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In This Issue

The *Michigan International Lawyer* is published three times per year by the International Law Section, State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2083.

Dear Members and Colleagues:

Margaret Dobrowitsky

The International Law Section will hold its 2012 Annual Meeting and Program entitled "*The 2012 U.S. Presidential Election-Impact on International Law and International Lawyers*" on Wednesday, September 12, 2012 at the Detroit Yacht Club on Belle Isle. The program will feature panelists who will discuss likely international law implications of President Obama's second term versus the election of a Republican President. Panelists will also discuss the likely impact that the election may have on specific areas of international law.

The Section held its May 2012 meeting and program at Delphi Corporation's Troy Offices & Customer Center. The Section extends many thanks to Daphne Short, Esq., Customs Counsel, U.S. and Canada for Delphi Corporation and SBM ILS Council Member for arranging this fascinating venue for the May meeting and program and introducing the speakers at the program. The program was entitled "*Business Opportunities under China's Recently Revised Foreign Investment Guidelines*" and featured Jianmin Yi, an attorney practicing in Shanghai, China, who spoke about what the Chinese Government's decision to encourage electric and hybrid car manufacturing means for conventionally powered vehicles, and what a total vehicle OEM can do to protect itself from the new requirements. Tim Kaufmann, Associate Attorney with The Cronin Law Firm spoke about issues related to structuring investments by Michigan companies as joint ventures, which has been a popular and effective legal structure used by Michigan companies to invest in China. Jeffrey Paulsen of Paulsen Law spoke about the critical importance of identifying **o**pportunities for Michigan companies in the industries in which China is interested in encouraging foreign investment, respecting cultural differences and negotiating strategies, and shared some interesting examples of these principles in practice.

The Section held its March 2012 meeting and program at the offices of Miller Canfield Paddock & Stone P.L.C. along the river in Detroit, Michigan. The program was entitled "*Diversity and A Global Workforce: Implications for Michigan Lawyers*". The Section extends many thanks to Tim A. Attalla, Section Member, for arranging this uplifting venue for the March meeting and program. Stephen Tobocman, Director of Global Detroit, spoke about entrepreneurial immigrants. David Victor, Director of International Business Programs, College of Business at Eastern Michigan University spoke about cross cultural issues in international transactions. Gregory Conyers, Director of Diversity at the State Bar of Michigan spoke about the

Michigan International Lawyer Submission Guidelines

The *Michigan International Lawyer*, which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's leading international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a $5 check or money order made payable to Wayne State University Law School for shipping and handling.

The Michigan International Lawyer will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:
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importance of a diverse bar membership. Many thanks to Debra Clephane, SBM ILS Council Member, and Jeffrey Paulsen, SBM ILS Chair-Elect, for reaching out to these inspiring speakers and introducing them at the program.

The Section also thanks Clark D. Bien of Strobl & Sharp, P.C. in Bloomfield Hills, MI for preparing a memorandum submitted on April 19, 2012 on behalf of the Section to The Special Committee on Defining the Practice of Law of the State Bar of Michigan containing comments on The Special Committee's proposed definition of the "Practice of Law". The memorandum presented reasons why the Section suggests that The Special Committee consider the definition of the "Unauthorized Practice of Law" in view of the globalization of the legal industry, and the opportunities that may not be presented to Members of the State Bar of Michigan interested in practicing in non U.S. jurisdictions because of a potential lack of reciprocity with foreign jurisdictions. Other U.S. jurisdictions such as New York are already addressing this concern. In the memorandum, the Section did not recommend any changes to the proposed definition as put forth by The Special Committee or suggest a delay in its approval, but did suggest that The Special Committee or another committee of the State Bar of Michigan continue to look at the issues raised by the Section in the memorandum regarding reciprocity with foreign jurisdictions.

Although the primary means by which the Section's officers communicate and distribute notices of meetings and programs remains the Section's "announcement only" listserv, the Section's Linked-In group is expanding rapidly with over 130 Members currently in the group and more Members signing up daily thanks to the efforts of Section Council Member Sonia Salah, Section Member Tim Kaufmann, Law Student Member Weldianne Climo and Section Chair-Elect Jeff Paulsen. They will provide more details on how the Linked-In project is progressing and instructions on how to link in and participate in the group at upcoming Section meetings. If you have not received email notices of the Section's recent meetings and programs, please feel free to go to the Section's page on the State Bar of Michigan website or contact the State Bar of Michigan to sign up for the International Law Section's listserv.

I would also like to thank the Section's officers and Council Members for their continued active participation in the Section this year. Special thanks to Jeffrey F. Paulsen, Chairperson-Elect, A. Reed Newland, Secretary, and David B. Guenther, Treasurer for their inspired ideas and continued efforts in support of the Section. I look forward to continuing to work with the Section's officers and the Council Members throughout this year.

All persons interested in the Section are invited and encouraged to attend Council meetings and programs. Please remember to attend the Section's 2012 Annual Meeting and Program entitled "*The 2012 U.S. Presidential Election-Impact on International Law and International Lawyers*" on Wednesday, September 12, 2012 at the Detroit Yacht Club on Belle Isle. If you have suggestions for programs or activities that you would like to be considered by the Section's Council, I encourage you to attend the Council meeting. If you are unable to attend, please feel free to contact me, one of the other officers of the Section, or any Section Council Member with your ideas. The Section welcomes all suggestions.

I hope to see you at an upcoming Section meeting and/or program. In the meantime, please enjoy this issue of the *Michigan International Lawyer*.

Section Council Meeting Minutes

A meeting of the Council ("**Council**") of the International Law Section ("**Section**") of the State Bar of Michigan ("**State Bar**" or "**SBM**") was held on March 21, 2012 at Miller Canfield, 150 W. Jefferson Ave., Suite 2500, Detroit, MI 48226.

The following officers of the Council were present in person: Margaret A. Dobrowitsky, Chairperson; Jeffrey F. Paulsen, Chairperson-Elect, and David B. Guenther, Treasurer. The following voting members of the Council were present in person: Debra Clephane, Linda Armstrong, Silvia Kleer, Aaron Ogletree, and Daphne Short. Other Members of the Section also attended the meeting. Names of each of the attendees will be filed with these meeting minutes.

Call to Order

Margaret A. Dobrowitsky, Chairperson of the Section, called the meeting to order at approximately 4:40 pm.

Approval of Agenda

The Chairperson circulated an agenda for the meeting, which was approved as presented.

Notice and Quorum

David B. Guenther, Treasurer of the Section and acting secretary in the absence of A. Reed Newland, presented a written notice of the meeting that was mailed or delivered to all members of the Council and to Members of the Section in accordance with the Section's Bylaws. The acting secretary said that the notice will be filed with the minutes of the meeting.

Approval of Meeting Minutes

The Chairperson reported that A. Reed Newland, Secretary of the Section, was unable to attend the meeting and that the minutes of the Council meeting held on January 25, 2012 would be presented for approval at the Council's May 16, 2012 meeting.

Treasurer's Report

The Treasurer, David B. Guenther, presented the unaudited financial statement of the Section for the five months ended February 29, 2012 and the related detailed trial balance for the same period, prepared by the Finance & Administration Division of the State Bar. As of the five months ending February 29, 2012, the revenues of the Section were $12,575.00, and expenses for the same time period were $3,182.22, resulting in Net Income of 9,392.78. The Section's ending fund balance as of February 29, 2012 was $27,444.37. Upon motion made and supported, Council approved of the financial statements. The Chairperson noted that the Section's financial statements are generally reprinted in the *Michigan International Lawyer.*

The Treasurer provided a preliminary comparison of Section revenues and expenses to other sections of the State Bar of Michigan. The Treasurer reported that he had identified eight sections of roughly comparable size to the Section and compared their revenues, expenses, ending fund balance and balance per member for the fiscal year ended September 30, 2011. Revenues and expenses were highly variable, but on a per member basis, the section with the lowest fund balance per member was Social Security at $17; the highest, Environmental at nearly $90; while the Section fell roughly in the middle at $40 per member. The Treasurer said he would endeavor to report back with a more detailed comparison at the May 16, 2012 meeting.

The Chairperson noted that there was no objection to providing Section financial reports to other sections if requested.

Chairperson's Report

The Chairperson noted the Report of the Special Committee on Defining the Practice of Law to the State Bar of Michigan Board of Commissioners and asked for discussion as to whether the Section should formally submit a response to the Report. Council and Section members expressed concerns as to whether the definition of practicing law proposed by the Report would apply to foreign lawyers in Michigan, or whether an exception applied. The Chairperson noted that comments on the Report, if any, were due by April 13. The Chairperson said that she would seek volunteers to provide comments, with the support of Council officers, and collect any comments by email.

The Chairperson next addressed the Memorandum dated February 16, 2012 regarding the Student Mentorship Program Proposal submitted by the Student Members of the Section under the guidance of Professor Troy Harris. Jillian Berndt and Weldianne Climo reported on the proposal and its goals. After discussion, the Chairperson suggested creation of a sign-up list of email addresses of Section members willing to have lunch with Student Members and/or Members in their first or second year of practice. The Chairperson requested that the Student Members revise the Memorandum to contemplate an email sign-up list and restrict the program to Student Members and first or second year attorney Members, after which the revised Memorandum will be circulated to Section members for con-

sideration at the May 16, 2012 Section meeting.

The Chairperson reported that the Section had paid its annual membership dues for the International Bar Association (IBA) but was not planning on sending any Section representatives to the IBA annual meeting.

The Chairperson reported that the annual State Bar Leadership Forum would be held June 8-9, 2012 at the Grand Hotel on Mackinac Island and recommended sending the Chairperson-Elect and the Secretary. Cost of attendance would be approximately $2,500 - $3,000. Section members expressed support for such attendance, noting that the forum had historically been an excellent way to meet other State Bar and section leaders and learn about resources available to State Bar sections. Upon motion made and supported, the Council unanimously approved sending the Chairperson-Elect and the Secretary.

Committee Reports

The Chairperson invited the Section's Committee chairs to report on their activities. Aaron Ogletree, co–chair of the International Trade Committee (ITC), reported on planning for a May 21, 2012 or possibly September 2012 event. Lara Phillip stated that the ITC was still seeking co-sponsorships and a suitable space for the event. The Chairperson noted that the budget for the event would need to be approved by the Council.

SBM-ILS LinkedIn Group

Jeffrey Paulsen updated the Section on the establishment and growth of the Section's LinkedIn Group as a means of increasing and improving communication among Section members. Mr. Paulsen said that 127 members have joined since it was organized and encouraged Section members to join. The group was seeking an additional Section member to serve as manager. Interested persons should contact Mr. Paulsen. The Chairperson thanked both Mr. Paulsen and Ms. Salah for their continuing efforts to promote the site.

