INTERNATIONAL ARBITRATION IN THE UNITED STATES AND EUROPE: WHERE DID IT COME FROM AND WHERE IS IT HEADED?

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Arbitration. Two or more parties independently agree in advance that if in the future they have a dispute between them, they will pick one or more independent outside parties to hear their issues and resolve their disagreements peacefully, without their having to resort to a full, public, and ostensibly more expensive litigation in the courts. Seems reasonable enough.

There has been a widespread reliance on arbitration as a primary business dispute mechanism in European nations for a long time. The United States adopted the Federal Arbitration Act ("FAA") in 1925 – over eighty years ago – but it has yet to catch on as a primary dispute mechanism except in a few industries.[1] Why has the United States not taken to commercial arbitration with the same fervor as its European counterparts? Are there historical antecedents to that traditional reluctance? Will that traditional reluctance hold up in light of the increasing globalization of international commerce, fueled by the openness and instant communication conferred by the ascendancy of the internet and the

[1] Arbitration in Latin America dates back to the late 1800s, but it was then largely abandoned until the past twenty years or so. The reasons for this abandonment are too extensive to be fairly treated within the limitations of this article. Hence, for the most part this article will focus on American and European international arbitration, with some attention to Latin American proceedings in the discussion of anti-suit injunctions in Part II below.

World Wide Web and increasingly interlocked world financial markets, with business and financial investments being made throughout the world?

Recent developments in the field of international arbitration suggest not. Or perhaps that it cannot. Whether more businesses in the United States will willingly embrace international arbitration, or be dragged into accepting it out of economic necessity, remains to be seen. But one thing is certain: with the overwhelming pull toward internationalization, not only with joint ventures, operations, and chains of distribution, but also with unilateral investments made abroad and the encouraging of foreign investments domestically, arbitration will figure more and more prominently into domestic business operations and business planning. And that means that in the years ahead, it will become ever more important for outside counsel, both corporate and litigation counsel, to be aware of and understand the processes and ramifications involved in the international arbitration of business disputes.

I. HOW DID THIS "ALTERNATIVE" JUSTICE SYSTEM EVOLVE?

A. The History of Commercial Arbitration in the United States ...

Most American lawyers who represent international or multinational business entities, or companies that do business or make investments abroad, are familiar with the FAA, at least Chapter 1 pertaining to domestic arbitration.[2] Less familiar are Chapters 2 and 3, which were added to the FAA as enabling legislation to the United States' ratification of the New York Convention on the Enforcement of Foreign Arbitral Awards

[2] 9 U.S.C. § 1 *et seq.*

("New York Convention") and the Inter-American Convention on International Commercial Arbitration ("ICA").

To oversimplify, the FAA and its interpretive case law provide that the courts of the United States will enforce written arbitration clauses in commercial contracts (or that, subject to certain requirements, are otherwise reflected in an exchange of writings), unless one of the parties can demonstrate a serious issue of fraud or mistake in connection with the making of the arbitration clause itself, commonly referred to as the courts' "gatekeeper" function.[3] Along similar lines, United States courts will enter judgments on awards rendered by arbitration panels even where the courts themselves would have reached different or opposite conclusions, unless the challenging party demonstrates that the arbitrators committed "manifest disregard of the law".[4] This should not be confused with "manifest disregard of the facts or evidence" which courts will typically not review absent something "shocking" to the conscience or public policy,[5] or where there is no basis whatsoever in the record for the panel's finding. Generally, foreign arbitration awards rendered in other signatory nations to the New York Convention and the ICA will also be recognized and enforced in the United States pursuant to Chapters 2 and 3 of the FAA.

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[3] *Prima Pain Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Howsam v. Dean Witter Reynolds*, __U.S.__, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002); compare England's Arbitration Act of 1996, sec. 30-32, 67 (allowing challenges to arbitration tribunal's jurisdiction while allowing arbitration to proceed) (http://www.legislation.hmso.gov.uk/acts/acts1996/1996023.htm).

[4] *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir.1986); *Consolidated Rail Corp. v. Metropolitan Transport. Auth.*, No. 95 Civ. 2142, 1996 WL 137587 at *19 (S.D.N.Y. Mar. 22, 1996); *see also Arbitration Between Space Systems/Loral, Inc. v. Yuzhnoye Design Office*, 164 F.Supp.2d 397 (S.D.N.Y. 2001).

