The young litigator also may want to determine whether or not he or she is willing to take a risk in focusing on this area. Moreover, invoking the confidence and attention of partners or practice managers so that they are willing to invest their resources in you will have a significant impact in shaping a career in international arbitration.

For Vikki, getting chosen to participate in the Willem C. Vis International Arbitration Moot, which takes place in Vienna, was the initial foot in the door that she needed to embark on a career in international arbitration. The competition is comprised of 156 teams from 49 countries and provides a great learning experience and early networking opportunities. “After that experience, I got the international arbitration bug and knew I wanted to do that for a living,” she recalls.

Capitalizing on that rare opportunity, she took on the extra load and coached the team during her third year in law school. She continued through the year right after law school. Vikki thus had the advantage of returning to Vienna during her second year as a coach for the Pace Law School Vis team, and this return trip materialized into another door opening event when she was invited by the University of Cologne to be a research assistant at its Institute for European and International Cooperation, and simultaneously coach their moot team for a year. That job was the nexus that enabled Vikki to maximize on her interactions with several German law firms’ international arbitration groups: “In particular, I heard several good things about the arbitration group at Shearman & Sterling in Frankfurt. I initiated contact with the practice group’s team leader during a practice session for the VIS moot team. I had an interview shortly thereafter and then started working for the group, and so in a manner of speaking, I believe international arbitration chose me after the moot.”
Practicing in Germany

Corporations involved in an international arbitration tend to seek firms that specialize in international arbitration, are experienced in the subject matter of the dispute, and have access to counsel in the place of the dispute to provide regional expertise and the applicable law. U.S. firms often fit that bill. For knowledge of the larger cases, U.S. companies often will hire specialized arbitrations groups, frequently found at larger firms (generally in the U.S. or Europe) or specialized international arbitration boutiques.

Again, Vikki Rogers: “While in Germany, my practice was really international. The majority of the international arbitrations I worked on involved construction law disputes implicating the laws of Spain, the Netherlands, Argentina, Venezuela, India, and the U.S., among others. On all my cases, we retained local counsel to get the specialized domestic legal knowledge, as well as identified local experts for the case. The cases I worked on were administered by the ICC International Court of Arbitration (ICC), but I since have become very familiar with American Arbitration Association (AAA) through my position as an international case manager at the International Centre for Dispute Resolution (ICDR). My clients all were American (even with respect to the cases I worked on in Germany), but the opposing party always was from another country. While at ICDR, I managed 45-55 arbitrations at any given time, involving counsel and arbitrators from every part of the globe.”

Choice of Law

Some attorneys fail to appreciate that the venue or “seat” of the arbitration is a significant tactical consideration. The procedural law of the venue will determine the support intervention that may be required from local courts during the arbitration. In addition, “although most contracts will routinely define the applicable law and thus preempt choice-of-law disputes, on occasion, some circumstances will arise in which the law of applicable forum is not very well developed for the legal issue at hand,” Vikki explains. “In one construction law case I was involved in, we had construction experts from the U.S. to advise regarding the relevant technical issues; then we retained local legal counsel and local experts for other points (for example, we hired a professor in the country of the project to comment on the current political situation which was allegedly impacting the project). When the applicable law was not dispositive on an issue, we would also reference U.S. law to help guide the tribunal. If referencing U.S. law did not seem appropriate given the character of the case or issue, then we also might take a broader comparative approach on a particular point of law.”

Work/Life Balances

Europe traditionally has enjoyed more regulated work hours and is regarded as more protective of its employees and their rights. Such sentiments add to the view that professionals in Europe enjoy a better work/life balance as compared to say, New Yorkers. Analyzing the work ethic in the different countries as it impacted her, Vikki found that, on average, her work hours were shorter in Germany, and the work day generally started around 9 a.m. until approximately 7 or 8 p.m., and weekends were generally work-free, while the supposed typical work hours in New York were longer on average, and included weekends.

Contrary to the common perception that Americans have more disposable income, and thus enjoy more luxurious surroundings, Vikki found that the living and workspace were more aesthetically pleasing in Germany. “Every full-time employee, including secretaries and paralegals, had relatively spacious offices with windows. In New York, it is not uncommon that new associates tend to share rooms with three or four associates, and are expected to work at least 60 hours per week. The pace was not nearly as fast in Germany, and we certainly enjoyed more vacation time there — six weeks plus a several days off for religious observances. In New York, the average vacation time is four weeks. Apartments were generally larger and newer, and at least a third cheaper than New York, and other living costs were generally much cheaper in Germany.”

Not that New York does not have its benefits. “Frankfurt is considerably smaller than New York. New York definitely offers more to do with your free
time. And, although Frankfurt is considered an international city, it is dominated by relatively few professional types and lacks somewhat in diversity. New York definitely offers more diversity and an opportunity to meet people pursuing all sorts of careers, from a multitude of backgrounds.

One of the factors informing a young lawyer’s decision-making process on whether moving to a foreign country is a worthwhile career move is determined by the income and benefits offered. In the case of practicing international arbitration in Germany, Vikki noted that the actual dollar amount remuneration appears to be more in the U.S.: “When I worked in Germany, my salary was about a third less than for the same associate-level position in New York; however, the cost of living was less in Germany. The bonus was the same, however, and the other benefits were generally better, including better healthcare packages (taxes, though, are considerably higher in Europe). It is also important to note that the working hours, cost of living, salary and benefits, etc. vary significantly among European cities and even can vary within firms in a city.”