New Business

The Council discussed possible topics and locations for the May 16, 2012 meeting. The Chairperson reported that Daphne Short had graciously offered the Delphi facility as a possible location. It was anticipated that a Chinese attorney from Delphi would speak on practice at Delphi and that Tim Kaufmann would present a paper on joint ventures in China. The Chairperson-Elect noted that the focus of the program would be on China.

The Chairperson invited discussion of the list of potential topics for the 2012 annual meeting of the Section and possible locations for the meeting. The Chairperson reminded members that the Council had determined at its November meeting not to hold the Section's annual meeting in conjunction with the State Bar annual meeting, since the latter would be held in Grand Rapids, which was somewhat removed from the majority of the Section's members. The Chairperson suggested intellectual property enforcement and seizure of counterfeit goods as a possible topic. She also proposed the Detroit Yacht Club as a possible venue. The Chairperson-Elect volunteered to request feedback from members and report back to the Council at the May meeting on the list of proposed topics and proposed venue. The Chairperson-Elect stated that the anticipated budget for the annual meeting was approximately $3,000, which was less than 2011.

Adjournment

There being no further business to come before the Council, the Chairperson adjourned the meeting.

Dinner and Program

The section provided dinner, followed by a panel discussion among Steven Tobocman, Director of Global Detroit; David Victor, Director of International Business Programs, College of Business at Eastern Michigan University; and Gregory Conyers, Director of Diversity at the State Bar of Michigan, on *Diversity and a Global Workforce: Implications for Michigan Lawyers.*

Respectfully submitted,

David B. Guenther, acting secretary on
behalf of A. Reed Newland
International Law Section
State Bar of Michigan

Compelling Arbitration and Enforcing Awards under the New York Convention in U.S. Courts

By Larry J. Saylor, Miller, Canfield, Paddock and Stone, P.L.C.

Introduction

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[1] is the most widely-recognized international treaty obligating signatories to enforce arbitration agreements and awards. The U.N. adopted the Convention in 1958, and by 2011, 146 countries were parties.[2] The United States ratified in 1970 with two conditions: First, the subject matter of the arbitration must be commercial.[3] Second, the award must be rendered in a country that is also a party.[4] Chapter 2 of the Federal Arbitration Act (FAA)[5] adopts and implements the New York Convention. The provisions of FAA Chapter 1 also apply to the New York Convention "to the extent that chapter is not in conflict with" Chapter 2.[6]

Compelling Arbitration

Article II.1 of the New York Convention provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article VII.2 defines "agreement in writing" as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The courts have held that an agreement to arbitrate signed by only one party was not "in writing" under Article II.2,[7] while an arbitration agreement in a purchase order, accepted by a sales confirmation, was enforceable.[8]

In ratifying the Convention, Congress decreed that "[a] n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."[9] Thus, the Convention is part of the "the supreme law of the land, as enforceable as [other] Congressional enactments."[10] Congress further decreed that federal courts have "original jurisdiction over . . . an action or proceeding" under the Convention, "regardless of the amount in controversy."[11] In contrast, Chapter 1 of the FAA, which governs domestic arbitration, establishes substantive federal law governing arbitration, but creates no federal question jurisdiction.[12] Chapter 2 also allows a defendant to remove "at any time before the trial thereof . . .." Further, "the ground for removal . . . need not appear on the face of the complaint but may be shown in the petition for removal."[13] The Supreme Court has held that the FAA applies in state as well as federal court,[14] but because of the broad jurisdictional provisions, virtually all reported cases involving Chapter 2 are in the federal courts.

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Venue of an action under Chapter 2 resides "in any [district] court in which . . . an action or proceeding with respect to the controversy between the parties could be brought," or in the place of arbitration if is in the United States.[15]

A court may compel arbitration at the place provided for in the agreement, "whether that place is within or without the United States."[16] The court may also appoint arbitrators in accord with the provisions of the agreement.[17] Thus, a U.S. court is required to refer a dispute to arbitration when:

(1) There is an agreement to arbitrate.

(2) Providing for arbitration in the territory of a Convention signatory.

(3) Arising out of legal relationship "considered as commercial."

(4) One party is not an American citizen or the commercial "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[18]

If the answers to all four of these questions are "yes," the court must order arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[19]

In *Scherk v. Alberto-Culver Co.*,[20] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[21] the Supreme Court read the Convention and FAA Chapter 2 as expressing a strong national policy in favor of arbitration and choice of forum in international commerce.[22] In *Sole,* the Court reasoned:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes

> must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[23]

The First Circuit applied these holdings in *Ledee v. Ceramiche Ragno*.[24] In that case, plaintiff, a tile distributor, entered into a distribution agreement with Italian tile manufacturer that required disputes to be arbitrated in Italy. Defendant terminated the agreement and plaintiff sued, alleging that the termination violated the Puerto Rico Dealer Act. Defendant removed under 9 U.S.C. § 205, and moved to compel arbitration in Italy. The Dealer Act requires just cause for termination, and provides:

> Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be considered as violating the public policy set forth by this chapter and is therefore null and void.

Ledee argued that the requirement to arbitrate in Italy was void and unenforceable. The court held that "null and void" under the Convention "must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale."[25]

In *Riley v. Kingsley Underwriting Agencies, Ltd.*,[26] the plaintiff sought to litigate fraud claims arising out of an agreement by which he became a Lloyd's underwriter, which required claims to be arbitrated in England. Applying the policy articulated in *Soler* and *Scherk*, the Tenth Circuit reasoned that "The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair."[27] Further, "Riley's suggestion that everyone in England will be biased against him has no basis in the record and we will not assume that Riley would get anything other than a full and fair hearing."[28] The court held that "null and void" must be narrowly construed and compelled arbitration in England.

Although the Convention allows the courts to decide whether the agreement is "null and void" as a threshold matter, contract validity is ultimately for the arbitrator to decide, absent a claim that the arbitration clause itself was fraudulently induced. For example, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[29] the Supreme Court held that a claim that the contract was fraudulently induced was arbitrable.[30]

Despite some earlier doubt, it is now well-settled that statutory issues must be arbitrated.[31] In *Stawski Distributing Co. v. Browary Zwiec, S.A.*,[32] the plaintiff, a beer distributor in Chicago, entered into a distribution agreement with defendant, a Polish brewer. The agreement required disputes to be arbitrated in Poland, under Polish law. Zywiec notified Stawski that it was terminating the agreement, and Stawski sued under the Illinois Beer Industry Fair Dealing Act (IBIFDA). IBIFDA (1) required good cause for termination; (2) made pre-dispute agreements to arbitrate unenforceable; and (3) required the application of Illinois substantive law to any dispute. Zywiec moved to compel arbitration in Poland. The district court denied the motion, holding that the Twenty-First Amendment, which reserves the regulation of alcoholic beverages to the states, trumped the Convention.[33] Zywiec appealed, and the Seventh Circuit reversed. While it held that Illinois law applied and invalidated the agreement's choice of law, the Convention trumped the IBIFDA provision regarding arbitration. It therefore ordered arbitration in Poland and directed the parties to arbitrate under Illinois law.

Recognition and Enforcement of Awards

Chapter 2 allows any party "[w]ithin three years after an arbitral award falling under the Convention is made," to apply to a court for an order any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award.[34] "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."[35]

Article V.1(e) of the Convention provides that recognition and enforcement may be refused where "[t]he award has . . . been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Some courts and commentators read this language as authorizing the filing of a motion to ***vacate*** an award only in the "country in which, or under the law of which, that award was made," and that held that "the law [under which an] award was made" refers to the ***procedural*** law of the place of arbitration, not the substantive law.[36]

The "SUBSTANCE and effect," rather than form, of the arbitral decision determines whether a particular arbitral decision is an "award" under the New York Convention. In *Publicis Communication v. True North Communications, Inc.*,[37] the Seventh Circuit held that a tribunal's "order" requiring respondent to turn over records was an award subject to confirmation under the New York Convention. However, in *M & C Corp. v. Erwin Behr GmbH & Co.*,[38] the Sixth Circuit held that an arbitrator's "clarification" of an earlier award for specific performance was not itself an award and did not require confirmation.

Article V.1 of the Convention provides that recognition and enforcement of the award "may be refused" if the party opposing enforcement establishes that:

> (a) The parties to the agreement . . . were . . . under some incapacity, or the said agreement is not valid

> under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award . . . contains decision on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated . . . that part of the award which contains decision on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or arbitral procedure was not in accordance with the agreement of the parties, . . . or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by competent authority in the country in which, or under the law of which, that award was made.

Article V.2 further provides that "recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that":

> (a) The subject matter . . . is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Much of the litigation about enforcement of international arbitration awards deals with "public policy" in Article V.2(a). The federal courts have concluded that it "'is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."[39] Similarly, the Sixth Circuit reasoned that "manifest disregard of the law" cannot be 'pigeonholed into the 'violation of public policy' basis for refusing to confirm an award."[40]

Under Article V.1(c), an award can be challenged on the ground that it is beyond the terms of reference to arbitration. The courts, however, generally view the submission broadly.[41]

Article V.1(b) guarantees a fundamentally fair hearing, but does not require application of the rules of evidence or other due process that would apply in a domestic court.[42]

The district court in *Chromalloy Aeroservices v. Arab Republic of Egypt*,[43] enforced an award even though it was set aside by an Egyptian court, where the award was otherwise valid under domestic law. The court construed Article V.1(e) as a "discretionary standard". The *Chromally* court also relied on Article VII.1, which provides:

> The provisions of the present convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by law . . . of the country where such award is sought to be relied upon.

This Article can form an independent basis for enforcement of an award, even if vacated by a court in the seat of arbitration.

As noted above, the provisions of FAA Chapter 1 also apply to the New York Convention "to the extent [they are] not in conflict with this chapter [Two] or the Convention".[44] The grounds for refusing to confirm and enforce an award in Chapter 1[45] are similar to those in the New York Convention, and some courts have applied to international awards the grounds under Chapter 1.[46] There is, however, no express counterpart in the New York Convention to 9 U.S.C. § 11(a), which allows vacation or modification of awards where there is "evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property".[47] Similarly, "manifest disregard of the law" has been recognized as a "non-statutory" ground for review of arbitration awards under Chapter 1. Some courts have assumed that "manifest disregard" applies to international awards without specifically analyzing the language of Article V.[48] Other courts have held that Chapter 2 provides the exclusive grounds for declining to enforce an award covered by the Convention.[49]

There is some doubt about the continued vitality of "manifest disregard" following the Supreme Court's decisions in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[50] and *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*,[51] but as of this writing the courts have not resolved the issue.