[5] Compare England's Arbitration Act 1996, sec. 69 (allowing for appeal on questions arising under English law, subject to certain requirements), and sec. 68 (allowing review for "serious irregularity").

In the United States, some of the prominent justifications for upholding commercial arbitration clauses and enforcing arbitration agreements revolved around the rights of private parties to determine their own dispute resolution mechanisms without resort to the courts; the expectation that arbitrations would be less costly than traditional litigation, and less cumbersome and intrusive on the parties and third parties due to limitations on discovery in arbitration as compared to the more extensive discovery available in the courts; the desire of the parties to select "industry" arbitrators who presumably would be more knowledgeable about the intricacies and accepted trade practices in specific industries than would courts of more general jurisdiction; and the expectation that arbitrations would be heard and resolved more quickly and with more finality than courtroom proceedings, in which discovery and motion practice can often take years, only to be accompanied by round after round of interlocutory appeals and/or direct appeals of "final" judgments.

Following the enactment of the FAA, the labor industry was among the earliest to adopt arbitration as a preferred dispute mechanism.[6] Outside of labor and perhaps a few other fields, though, arbitration was not so readily or broadly embraced, certainly not until at least the last twenty-five years or so.

Why might this be so? Unlike in Europe, where for a long time there have been very real concerns about "home cooking" by the courts of other nations (although this may be changing somewhat due to the creation of the European Community) the United States has a federal system overlaid on the State court system. In the United States, with the federal courts' ability to exercise diversity and removal jurisdiction, fears of being

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[6] *See, e.g.*, the *United Steelworkers Trilogy*, 363 U.S. 564 (1960), 363 U.S. 574 (1960), and 363 U.S. 593 (1960).

"home-towned", while still prevalent, have been somewhat reduced. There has also been a sense of comfort, whether real or imagined, in the broad discovery mechanisms available in federal and state courts and the perception that such mechanisms ensure that "the truth" will eventually be revealed. Add to that the requirement that all States give full faith and credit to judgments rendered by the courts of other States, and for a long time there was no substantial impetus toward incorporating alternative dispute mechanisms into most commercial or business dealings.

Over the past thirty years or so, some of the traditional reluctance toward arbitration has begun to erode. The increasing costs of courtroom litigations and discovery costs running into the hundreds of thousands or even millions of dollars, while not the norm, are by no means unheard of or unusual any more. Moreover, despite the federal system overlay, many companies are still very much concerned with jurisdictional and venue issues – of being dragged into a court in the plaintiff's State, which, whether it be a state or federal court, will have a jury composed of local citizens. With the explosion of lawsuits in this country, one fear is that state court juries are composed of lay people who may on occasion be inclined to rule in favor of their own fellow citizens who claim to have suffered some harm, and against the "deep pocket" of the foreign corporation, whether on the theory that the corporation can better absorb the loss than the individual or on some other "non-legal" theory unrelated to the merits of the dispute. Where there is a corporate plaintiff, this concern is somewhat lessened, yet there is still a perceived risk that a jury's judgment may be affected by a conscious or subconscious desire to aid, or at least not hurt, a local business that employs local citizens, funds local

pensions, and pays local taxes. A federal system does not necessarily moot this concern since it, too, draws its jurors from the local populace.

From the opposite perspective, with the national investing craze of the 1990s, facilitated by the internet and on-line "instant" brokerage accounts, and with real time access to the markets available for the first time to individual investors, many people of all economic strata found themselves participating in a highly regulated industry that requires mandatory arbitration of customer disputes by its members. With the subsequent bursting of the stock market bubble, many of those investors who lost money and sought redress found themselves (or their family members, friends, or colleagues) exposed to the arbitration system for the first time. As with any "new" concept, with exposure comes familiarity, and with familiarity comes understanding and a lessening of traditional fears of the unknown or unfamiliar.

One oft-heard complaint with customer arbitrations, certainly in the securities industry but also in other industries, is that arbitrators are more likely than courts to "split the baby" or render a "feel good" award. While this may be true in some instances, it has a counterpart in the jurisdictional and venue issues giving rise to fears of localized jury verdicts in courtroom proceedings, as discussed above.