Diversity
Reflecting on how the different countries deal with diversity issues, Vikki observed that in both countries there were relatively few ethnic minorities working as lawyers in the office. However, the legal community as a whole is very diverse given the international character of the work. “As for women, at the associate level, the arbitration group in Germany was small and mostly women; the litigation group in New York was large and probably evenly split between men and women. At the partner level in Germany, I wasn’t aware of any female partners; and in New York, I was only aware of a few female partners. So at the higher levels, the field generally still appears to be male dominated. I personally know only a few handful of women around the world who have stayed with arbitration long term. Although I am not sure why, I only can guess that it is because the hours are very demanding and there is still a climate in which women leave if they chose to have a family or desire to have a greater work/life balance.

In an effort to change this trend, among other reasons, a relatively new group called “Arbitral Women” was created as an informal organization for women who practice international commercial arbitration around the world. They hold periodic meetings and gatherings, generally around major arbitration conferences. The organization is very good for networking, and also offers a forum to share the latest developments in international arbitration.

Parting Thoughts
Commenting from the vantage point of one who actively has been involved in an international arbitration in a wide range of settings, including academia and private practice, Vikki believes international commercial arbitration is a dynamic field that offers a lawyer the opportunity to practice with exceptionally competent lawyers, on complex and exciting issues of law, while facing challenges that can be encountered only in an international context. “Because of all of these unique attributes, it is a very demanding field that requires a lot of hard-work. But the pay off is worth it on a number of different levels. It offers exciting and challenging opportunities within the academic context, from the institutional perspective, and as a professional practioner. It will definitely satisfy a person’s wanderlust and curiosity towards foreign culture and practice.”
Nosiz Ralephata is an attorney with Turner Padget Graham & Laney in Charleston, South Carolina. She is chair of the U.S. Litigators’ Role Abroad Subcommittee of the International Litigation Committee of the Section. This article is the latest in her series about young litigators’ options in international litigation. She can be reached at NRalephata@TurnerPadget.com. She is always on the lookout for stories and tales of young litigators practicing abroad.

The study was conducted during a six-month period and was comprised of an online questionnaire which was completed by 103 respondents; as well as 40 in-depth interviews.


By using creative and proactive thinking, sometimes less than perfect grades can be circumvented through such methods as publishing and developing specific sought after skills in the field.

Care to the substance and place of publication should be taken as the market is flooded with articles by practitioners on international commercial arbitration.

Keeping the Status Quo (Continued from page 6)

John J.P. Howley is a partner in Kaye Scholer LLP in New York. He has represented domestic and foreign clients in international arbitrations under AAA-ICDR, ICC, and UNCITRAL rules. He is admitted in New York and various federal courts, and he is a registered foreign lawyer in England and Wales.


New York Convention, Article II(3).
As this issue’s Co-Chairs’ Note so graciously mentions, the ABA Litigation Section recently honored The ILQ as this year’s best print publication for its category. Of course, upon accepting the award at the Litigation Leadership meeting, an unnamed Editor immediately dropped it. Luckily, the rugged Lucite award (good thinking, ABA!) did not break. That would have been embarrassing.

While the praises of Messrs. Burke and Roth are gratefully accepted (and, of course entirely warranted), there were a number of things that helped to make The ILQ a stand-out publication last year in addition to the obviously top-notch editorial work from yours truly. In a world where “content is king,” we have been lucky to have been able to choose from an excellent and wide-ranging body of work from our contributors. Last year, we published articles with topics ranging from Allison Butler’s review of China’s take on the UN Convention on International Sale of Goods and Jason Yackee’s scholarly work on the new Hague Convention on Choice of Court Agreements, to Thomas Brewer’s analysis of the circuit split over attempts to increase the scope of judicial review of arbitration awards. We also have benefited from regular contributors like U.S. Litigators’ Role Abroad Subcommittee Chair, Nosizi Ralephata, whose superb and insightful articles on young litigators practicing abroad has brought an interesting new dimension to the subject of international litigation.

The importance of having such varied and consistently high-quality submissions cannot be overstated. Of course, even the best writing can be left to gather dust if not for the efforts of those whose job it is to make sure it is presented in an appealing manner. As one assistant editor’s Portuguese grandmother was want to say, “os olhos comem também.” The superb work of Stephanie Schwausch and her team at Vinson & Elkins have made sure that the layout of each edition has been a feast for the eyes as much as the mind.

Finally, while we have been able to address a variety of issues this year, we also have been fortunate in being able to consider certain subjects in more depth. Themed editions, like this past spring’s “Destination: Asia” and this issue’s “Focus: International Arbitration,” have provided a way to explore certain regions and topics more fully. The positive feedback we have received on this type of issue helped us decide to make it an ongoing tradition. Readers can look forward to a Latin America themed issue next quarter.

Needless to say, while we cherish the honor bestowed upon our publication, we also are aware of the burden to continue working to this high standard. Put simply, to do this publication we rely in large part on you, the faithful reader, to remain active as Committee Members, to recruit your colleagues, and to contribute your thoughts and analysis in future articles, commentaries, and reviews. Getting involved is easy. Simply forward contributions to one of the editors using the contact information below. Without your contributions, we cannot hope to replicate our success in this coming year and, more importantly, give ourselves a second chance to successfully accept the award without immediately dropping it. Thus a toast to your continued contributions and improved hand-eye coordination of the editorial staff of the Section of Litigation’s best Committee journal, The ILQ.

*Or in English, “the eyes also eat.”*
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