Appeal of Orders Regarding Arbitration

Chapter 1 of the FAA governs appeals to the federal courts of appeal under Chapters 1 and 2. Reflecting the policy in favor of arbitration, 9 U.S.C. § 16(a)[52] provides a right to appeal from an order blocking arbitration, but 9 U.S.C. § 16(b) provides that there is no right to appeal from an order allowing arbitration to proceed.[53] Thus, 9 U.S.C. § 16(b) carves orders allowing arbitration to proceed out of 28 U.S.C. § 1292(a), which would otherwise allow an appeal of right from an order granting or denying a stay.

About the Author

Larry J. Saylor, a principal in the Detroit office of the law firm of Miller Canfield, litigates complex business disputes in state and federal courts throughout the country, and in domestic and international arbitration. He has experience compelling arbitration

and enforcing arbitration awards, and serves as an arbitrator on the American Arbitration Association's commercial, complex commercial and franchising panels. Larry also serves as Chair of the firm's Antitrust and Trade Regulation Section, and as an adjunct professor at University of Detroit Mercy School of Law, where he teaches a course on franchising and dealer law. He was chair of the Antitrust, Franchising and Trade Regulation Section of the State Bar of Michigan and Article Editor of the Michigan Law Review, and writes and speaks regularly on antitrust, franchising, business torts, and arbitration. He received his J.D., magna cum laude, from the University of Michigan Law School, his M.C.R.P. from Ohio State University and his A.B. from Miami University, Ohio.

Endnotes

1 3 U.S.T. 2517 (June 10, 1958).

2 *See* http://www.newyorkconvention.org/new-york-convention-countries (last accessed December 5, 2011).

3 *See* 9 U.S.C. § 202.

4 *See* New York Convention Article I.3; *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932-33 (2d Cir. 1983), *citing* Presidential Proclamation dated September 1, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997.

5 9 U.S.C. §§ 201-208.

6 9 U.S.C. § 208. Similarly, Chapter 3 of the FAA, 9 U.S.C. §§ 301-307, implements the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), adopted Jan. 30, 1975 The Panama Convention applies "unless otherwise agreed," if "a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States . . . ." Otherwise, the New York Convention applies.

7 *See Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999).

8 *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845-46 (2d Cir. 1987)

9 9 U.S.C. § 203.

10 *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992), *citing Sedco, Inc. v. Petroleos Mexicanos, Mexican Nat'l Oil Co.*, 767 F2d 1140, 1145 (5th Cir. 1985).

11 9 U.S.C. § 203.

12 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26 n. 32 (1983).

13 9 U.S.C. § 205.

14 *Southland Corp. v. Keating*, 465 U.S. 1, 11-16 (1984).

15 9 U.S.C. § 204.

16 9 U.S.C. § 206.

17 *Id.*

18 *See* 9 U.S.C. § 202. *See Riley*, 969 F.2d at 959; *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982).

19 New York Convention, Article II, ¶ 3 (emphasis added).

20 417 U.S. 506, 516-17 (1974).

21 473 U.S. 614, 629 (1985).

22 *Also see M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

23 473 U.S. at 629, *quoting M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 9.

24 684 F.2d 184, 186-87 (1st Cir. 1982).

25 684 F.2d at 187. Also see *Soler,* 473 U.S. at 621.

26 969 F.2d 953, 958 (10th Cir. 1992).

27 969 F.2d at 958.

28 *Id.* at 960.

29 *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)

30 *Also see Scherk*, 417 U.S. at 519 n. 14 ("an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion"); *Riley*, 969 F.2d at 960 ("[a] plaintiff seeking to avoid a choice provision on a fraud theory must . . . plead fraud going to the specific provision").

31 *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (securities); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust).

32 349 F.3d 1023 (7th Cir. 2003).

33 2003 WL 2290412.

34 9 U.S.C. §207.

35 *Id.*

36 *See, e.g., M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847-49 (6th Cir. 1996); A. Redfern, Law and Practice of International Commercial Arbitration, § 10-49 (4th ed. 2004). But *see Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D. D.C. 1996), discussed below.

37 206 F.3d 725, 728, 729 (7th Cir. 2000).

38 289 Fed. Appx. 927, 2008 WL 3889739, (6th Cir. 2008).

39 *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975). *In accord is Slaney v. International Amateur Athletic Federation*, 244 F.3d 580, 593-94 (7th Cir. 2001).

40 *M&C Corp v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847-48 (6th Cir. 1996). In accord is *Stawski Distributing Co. v. Browary Zywiec S.A.*, 126 Fed.Apx. 308, 2005 WL 545702 (7th Cir. March 1, 2005) ("an error in the application of substantive law does not authorize a court to annul the outcome of arbitration").

41 *See, e.g., M&C, supra*, 87 F.3d at 849-50; *Willoughby Roofing and Supply Co., Inc. v. Kajima Intern., Inc.*, 776 F.2d 269 (11th Cir. 1985).

42 *Compare Slaney*, 244 F.2d at 592-93; with *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papiere (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

43 939 F. Supp. 907 (D. D.C. 1996).

44 9 U.S.C. § 208.

45 9 U.S.C. § 10 provides that a court can decline enforcement:
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 11 provides that a Court can also refuse enforcement:
(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award[; or]
(b) Where the arbitrators have awarded upon a matter not submitted to them, ...

46 *See, e.g., Yusef Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19-20 (2d Cir. 1997).

47 9 U.S.C. § 11(a).

48 See, e.g., *Yusuf, supra; Stawski Distributing Co. v. Browary Zywiec S.A.*;126 Fed. Apx. 308, 2005 WL 545702 (7th Cir. March 1, 2005); *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche International, Ltd.,* 888 F.2d 260, 265 (2d Cir. 1989).

49 *See, e.g.*, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998); *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847-48 (6th Cir. 1996) (declining to apply manifest disregard under the Convention).

50 552 U.S. 576, 584-85 (2008).

51 130 S.Ct. 1758, 1767-68 & n.3 (2010).

52 That section provides:

(a) An appeal may be taken from--
(1) an order--
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.

53 That section provides:
(b) Except as otherwise provided in section 1292(b) of title 28 [allowing certification of "a controlling question of law"], an appeal may not be taken from an interlocutory order--
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

Sobriety After the Zeal: What's Next for the Arab Spring?

By Heather Pillot

To date, the "Arab Spring" has toppled three regimes marked by dictatorial repression: that of Colonel Muammar Gaddafi in Libya, President Honsi Mubarak in Egypt and President Zine El Abidine Ben Ali in Tunisia.[1] Leading the way was Tunisia, which held its first post-revolution election in October of this year. The Nahda, a moderate Islamist party, won the day, taking forty-one percent of the assembly's seats.[2] Following suit, on November 28 and 29, 2011, Egypt commenced voting for its new Parliament, a process designated to occur in stages over the course of the next several months. Egypt's Muslim Brotherhood, by way of its political arm, the Freedom and Justice Party, emerged as the front-runner and winner of the largest bloc in parliamentary elections, along with the ultraconservative Salafis who have taken nearly a quarter of the vote.[3] Finally, Libya's "Public National Conference" is due to be elected by June of 2012 and is charged with drawing up a new constitution within 60 days. If approved by referendum, Libyan elections will occur six months thereafter.[4]


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The widely-publicized photos of enthusiastic voters in Tunisia and Egypt are meant to evoke the success of the revolutions and a triumph for western liberal democracy over

the repressive dictatorial regimes. As cautioned by Professor Gregory Fox in *Intolerant Democracies*, "[t]he holding of free and fair elections alone, however, provides no guarantee that a democratic system will become firmly established and capable of resisting challenges by anti-democratic actors."[5] The interim transitional military regimes in Egypt and Libya and the newly elected government in Tunisia's greatest challenge may be to redress decades of human rights' abuses[6] without themselves becoming new perpetrators.

Even if one were assured that the electoral process was free and fair and even if, in the cases of Egypt and Libya, the transitional military regimes transfer control of the country without illegitimately reserving power for themselves, questions nevertheless remain regarding the agenda of the political parties and their respective intentions to create and preserve truly pluralist and substantive democracies.[7] Whether, and to what extent, the newly elected leaders will be monitored and preserve human rights as they, along with competing interests, jostle for position, remains to be seen.

To date, Tunisia appears to present the most inspiring example. Tunisians are quietly and peacefully transitioning to a democracy in which the Nahda's political power is limited and balanced by its coalition with secular parties recognized for their laudable support of human rights during Zine-el-Abine Ben Ali's rein.[8] Furthermore, a general Tunisian election is scheduled to take place under a new Tunisian constitution in late 2012 or early 2013.[9]

In Egypt, on the other hand, the multitude of "unknowns" associated with the Muslim Brotherhood and Salafis' political agenda gives pause.[10] Certainly the ultraconservative policies of the Salifais', which include religious piety, conservative dress for women, banning alcohol and cutting off the hands of thieves, seems inconsistent with the aims of the celebrated Egyptian protestors. Even the comparatively moderate platform of the Freedom and Justice Party gives rise to concern. *The New York Times*, for example, has quoted Mehdi Akef, a former top Brotherhood leader and a conservative, as stating: "Our preliminary platform will be shown through the Freedom and Justice Party. But our full platform will not be disclosed until we are in complete control and take the presidency as well."[11]

Critics of the Muslim Brotherhood cite the group's prior tacit partnership with Egypt's existing military regime and its conservative views on the rights of women and intolerance of religious minorities as evidence that the Brotherhood and its Freedom and Justice Party, are unlikely to spark liberal democracy pleasing to the Western palate.[12] Others, however, are more optimistic about the Party's prospects.[13] Such commentators note that the political platform adopted by the Freedom and Justice Party diverges from the broader religious movement. This movement, in and of itself, contains diverging viewpoints, many of which are not intent on establishing a conservative state based upon shari'a law and subversion of liberal democratic ideals.[14] Indeed, Brotherhood leaders have reportedly proclaimed their dedication to religious tolerance and a "democratic and pluralist form of government and that Coptic Christians and women would be welcomed into the political party affiliated with the movement."[15]

In any event, despite the lightning speed with which "free and fair" elections are being held or organized, the underpinnings of substantive liberal democracy embracing political opposition appear to be far from taking hold in "post-revolution" Libya and Egypt. Libyan militias, for example, have been reported as terrorizing civilians, including the ransacking and burning of the town of Misrata, population 30,000.[16] Also in Libya, around October 23, 2011, the bodies of 53 purported Gaddafi supporters were discovered after having been apparently killed execution-style.[17] There are simultaneous reports that protesters in Egypt continue to be unjustifiably arrested, tried before military courts, and detained in military jails.[18]

In this context, and particularly with respect to the Egyptian elections, the "Algeria example" discussed by Fox and Nolte in *Intolerant Democracies* deserves consideration.[19] Fox and Nolte discussed the 1991 Algerian election in which the Islamic Salvation Front ("FIS") took the popular vote and won a majority of parliamentary seats. Significantly, the multiparty elections were "generally thought to be free from serious irregularity." Nevertheless, the FIS victory was problematic. If victorious, the FIS threatened to ban political opposition and future democratic elections. Specifically, the FIS:

> [M]ade it clear during the election that if victorious it intended to remake Algeria into an Islamic state. While FIS leaders issued contradictory statements as to whether their plans included holding future elections, several expressed open hostility toward multiparty democracy.[20]

Before the second round of voting, which would have brought the FIS to power, the Algerian military cancelled the elections, declaring a state of emergency and effected a *coup d'etat.*[21] The FIS victory gave rise to the question: Is there an obligation to respect the result of an election that, while freely and fairly conducted, ultimately constitutes a democratic "suicide pact."[22] Indeed, his article, *Fragile Democracies*, Samuel Issacharoff, poses the related question: "[C]an democracies act not only to resist having their state authority conscripted to the cause of intolerance, but also, under certain circumstances, to ensure that their state apparatus not be captured wholesale for that purpose?"[23] If so, could the Algerian military's conduct be viewed as an act of democratic self-defense?[24]

As in Algeria, the popular votes in Tunisia and in Egypt, appear to be in favor of regimes whose platforms on human rights issues appear to be spotty, at best. The Arab Spring generally, and the Egyptian uprising in particular, has been

characterized as having a decidedly liberal and secular "feel," in which youthful Egyptians protested en masse, fueled and organized in part by social media platforms like Facebook. A popular vote in favor of political parties with potentially *more* conservative agendas than those associated with the ousted regimes makes the election results particularly puzzling. How will the fall-out in Tunisia, Egypt and Libya color international human rights advocates' view of the "Arab Spring?" Will the overthrow of military or dictator-rule in favor of anything other than liberal or secular governance offend the international community's expectations for what a "successful" revolution should look like? [25]

Notwithstanding anything that human rights advocates have to say about the political aspirations of the Nahda, the Freedom and Justice Party or the Salafis, one might argue that champions of liberal democratic governance ought to generally respect the outcome of *any* peacefully-held election so long as it was conducted freely and fairly and devoid of serious irregularity. The International Covenant on Civil and Political Rights (ICCPR), in Article 25, obligates its members to hold regular, legitimate elections and to honor the results of those elections.[26] A strict application of the letter of the ICCPR, therefore, might suggest that the international community ought to respect and honor the outcome of the Arab Spring elections, regardless of the policies of the elected candidates. To question the "correctness" of Egyptian or Tunisians' political choices, one could contend, is akin to a paternalistic West imposing its notion of "correct" governance onto an unreceptive, supposedly sovereign, state.[27] Irrespective of one's position on the matter, there can be little dispute that a celebrated revolution followed by a popular-vote for a repressive regime is a bitter pill, indeed.

In short, there are some disconcerting signs that the outcome of the Arab Spring may initially fall short of hopes. Despite the vestiges of liberal, democratic processes in Tunisia, Egypt and Libya, there is some cause for concern that the electoral process may, in some respects, be tantamount to a triumph of form over substance.

Undoubtedly, the Arab Spring revolutions may yet pave the way for a democratic Middle East which effectively combines religious culture with liberal democratic principles resulting in a fair and inclusive polity truly representative of the people. A skeptic, on the other hand, cannot help but wonder whether the same revolutions have merely paved the way for yet another autocratic regime to act with impunity, all the while masked by a rushed electoral process in which voters cling to the familiar while stifling any possibility of genuine reform.

About the Author

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Endnotes

1 Certainly the Arab Spring is not limited to these nations and includes civil uprisings throughout Arab states, including Syria, Yemen, Lebanon, Morocco, Algeria and others. In most cases outside of Egypt, Libya and Tunisia, however, civil unrest has not resulted in regime change, although it has in many cases, including, Morocco Jordan, Kuwait and Lebanon, caused the implementation of government or even constitutional reform. Certainly, in the case of Syria, the extent to which the Arab Spring demonstrations serve as a catalyst for the topple of the President Bashar Assad's regime, or whether the approbation of the international community of the regime's violent repression of demonstrators is ultimately responsible for regime-change in Syria, remains to be seen.

2 *See Islamists and Secularists at One*, The Economist, November 26, 2011 at 58; *See also* Anthony Shadid, *Tunisia Faces a Balancing Act of Democracy and Religion*, N.Y. Times, Jan. 31, 2012 at A1.

3 *See* David D. Kirkpatrick, *Deal to Hasten Transition in Egypt is Jeered at Cairo Protests,* N.Y. Times, Nov. 23, 2011 at A1; *See also* Kristen Stilt, "*Islam is the Solution": Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 Tex. Int'l L.J. 73, 74-80 (2010).

4 *See Muammar Gaddafi's death: NTC commander speaks*, BBC News, October 22, 2011, available at http://www.bbc.co.uk/news/world-africa-15412529 (last viewed Nov. 30, 2011). *See also* David D. Kirkpatrick, *In Egypt, a Conservative Appeal Transcends Religion*, N.Y. Times, December 11, 2011, at A6.

5 Gregory Fox and Georg Nolte, *Intolerant Democracies*, 36 Harv. Int'l L.J. 1 at 1 (1995).

6 Human rights activists documented particularly grievous and uncountable detentions and disappearances at the hands of the Gaddafi administration. *See e.g.,* United Nations, Human Rights Committee Concluding Observations, CCPR/C/LBY/CO/4 15 November 2007, at 14, 15 and 23 available at <http://daccess-dds- ny.un.org/doc/UNDOC/GEN/G07/453/27/PDF/G0745327.pdf> (last visited November 29, 2011); *See also, Truth and Justice Can't Wait,* (Human Rights Watch Report on Libya), Dec. 12, 2009, §§ IV, VI and VIII, available at <http://www.hrw.org/reports/2009/12/12/truth-and-justice-can-t-wait> (last accessed on November 30, 2011).

7 Also problematic in the case of Egypt, is the fact that unclear voting and electoral mechanisms make for a voting process that is less than transparent. A more fundamental concern is whether the transitional military regime will concede control

of Egypt and constitutional authority to the duly elected parliament and president. *See e.g.,* David D. Kirkpatrick, *Egypt Islamists Demand End to Military Rule*, N.Y. Times, Nov. 19, 2011 at A1. *See also* Kirkpatrick, *supra* note 3.

8 *Supra,* note 2.

9 *Id.*.

10 *See generally* Nathan J. Brown & Amr Hamzawy, *The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?*, 89 Carnegie Papers: Middle East Series 1 (2008); *See also* Stilt, supra note 4 at 85-86.

11 David D. Kirkpatrick, *Egyptian Elections Expose Differences in Muslim Brotherhood,* N.Y. Times, June 20, 2011, at A4,.

12 *See e.g.,* Stilt, *supra* note 4 at 104-105.

13 *Id.* at 86.

14 *Id.*

15 *See* Michael Slackman, *Islamist Group is Rising in Force in a New Egypt*, N.Y. Times, March 25, 2011, at A1.

16 *See Libya: Militias Terrorizing Residents of 'Loyalist' Town*, (Human Rights Watch Press Release), Oct. 30, 2011, available at <http://www.hrw.org/news/2011/10/30/libya-militias-terrorizing-residents-loyalist-town> (last visited November 30, 2011).

17 *See Libya: Apparent Execution of 53 Gaddafi Supporters* (Human Rights Watch), Oct. 24, 2011, available at http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters (last visited November 29, 2011).

18 *See e.g., Broken Promises, Egypt's Military Rulers Erode Human Rights*, (Amnesty International) November 2011, available at http://www.amnesty.org/en/library/asset/MDE12/053/2011/en/47be269e-b67a-42f4-835b-787f91044e04/mde120532011en.pdf (last visited November 30, 2011).

19 Fox & Nolte, *supra* note 6 at 5.

20 *Id.*at 6.

21 For clarity's sake, the Algerian army cannot be characterized as a hero. During the course of the *coup*, the army rounded up and imprisoned tens of thousands of FIS supporters in Saharan desert concentration camps, where the prisoners were subject to torture.

22 Fox & Nolte, *supra* note 6 at 8.

23 Samuel Issacharoff, *Fragile Democracies*, 120 Harv. L. Rev. 1405 at 1408 (2007).

24 The European Court of Human Rights, when confronted with a Turkish ban of political parties gave a decided answer of "maybe." In *Socialist Party and Others v. Turkey*, the court declared that the ban of political parties posing an asserted threat to Turkish national unity and security "was not necessary in a democratic society." *Socialist Party and Others v. Turkey*, ECHR, May 25, 1998 Judgment, both *available at* <http://hudoc.echr.coe.int>. The court determined that, where the political party did not pose a threat to democratic process, "the fact that such a political programme is considered incompatible with the current principles and strictures of the Turkish State does not make it incompatible with the rules of democracy… provided they do not harm democracy itself." *Id.*

25 The scope of this article certainly does not endeavor to fully address such a broad question. For further discussion of democracy as a human right generally, *see* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46 (1992). For discussion of a state's ability to exclude undemocratic actors from democratic process and the obligation, if any, to recognize the legitimacy of a procedurally proper election resulting in a decidedly undemocratic regime, *see* Issacharoff, *supra* note 23 and Fox & Nolte, *supra* note 6 at 5-13.

26 *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

27 For a decidedly more nuanced response to Fox and Nolte's position set forth in *Intolerant Democracies*, *see* Martti Koskenniemi, *Democratic Intolerance: Observations on Fox and Nolte*, 37 Harv. Int'l L.J. 231 (1996) and Brad Roth, "*Intolerant Democracies": A Reaction*, 37 Harv. Int'l L.J. 231 (1996).

An Overview of Modern International Arbitration

By Stephen P. Anway

Introduction

To most people (including most lawyers), the world of international arbitration is shrouded in a veil of mystery. The widely-held perception of our practice is the stuff that movies are made of — lawyers traveling around the world to exotic countries, meeting with officials from foreign governments and multi-national corporations, and representing them before international tribunals in high-stakes cases.

In reality, our practice is much more sobering: endless hours of intense work, countless days and nights in planes and hotels crossing many time zones (which is murder on one's sleep schedule), and formidable challenges in doing this work through different languages and cultures. None of this, however, should be surprising. These features are inherent to any international arbitration practice.

Instead, the real mystery surrounding investment treaty arbitration is more elementary: what *is* it? In generic terms, international arbitration is a method for resolving disputes arising from international commercial agreements and other international relationships. Like all arbitration, international arbitration is a creature of contract. It arises from an agreement between parties from different countries to submit their disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties. That agreement is usually struck in a dispute resolution clause in an international contact or treaty in which the parties agree to arbitrate future disputes.

Parties agree to resolve their disputes through international arbitration for a number of reasons. They include:

- *Neutrality*. International arbitration provides the parties a way to resolve their disputes without having to litigate in their counter-party's domestic courts, which may be viewed as less than neutral (and in extreme cases xenophobic), may take too long, and may require unnecessary formalities.
- *Confidentiality*. Unlike domestic litigation in many countries, international arbitration is — with limited exceptions — a confidential process in which trade secrets and other sensitive information can be shielded from the public and other interested third parties.
- *Specialist Decision-Makers*. International arbitration allows parties to hand-pick their decision makers, which is particularly important where the dispute involves technical issues that domestic courts are ill-equipped to handle.


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- *Finality*. International arbitral awards generally cannot be appealed; in most circumstances, a losing party's only recourse is to seek vacatur of the arbitral award based on a limited number of grounds in a court located in the place (seat) of the arbitration.
- *Enforceability*. International arbitral awards are, as a general rule, readily enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention."

This last point bears particular emphasis. Adopted by 146 nations, the New York Convention requires signatory nations to give effect to international arbitration agreements and awards. This mechanism allows the prevailing party to take an international arbitral award to the jurisdiction where the counter-party has assets and to convert the award into a local court judgment. The court judgment can then be taken to the sheriff (or the local equivalent) to seize the assets of the counter-party, liquidate them, and use the proceeds to satisfy the underlying arbitral award judgment.

Importantly, however, there is no comparable multilateral treaty requiring recognition and enforcement of foreign court judgments.[1] Thus, whereas courts are required to recognize and enforce foreign *arbitral awards* under the New York Convention, they are generally not required to recognize foreign *court judgments*. For that reason, international arbitral awards "travel" better than court judgments; they have—in the words of Jan Paulsson—better "international currency."

For all of these reasons, international arbitration is becoming the principal way for commercial parties to resolve their cross border disputes. And as a consequence, it is becoming increasingly important for counsel advising international business clients to be familiar with international arbitration.

Commercial and Investment Treaty International Arbitration

There are two main types of international arbitration today: commercial international arbitration, on the one hand,

and investment treaty arbitration, on the other hand. The following sections provide a brief overview of both.

Commercial International Arbitration

Commercial international arbitration clauses are found in contracts between parties from different countries. Below is a common international arbitration clause (the bracketed parts can be easily modified to suit the preference of the parties):

> All disputes arising out of or in connection with this Agreement shall be finally determined by arbitration administered by the [International Chamber of Commerce] and governed by its arbitration rules in effect as of the date of this Agreement. The number of arbitrators shall be [three]. The place of arbitration shall be [Geneva, Switzerland], and any and all awards and other decisions shall be deemed to have been made there, without prejudice to the right of the arbitral tribunal to hold hearings, meetings, or sessions any place it deems appropriate. The language of the arbitration shall be [English].

The general rule of thumb is to keep international arbitration clauses simple, leaving to the parties the flexibility to custom-build a proceeding to meet the demands of a future dispute, whatever that may be. Precisely because counsel does not know which disputes will later arise, it is generally not advisable to graft onto the clause "bells" and "whistles" that may not suit the particular dispute that later arises.

This issue highlights another advantage of international arbitration over domestic litigation: international arbitration presents the parties with a clean slate on which to write their process. Many lawyers seem to believe that there is only one procedure that should be followed in international arbitration (which, invariably, is the procedure they have used in the past). Most international arbitration rules, however, leave tremendous flexibility to the parties to determine the procedure of the arbitration. If the dispute resolution clause is drafted broadly, then the parties can look at each case anew and ask themselves: *How much process do we really need to resolve this dispute?*

Consistent with these principles, an international arbitration clause generally should contain the following items—but not much more:

- The arbitration institution that will administer the arbitration and/or the rules that will govern the arbitration;
- The seat (place) of the arbitration;
- The number of arbitrators;
- The language of the arbitration;
- The governing substantive law (if not specified elsewhere in the agreement); and
- Certain optional provisions, such as clauses concerning discovery, confidentiality, and interim relief.

The model international arbitration clause reprinted above is a good example of one that incorporates the first four of these points. Each is briefly summarized below.

First, an international arbitration clause should specify the arbitration institution that will administer the arbitration and/or the arbitration rules that will govern it. The leading institution for international commercial arbitration is the Court of Arbitration of the International Chamber of Commerce ("ICC"). Created in 1923 in Paris, the Court of Arbitration is not a "court" in the traditional sense but, rather, an arbitral institution that administers arbitrations under the ICC Arbitration Rules. Although based in Paris, the ICC has offices around the world (and recently announced that it will open an office in New York). ICC arbitrations can be — and often are — "seated" in jurisdictions other than Paris.

In addition to the ICC, there are numerous other commonly-used institutions that administer international commercial arbitration, including: the International Centre for Dispute Resolution ("ICDR"), which is the international arm of the American Arbitration Association ("AAA"); the London Court of International Arbitration ("LCIA"); the Stockholm Chamber of Commerce ("SCC"); the Vienna International Arbitration Centre ("VIAC"); the China International Economic and Trade Arbitration Commission ("CIETAC"); and the Hong Kong International Arbitration Centre ("HKIAC").

Alternatively, parties can agree to conduct their arbitrations under a set of arbitration rules but not under the purview of an institution or administering body. These are referred to as "ad hoc" arbitrations. The arbitration rules of the United Nations Commission on International Trade ("UNCITRAL") are the most common rules used in ad hoc international arbitration. The UNCITRAL arbitration rules are largely self-contained and provide that, after the constitution of the arbitral tribunal, the arbitral tribunal will administer the arbitration in accordance with the rules. If there are disputes concerning the constitution of the tribunal, the parties can seek recourse before the Permanent Court of Arbitration at The Hague ("PCA").

Second, the parties should specify in their international arbitration clause the place (seat) of the arbitration. The place of the arbitration is the legal system to which the parties subject the arbitration. Although international arbitration is largely independent of local courts, if recourse is needed from a court regarding the conduct of the arbitration or the award, such recourse generally can be only obtained in a court in the place of the arbitration and according to its local arbitration law.

The place of arbitration should be a jurisdiction with a predictable, neutral legal system that favors arbitration. The reason is simple: The place of the arbitration is where the losing party can seek to vacate the award. Counsel should avoid

the situation where, after years of fighting for an award, the losing party can seek vacatur in a court system where there is no predicable arbitration law and the court may vacate the award simply because it disagrees with the merits of the decision. The key in selecting a place of arbitration is the predictability that the local courts will uphold any arbitral award. For that reason, New York, London, Paris, The Hague, Stockholm, and Geneva are the most commonly-selected places of international arbitration.

This does not mean, however, that the international arbitration hearings must be held in the place of the arbitration. The hearings can be held anywhere that is convenient for the arbitral tribunal and the parties. Nor does it mean that the arbitral tribunal must deliberate or sign the award in the place of the arbitration. Rather, the place of the arbitration is where the international arbitration is *deemed to take place*.

Third, parties should consider specifying the number of arbitrators in their arbitration clause. It should be one or three, depending on the expected value of the dispute. In the alternative, the parties can remain silent on the number if the arbitral rules specified in the dispute resolution clause provide a default rule.

Fourth, the parties should specify the language of the arbitration. English is the most common.

For most other matters, the arbitral rules that you select will fill in the gaps. Where the arbitral rules are silent on an issue of procedure, the issue is largely left to the discretion of the arbitral tribunal. Discovery is one such example. Most international arbitral rules do not contain specific rules on discovery. Tribunals therefore often look to the convention in international arbitration concerning discovery, which are generally reflected in the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"). The IBA Rules — which can be expressly adopted by the parties in their international arbitration clause or after the disputes arises — recognize that expansive documentary discovery is generally inappropriate in international arbitration and impose basic requirements concerning document requests (they do not expressly contemplate depositions).

These, then, are the basic components to a commercial international arbitration clause. The following section discusses the other major type of international arbitration: investment treaty arbitration.

Investment Treaty Arbitration

Investment treaty arbitration clauses are found in treaties between two countries ("Bilateral Investment Treaties" or "BITs") or investment treaties between more than two countries ("Multi-Lateral Investment Treaties"). The purpose of investment treaties is to encourage and protect foreign investment by creating mutually favorable conditions for investments by nationals of each signatory State in the territory of the other signatory State. The theory behind these treaties is that, by creating mutually favorable conditions for foreign investment, the signatory States will stimulate business initiatives and foster their economic development while, at the same time, securing protection for their own investors' foreign investments.

Investment treaties seek to encourage and protect foreign investment by according foreign investors two categories of rights. *First*, they grant foreign investors rights based on two "contingent" (or relative) standards: (*i*) national treatment, which assures nondiscrimination or no-less-favorable treatment than the citizens or companies of the host State (the State were the foreign investment is been made); and (*ii*) most-favored nation ("MFN") treatment, which assures treatment no-less-favorable than the treatment of aliens or companies from other States.

Second, investment treaties accord foreign investors "non-contingent" (or non-relative) rights, based on what are called "absolute" standards because their meaning is not dependent on differential treatment. Non-contingent (absolute) standards are intended to protect the rights of foreign nationals regardless of whether the host State provides the same rights to its own or a third State's nationals. States to investment treaties typically undertake to provide the following non-contingent protections to investors of the other signatory State:

(a) Fair and equitable treatment;

(b) Full protection and security;

(c) Non-impairment by discriminatory measures; and

(d) Protection against unlawful expropriation without compensation.

In the dispute resolution clauses of these treaties, the contracting States often agree that, if the host State fails to provide one or more of these protections to a foreign investment protected under the treaty, the protected investor of the other State can initiate an international arbitration against the host State. Once seized of the matter, the arbitral tribunal will determine if the host State violated the investment treaty and, if so, can order the host State to pay damages to the investor. In this way, the signatory States make a standing offer to arbitrate disputes with an investor, and the investor "accepts" that standing offer by initiating arbitration. Thus, investment treaty arbitration, like all arbitration, is based on the consent of the parties.

Many investment treaties give the investor the option of choosing one of several types of international arbitration. The three most common are (*i*) arbitration administered by the International Centre for Settlement of Investment Disputes ("ICSID") in Washington D.C., which is a division of the World Bank and specializes in investment disputes involving respondent States, (*ii*) arbitration administered under the UNCITRAL Arbitration Rules, and (*iii*) arbitration administered

by the SCC Arbitration Rules. The Energy Charter Treaty, for example, gives qualifying investors all three options.

The number of investment treaties has grown significantly over the past two decades. In 1992, there were approximately 700 BITs.[2] Today, the number has swelled to 2,750.[3] Because investors have the option of bringing claims directly against host States under most of these investment treaties (by accepting the host State's standing offer to arbitrate), there has been an increasing number of claims brought by investors against host States. All told, ICSID has registered 369 investment treaty claims against host States under the ICSID Convention and the Additional Facility Rules, the vast majority of which were filed in the last decade.[4] In 2011 alone, ICSID registered 38 new investment cases, which is the largest number of claims that ICSID has registered in any single year.[5]

The explosion of investment treaty claims filed in the past decade has resulted in a proliferation of decisions by international tribunals deciding those claims. Those decisions form a body of case law that consists of hundreds of decisions (which, on average, increases by several more each month). Most of this body of case law is publicly available on the ICSID website (icsid.worldbank.org) and a small handful of other websites dedicated to maintaining investment treaty decisions and awards. The most popular include *Investment Arbitration Reporter*, maintained by Editor and Publisher Luke Eric Peterson (www.iareporter.com), and *Investment Treaty Arbitration*, maintained by Canadian law professor Andrew Newcombe (italaw.com).

It is this body of case law that informs our analysis of the scope of BITs, the jurisdictional requirements they impose, and the substantive protections they accord. Past cases, however, are not in principle binding on future ones. Nevertheless, counsel and tribunals cite prior cases as persuasive authority in investment treaty arbitration much the same way that lawyers do in common law systems. For that reason (among others), it is advisable for parties involved in investment treaty arbitrations to retain counsel who have expertise in public international law and investment treaty law in particular.

Conclusion

This article has aimed to provide a brief overview of modern international arbitration. It is a vibrant, exciting area of law. What no article like this one can convey, however, is the richness that international arbitration brings to the people involved in the practice. At its core, our job is to work with people from different countries and cultures to resolve their international disputes. Throughout that process, we gain a profound appreciation for — and much deeper understanding of — other legal systems, cultures, and world views. And along the way, we hope to make a positive contribution to the development of international law and, if we're lucky, to make a few friends around the world.

This article is based on a speech given by Stephen Anway to the International Law Section of the Michigan State Bar on November 16, 2011. He can be contacted at stephen.anway@squiresanders.com or +1.212.407.0146.

About the Author

Stephen P. Anway is a partner in the international arbitration group at Squire Sanders (US) LLP and practices in its New York office. He acts as counsel in investment treaty arbitrations and commercial arbitrations under the ICSID, ICC, and UNCITRAL Arbitration Rules. He also represents clients in US courts in cases with an international law element, including cases concerning the recognition and enforcement of international arbitral awards. In addition to contentious matters, he advises governments on various issues of public international law and is a frequent lecturer on investment treaty and commercial arbitration matters.

Endnotes

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1 There are exceptions, such as court judgments obtained and enforced within the European Union.

2 Mirian Kene Omalu, NAFTA and the Energy Charter Treaty, 2 n.10, (1999).

3 UNCTAD, World Investment Report 2010, p. 83 (2010).

4 The ICSID Caseload Statistics, 7 (Issue 2012-1), p. 7.

5 *Id.*

Attribution of Wrongful Conduct Via "Effective Control" as Intended in the International Law Commission's Draft Articles on the Responsibility of International Organizations[1]

By Captain Nicholas Mull[2]

Introduction

This article will focus on the application of the International Law Commission's (ILC) notion of "effective control" as it pertains to what is currently labeled as draft article 7 of the Draft Articles on Responsibility of International Organizations (DARIO). Since the notion of draft article 7 seemingly will only apply to situations of state troop contingents to forces of International Organizations (IO) such as the United Nations (UN), the article will treat the analysis from the standpoint of military operations.[3]

First, a background of the concept of legal responsibility for international organizations under draft article 7 will be provided. Second, an analysis of "effective control" from the three most prominent examples of judicial application of "effective control" as intended in draft article 7 by the ILC: (1) *Behrami & Saramati*, (2) *Nuhanovic*, and (3) *Al-Jedda*. Third, will be a review of real and political implications of the ILC framework as it applies to state contingents of UN peacekeeping forces. Finally, a conclusion of the likely progression of the "effective control" doctrine as it pertains to the future of UN peacekeeping.

"Effective Control" Under Draft Article 7

Certainly any discussion of the meaning of a proposed rule of law should begin with the actual text of that proposed rule:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct.[4] (emphasis added).

In applying this draft article to any situation, it is critically important to realize that "dual or even multiple attribution of conduct cannot be excluded."[5] As such, attribution of conduct to an IO under the DARIO does not necessarily mean that same conduct is not also attributable to the State and vice versa.[6] The notion of holding a state and IO joint and severally liable for the same conduct has been reaffirmed by numerous scholars and even some courts.[7]

Specifically, there are rare situations in which an organ or agent of a state may be "fully seconded" to an IO in which the IO would be solely responsible for any conduct.[8] This type of situation would be governed by draft article 6 however, because that "fully seconded" organ or agent becomes a *de facto* organ of the IO.[9] Contrary to that situation, draft article 7 applies to situations in which the donor state still retains a level of control over the organ or agent so that the default attribution to the state would remain absent a finding that it was the IO and not the state that had "effective control" over the wrongful conduct.[10]


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Draft article 7 seems to only apply to situations in which state troop contingents are provided to forces under the auspices of an IO; at least any and all practice cited is related to UN peacekeeping.[11] Since draft article 7 looks to "effective control" over the specific conduct, it leaves open the possibility that both the state and the IO may have "effective control."[12]

The primary question based on the text of the draft article and most relevant to this Article is what exactly does it mean to have "effective control" over the wrongful conduct. Does the meaning of "effective control" vary depending on the nature of the challenged conduct? Can "effective control" mean control over territory? Or, does it imply "effective control" over the personnel such as operational control or administrative control?[13] Does "effective control" indicate the party that was in the best position to prevent the wrongful conduct? Does "effective control" only apply to situations in which the IO directly orders the wrongful conduct? Is "effective control" determined by agreements between the IO and state?

The notion of "effective control" that has been proposed by the ILC as the proper interpretation of draft article 7 points to one general concept. The ILC commentary indicates a position that effective control over specific conduct should be determined by operational control.[14] But, that does not help that much in application. Instead of asking whether the IO had "effective control" the question becomes whether it had operational control. So, how is operational control determined?

First and foremost, it is clear that the ILC did not intend attribution to rest on a notion of exclusive control over the state troop contingents since states always retain administrative control over their troops, which includes disciplinary measures and criminal jurisdiction.[15] Instead, "effective control"

is to be determined on a case-by-case basis of the factual operational control over the specifically challenged conduct and not simply based on which party claims to have, or actually has ultimate strategic authority and control.[16] The importance of this is the fact that generally the UN purports to accept responsibility for acts of peacekeeping forces that it considers to be a subsidiary organ of the UN despite the nature of the contingents being state organs. Thus, the claim of the UN to accept responsibility as a means to entice states to volunteer their forces will not control the legal determination of which, if not both of the parties is responsible.

Analysis

In looking to the standards of "effective control" from the ILCs draft article 7 of the DARIO that has been applied by the European Court of Human Rights (ECHR) and the Court of Appeal in the Hague, the two questions left posed is which will prevail and which best illustrates the intent of the ILC, if any.

What Test Should Be Applied?

As a preliminary matter, it is important to emphasize the difference between the "effective control" standard for jurisdiction and that of attribution. These two concepts are often discussed together by the court because they can be closely related, but the difference is important with regard to future applications and revisions of draft article 7 of the DARIO.

The concept of "effective control" that looks to the amount of factual control a state had over territory at the time in which an alleged human rights violation occurred is a jurisdictional matter irrespective of attribution.[17] This notion of "effective control" is directly related to the primary rules of international law — whether there was a violation of an international obligation — not the secondary rules that govern attribution of which the Articles on State Responsibility for Internationally Wrongful Acts (ASR) and the DARIO are concerned.

Therefore, "effective control" for purposes of draft article 7 is generally without regard to territorial concepts. For purposes of attribution, it is not relevant whether the state or IO has any control over territory. While there may be specific human rights abuses in which control over territory may be in alignment with "effective control" over the actual wrongful conduct as it was closely in *Al-Jedda*, the potential overlap does not merge the issues as one.[18]

With the possibility that the "effective control" standard of draft article 7 should be applied based on territory eliminated, the prevailing standard will be based on some level of control, whether that be strategic (ultimate), operational, or preventative.

Concerning the "ultimate authority and control" test from *Behrami & Saramati*, it is likely this will not be the prevailing standard of attribution under draft article 7 as the case law and weight of the DARIO increases. First, the "ultimate authority and control" standard was vehemently rejected by the ILC and numerous scholars with specific citation to the case giving its birth.[19]

Second, this test if applied as the standard for determining "effective control" over conduct would produce grossly unjust results. Victims of human rights abuses at the hands of UN peacekeepers would in many cases be without remedy for the harm done to them. The lack of remedy rests not only with the scapegoating by states to blame the UN, but the absolute immunity under Article 105 of the UN Charter the organization possesses in all domestic courts.[20] Additionally, the UN is beyond the jurisdiction of international courts because it is not a party to treaties forming many of the courts, and the ICJ only hears cases between states. Furthermore, while the UN generally accepts responsibility for the actions of UN peacekeepers as a matter of political policy, it does not do so in situations in which the conduct goes against orders or policy of the UN.[21]

The "ultimate authority and control" test may be the preferred method of states, but it certainly is not of the UN as the UN counsel also rejected this as a standard for determining "effective control."[22] It has the effect of absolving states from responsibility of monitoring their troop contingents, and ensuring compliance with obligations of the state. Also, by implementing a standard in which states do not have to be concerned about potential attribution, states will not have the incentive to exercise their administrative control over the troop contingents to deter and help prevent any wrongful conduct from occurring.

A standard of "effective control" based on factual operational control over the specifically challenged conduct ensures the proper alignment of incentives for states to use their administrative control to prevent wrongful conduct. It also focuses more precisely on the entity that may have ordered the conduct, or due to its negligence and lack of implementing disciplined leadership was in the best position to prevent the conduct. As noted by the ILC, a standard looking to the factual control over the conduct in question directly implies a role in the commission of the act, whether that role was direct or indirect from dereliction.[23]

While there is extremely limited practice regarding the application of "effective control" as is intended in draft article 7 of the DARIO, there is an abundance of state practice and International Court of Justice (ICJ) jurisprudence regarding the control analysis of article 8 of the ASR.[24] Article 8 of the ASR states:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[25]

The parallel article to draft article 7 in the ASR is actually article 6 based on the context of attribution as it pertains to

organs placed at disposal to a state or IO.[26] However, as articulated by the ILC, there is a different standard in applying both of the articles due to the nature of IOs not having traditional governmental authority.[27]

But, the jurisprudence and commentary surrounding the application of article 8 of the ASR is directly in line with the "effective control" concept of draft article 7.[28] In fact, "effective control" has been held by the ICJ to be the standard of application for article 8 of the ASR.[29] Based on the alignment of standards and need to look elsewhere for a clearer understanding of what is meant by "effective control," the same mode of analysis should be used for draft article 7 of the DARIO.[30]

In the *Paramilitary Activities* case, the ICJ found general control and even a large amount of dependency to be insufficient to attribute actions to the state.[31] Instead, the State must have "effective control of the . . . operations in the course of which the alleged violations were committed."[32]

The standard of effective operational control in this context was not challenged until the International Criminal Tribunal for the former Yugoslavia (ICTY) made its decision in *Tadic*.[33] In that case, the tribunal rejected the notion of effective operational control and stated the attribution should be determined by an overall control test.[34] However, this was a criminal case in which the tribunal was trying to establish the existence of a non-international armed conflict. To do so, it needed to be able to attribute the actions of the Bosnia Serb militias to Serbia.

Subsequently, in the *Genocide* case the ICJ disregarded the ICTYs overall control test as incorrect.[35] Additionally, it noted that the ICTY was charged with criminal prosecutions of individuals and was not charged with making distinctions of state responsibility.[36]

In the *Genocide* case, the ICJ applied article 8 of the ASR to determine if conduct of military forces that were neither *de jure* nor *de facto* organs of the state, but under the control of the state could be attributed to the state.[37] The importance of this distinction is that if the forces could be deemed a *de facto* organ of the state then all actions of that force would be attributable to the state just as a *de jure* organ despite the state potentially exercising no direct control. Concerning the article 8 standard, if it can be shown that the state had effective operational control over the specific wrongful conduct then it can be attributed to the state. The court also distinguishes "effective control" from acting under the directions of, which implies that "effective control" does not necessarily mean that the wrongful conduct was ordered by the state, but that the state exercised enough control that the conduct would not have occurred if the state sought to prevent it. This line of reasoning seems to be very much in line with the *Nuhanovic* ruling because it focuses not only on whether the wrongful conduct was ordered but was the control effective enough to have prevented it if not a result of direct orders.

Further the court notes that an "overall control" test broadens the scope of liability far beyond what is just because responsibility should not attach to parties having no role in the wrongful conduct.[38] This is in direct agreement with the ILC stance against the "ultimate authority and control" test of *Behrami*. Although phrased differently, the two tests really are one in the same. Therefore, the ICJs jurisprudence through analogy with the laws on state responsibility affirms that the "ultimate authority and control" test should not be used to determine attribution.

Implications on United Nations Operations.

The major concern in the development of the case law relating to draft article 7 is the future of UN peacekeeping operations. The question is whether states will continue to voluntarily give troop contingents to support UN peacekeeping operations if they may be subject to dual attribution with the UN, or sole attribution under a strict level interpretation of effective operational control. Additionally, if the *Nuhanovic* rationale is followed more closely, there are few situations where it can be said that the state was not in a position to prevent the wrongful conduct from occurring.

As noted previously, the UN has a general policy of accepting responsibility for actions of UN peacekeepers based on the political realities of the situation. Clearly, the UN is concerned that if it does not voluntarily accept responsibility then member states will be less willing to cooperate in the formation of peacekeeping forces.

There are generally three types of situations in which an "effective control" argument could come in to play: (1) situations where the UNSC gives a general authorization to member states to take action such as in Libya; (2) UN creates a subsidiary civil administrative organ that is to work in conjunction with a security force authorized by the UNSC but not operationally controlled by the UN such as KFOR; and (3) a situation with the classic UN peacekeeper blue helmets. How will attribution come out in the future?

What is clear from *Al-Jedda* and the ILCs commentary is that the UN cannot be attributable for acts conducted by forces that were merely authorized by the UNSC to conduct a certain operation. This is a situation where, like noted in *Al-Jedda*, the UN does not play an active role in conducting operations so it has neither "ultimate authority and control" nor "effective control."

Concerning the second possible context, it is likely any future rulings will not find attribution to the UN. However, that does not foreclose attribution to an IO such as NATO as would have been the potential in Kosovo. This can be said with relative confidence based on the response from the ILC, scholars, and the UN to the *Behrami* ruling, and the distance the ECHR created from it in *Al-Jedda* by finding a means to distinguish the cases.

As such, most future applications will likely be found in the third context, which is most similar to the *Nuhanovic* case. In this context, the facts leave open the door for dual attribution in many, if not most cases. The ability to prevent wrongful conduct and continuous communication between the troop contingents and its domestic chain of command is most often the case.

Conclusion

First, "effective control" should be evaluated from a purely operational control standpoint. The qualifier that the control be "effective" dismisses the notion that attribution should lie with the IO or State that has "ultimate authority" over the entire scope of operations. When seeking attribution for a specific human rights violation, it is the specific conduct that is relevant for analysis not the entire strategic framework of the operation. Looking to "effective control" which is the factual authority to direct and control the unit in operations, it additionally implies the entity in the best position to prevent any wrongful conduct. If wrongful conduct occurs, it is not related to the strategic objectives of a UN peacekeeping operation, but it is related to either illegal orders at the operational level or as a result of a troop contingent with a lack of good order and military discipline.

Secondly, it may not matter much in practice because the state may not be able to escape joint liability for the human rights violation. As the party that retains administrative control over troops, the state is responsible for training, leadership, personnel assignments, and instilling military discipline within a unit. If a human rights violation occurs, it is because the troops lack military discipline. That lack of military discipline is either shown by actions violating human rights without orders from the chain of command, or following what should be known as illegal orders.

Therefore, it is at least the opinion of this author that the "effective control" test of draft article 7 of the DARIO should be utilized to determine if the IO is also responsible for the conduct, not simply as a means for a state to evade attribution for its inability to properly exercise the control it retains when providing troop contingents to the UN.

About the Author

Nicholas Mull is a commissioned officer in the U.S. Marine Corps with the current rank of Captain. He was commissioned upon receiving his B.S. from the Honors College at Eastern Michigan University in Political Science and History in 2004 after four years of training as a Midshipman in the Naval Reserve Officer Training Corps (NROTC). Upon graduation from The Basic School in Quantico, VA, Nick was assigned to Camp Lejeune, North Carolina for duties as an Adjutant/Legal Officer. He subsequently deployed to Iraq in 2005-2006 and in 2007; serving as the Adjutant/Legal Officer for combat logistics units. In 2007, he was assigned to Headquarters, U.S. Marine Corps to serve as the Head of the Personal Awards Section for the Marine Corps and Recorder for the Commandant of the Marine Corps' Awards Board. In 2009, Captain Mull was one of two officers selected to participate in the Funded Law Education Program for the Marine Corps to attend law school while on active duty to become a Judge Advocate. During law school, Nick was a member of the Moot Court program, Article Editor for the Journal of Law in Society, and as Co-Chancellor and Oralist for the Jessup International Law Moot Court team. Captain Mull received his J.D. with honors from Wayne State University Law School in May 2012, and is awaiting his future assignment to Okinawa, Japan.

Endnotes

1 This article is an excerpt of a much larger piece that can be obtained from the author via e-mail: nicholas.mull@gmail.com.

2 Juris Doctor Candidate 2012, Wayne State University. Captain, United States Marine Corps. DISCLAIMER: Any opinion expressed in this article is that of the author and author alone, and should not be attributed to the Department of Defense or the U.S. Marine Corps.

3 *See* Tom Dannenbaum, *Translating the Standard of Effective Control Into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving As United Nations Peacekeepers*, 51 Harv. Int'l L.J. 113, 141 (2010).

4 Rep. of the Int'l Law Comm'n, 63rd sess, Apr. 26-June3, July 4-Aug. 12, 2011, UN Doc. A/66/10; Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011 [hereinafter *DARIO*].

5 *Id.* at chapter 2, ¶ 4.

6 *Id.*

7 *See, e.g.,* Pierre Klein, *The Attribution of Acts to International Organizations, in* The Law of International Responsibility 297 (James Crawford, Alain Pellet, & Simon Olleson eds. 2010).

8 *DARIO, supra* note 4, at art. 7, ¶ 1.

9 *See id.*

10 *See id.*

11 *See id.*

12 Special Rapporteur on the Responsibility of International Organizations, *Eighth Report on Responsibility of International* Organizations, Int'l Law Comm'n, UN Doc. A/CN.4/640 (Mar. 14, 2011) (by Girogio Gaja)[hereinafter *Eighth Report*]: "[E]ffective control of a particular conduct may belong to the contributing State rather than to the United Nations;" implying that "effective control" applies equally to the State and the IO, and since multiple attribution is noted as a possibility by the ILC, both the State and the IO could be responsible based on both entities having "effective control" over the wrongful conduct.

13 In military terminology, administrative control refers to the control over military personnel that involves: pay, promotion,

training, discipline, personnel assignments, and other matters not directly related to conducting a military operation.

14 *See DARIO, supra* note 4 at art. 7, ¶ 10.

15 Special Rapporteur on the Responsibility of International Organizations, *Second Report on Responsibility of International* Organizations, Int'l Law Comm'n, UN Doc. A/CN.4/541 (Apr. 2, 2004) (by Girogio Gaja), ¶ 40

16 *Eight Report, supra* note 12 at ¶¶ 33-35.

17 *See* Bankovic v. Belgium, App. no. 52207/99, Eur. Ct. H.R. ¶¶ 46 and 61 (2001) (finding jurisdiction is determined by effective control of the territory so that the international obligations flowing from the European Convention on Human Rights are applied extra-territorially).

18 *See Al-Jedda* App No. 27021/08 at ¶ 61; *see also* Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19(3) E.J.I.L. 509, 511 (2008) (noting the connection between the "effective control" notion providing extraterritorial effect of the ECHR, but that the "effective control" of attribution of conduct is distinct).

19 *DARIO, supra* note 4 at ¶¶ 110, FN 115.

20 U.N. Charter art. 105.

21 *See DARIO, supra* note 4 at art. 7, ¶ 6.

22 *See id.* at ¶ 10. (noting that after the *Behrami* ruling, the UN Secretary-General rejected the notion of "ultimate authority and control" and instead made clear that the responsibility of the UN would be limited to the effective operational control it actually possesses).

23 *Id.*

24 *See, e.g.,* Rep. of the Int'l Law Comm'n, 53rd sess, Apr. 23-June 1, July 2-Aug. 10, 2001, UN Doc. A/56/10; Draft Articles on Responsibility of State for Internationally Wrongful Acts, with Commentaries (2001), Art. 8.

25 *Id.*

26 *See* Jose Alvarez, *Memorandum to Advisory Committee, U.S. State Department, encl. 1, 5.*

27 *See DARIO, supra* note 4 at art. 7, ¶ 4.

28 Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19(3) E.J.I.L. 514 (2008) (drawing analogy between draft article 7 "effective control" and that of the ICJ's "effective control" test applied to article 8 of the ASR).

29 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14 ¶ 115 (June 27).

30 *See DARIO supra* note 4 at art. 7, ¶ 5 (stating that control plays a different role when looking to organs or agents placed at the disposal of an IO than it does in apply article 8 of ASR; however, the only difference the ILC cites is that under ASR the result is whether conduct is attributable to at all to a state, and under the DARIO the answer is which entity, the IO or state, is responsible. But, the mode of analysis is not disregarded, and the commentary›s definition of «effective control» does actually parallel that of article 8 of the ASR).

31 *Nicaragua*, 1986 I.C.J. 14.

32 *Id.*

33 Prosecutor v. Tadic, Case No. IT-94-1-T (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

34 *Id.* at ¶ 145.

35 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment, 2007 I.C.J. 43, ¶¶ 403-04 (Feb. 26).

36 *Id.*

37 *Id.* at ¶ 398.

38 *See id.* at ¶ 406.

Treasurer's Report

For the six months ending March 31, 2012

	Current Activity March	Year-to-date March
Revenue:		
International Law Section Dues	30.00	12,485.00
International Stud/Affil Dues		120.00
Total Revenue	30.00	12,605.00
Expenses:		
ListServ		125.00
Meetings	1,508.19	2,370.62
Newsletter	304.74	2,439.12
Misc.	93.75	153.25
Total Expenses	1,906.68	5,088.90
Net Income	(1,876.68)	7,516.10
Beginning Fund Balance:		18,051.59
Total Beginning Fund Balance		18,051.59
Ending Fund Balance	(1,876.68)	25,567.69

Event Calendar:
Meetings, Seminars, & Conferences of Interest

June 14-15, 2012
IBA Antitrust Conference
Madrid, Spain
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=292F1572-8DAC-4482-BA0D-EFB3909A4202

June 13-15, 2012
5th Annual U.S. - Latin American Tax Planning Strategies Conference
TBA
http://www.americanbar.org/groups/taxation/events_cle.html

June 13-16, 2012
AILA Annual Conference
Nashville, TN
http://www.aila.org/content/default.aspx?docid=29443

June 14-16, 2012
Hot Issues in International Employment
Boston, MA
http://www.aija.org/uploads/events/08Boston_program.pdf

June 14-16, 2012
15th Transnational Crime Conference
Sao Paulo, Brazil
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4E40EB0D-1A63-4AD3-9964-FA88ACCC12FA

June 20-22, 2012
Managing client relationships: A multi-generational approach
Munich, Germany
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=FB73FC69-8F94-4FF3-A8D0-29E66DB2E569

June 20-21, 2012
2nd Mediterranean Conference
Barcelona, Spain
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=A74465BF-9F88-4CFC-8A37-2B5D9AC1CF85

July 9, 2012
Annual International Conference on Law, Regulations and Public Policy (LRPP 2012)
Singapore
http://www.law-conference.org/

July 12-13, 2012
Diversity and Inclusion Workshop
The New Look of Law Practice Management
Chicago, IL
http://www.americanbar.org/calendar/2012/07/lpm_diversity_and-inclusion-workshop-2012.html

July 12-13, 2012
Drafting Model Laws on Indoor Pollution for Developing and Devloped Nations
Boulder, CO
http://www.worldenergyjustice.org/?page_id=1487

August 2-7, 2012
ABA Annual Meeting
Chicago, IL
http://www.americanbar.org/calendar/annual.html

August 9-10, 2012
African Regional Forum Conference
Kampala, Uganda
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=FC7EDE51-917A-47A4-B608-CC37EA049EEF

August 22-24, 2012
Partnering for Compliance
San Jose, CA
http://www.partneringforcompliance.org/

September 14-15, 2012
16th Annual Competition Conference
Florence, Italy
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=8801B724-EF43-4083-A508-3A47F4D84C27

September 14, 2012
2012 Fall CLE Conference
Montreal, Canada
http://www.aila.org/content/default.aspx?docid=37526

September 30-October 5, 2012
IBA Annual Conference
Dublin, Ireland
http://www.int-bar.org/conferences/Dublin2012/

October 5-6, 2012
Conference on International Law in Africa
Maputo, Mozambique
http://www.afil-fadi.org/

October 16-20, 2012
2012 Fall Meeting
TBD
http://www.americanbar.org/groups/international_law/events_cle.html

October 19-21, 2012
ASIL Midyear Meeting and Inaugural Research Forum
Athens, GA
http://www.asil.org/activities_calendar.cfm?action=detail&rec=239

November 5-6, 2012
Mergers and Acquisitions
Hong Kong
http://www.surveymonkey.com/s/mergersandacquisitionshongkong

November 18-19, 2012
Law firm management in troubled times
San Jose, Costa Rica
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=24c01bf6-31d4-4a39-9afe-2efd55d09c91

November 25-27, 2012
3rd Asia Pacific Regional Forum Conference
Kuala Lumpur, Malaysia
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=2f926d3f-c4aa-451e-8a24-8f184f1a00a1

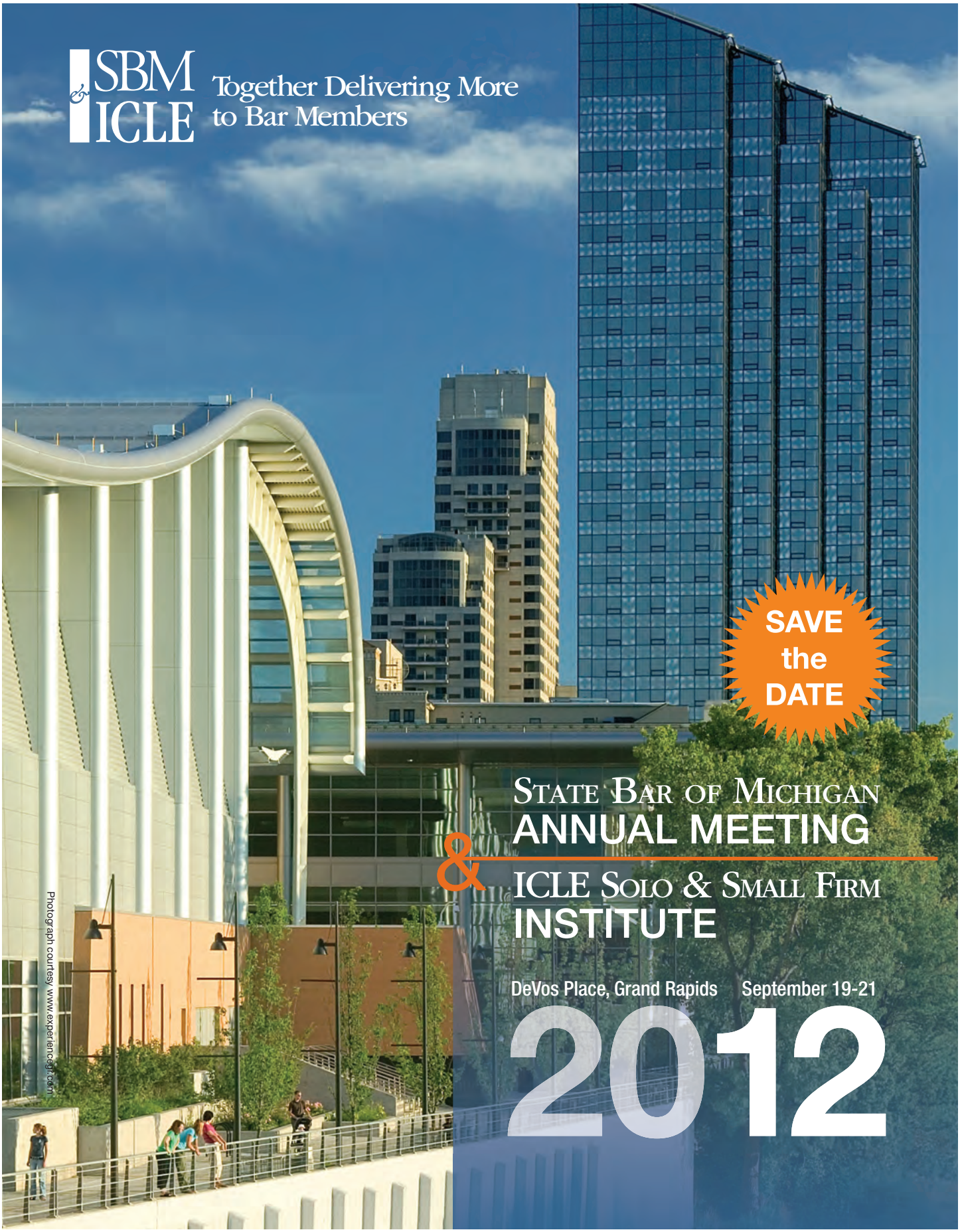
November 30-December 1, 2012
Conference on International Aspects of Intellectual Property Law
Temple, AZ
http://www.fellmeth.net/ASUIIP2012.pdf

Other ABA Section of International Law Events
http://www.abanet.org/intlaw/calendar/home.html

Other AILA events
http://www.aila.org/content/default.aspx?bc=1010

Other ASIL Events
http://www.asil.org/events/calendar.cfm

Other IBA Events
http://www.ibanet.org/conferences/Conferences_home.cfm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