Juxtaposed against those concerns is the reality that many cases tend to settle before trial, so often these fears of home-town verdicts do not materialize, or perhaps it is in part those fears that lead many cases to settle before trial. In fact, fewer than 3% of all federal civil cases ever make it to a jury verdict today. So for those instances where the parties are certain that they cannot resolve their disputes amicably, arbitration with its more expedited and less expensive processes, and supposedly more industry-

knowledgeable and party-neutral arbitrators, is increasingly being seen as a viable alternative forum where the disparity in wealth and sophistication between the parties, and local prejudices, may not have so great an effect on forcing one party to settle prematurely, thereby providing a perceived greater possibility of having disputes heard and resolved on the merits.

B. ...And in Eurpoe.

Unlike in the United States, European parties have a long history of resorting to arbitration to resolve commercial disputes. One of the main reasons for this is obvious. Without an overlying federal system like in the United States, European parties have had a heightened concern of being "home-towned" by the courts other nations. For instance, how likely is it that a French defendant would be happy to be hauled before a British court, or that a German defendant would find comfort pleading his defense before a French court?

At the same time, it may be undesirable, not to mention economically unfeasible, for many European parties to restrict their business dealings solely to counterparties from their own nation. In this age of increasing globalization, it may not even be possible to do so. For instance, two companies from country A may enter into a contract, and later one of them may be bought out by or assign part or all of its contract to a company from country B. Or the first company may contract to provide goods or equipment to the second company, which then either uses those goods or equipment in country B where harm allegedly occurs. Or everything is contained in country A as expected, but has an effect on a person or company from country B, who then brings suit in country B.

Put aside the various Eurpoean nations' respective historical interactions, and the real or imagined feelings of their respective citizens toward each other. There still remains the reality that each country has its own entirely separate and perhaps even conflicting substantive laws on similar subjects. The expectations of a party in one nation upon entering into a commercial contact, including the rules governing their relationship and how any disputes will be resolved, may be entirely different than the expectations of its foreign counterparty. Whose expectations will be rewarded? Should either party's expectations be adopted and the other's rejected, or should there be some middle ground or "smoothing" of those expectations to better vindicate the overarching business objective of the parties when they first started doing business together? Not only is there a fear that the courts of one nation might be more inclined to favor its own corporate or individual citizens, but even if that court endeavors to be objective, that court will still be bound to apply the laws of its own nation.

Take this one step further: the courts of a particular nation will not only be bound to apply its own substantive laws, but it will also be bound by its nation's own procedural laws. In the United States, many people have little or no appreciation of how significant this may be on the ultimate resolution of foreign commercial disputes. For instance, one European party may be from a common law (or adversarial) jurisdiction, as in England, while the other may be from a civil (or inquisitorial) jurisdiction like France. One nation may allow the parties to take some discovery, while another may severely limit or deny pre-trial discovery except upon specific order of the court.[7] One jurisdiction may allow

[7] The references in this article are general in nature and pertain only to party-discovery. With regard to third-party discovery, litigants are advised to consult local counsel and to refer to the laws and rules of their seat of arbitration, of the administrative body if one is being used, and the laws of the nation where third-party discovery may be sought. For instance, as a general matter, and subject to certain later French

the parties to cross examine witnesses; in the other, such a notion of confrontation of the witness may be unheard of (and in some jurisdictions, such as the Netherlands, it is in the discretion of the court to determine whether any live witnesses will be heard at all). One nation may allow for bare bones pleadings simply identifying the issues to be developed later through documents and testimony to be elicited at trial; another may require in-depth pleadings attaching all relevant documents and/or sworn pre-drafted witness statements which will largely guide and may even determine the outcome of the trial.

Let us even assume that the parties were sophisticated, and that at the time they entered into their business dealings they anticipated the possibility of having to litigate in the other party's home country. Suppose that a dispute does later arise, and one of the parties from nation A obtains a judgment from the courts of its own country A against a foreign defendant from country B. How can A be assured that the courts of nation B (or any other nation) will enforce the judgment that it has obtained from A's own national courts? What good is a judgment of liability from country A if the other party's assets are located in country B or another nation that refuses to recognize the foreign judgment rendered by country A?

This works both ways. How can a plaintiff from country B, who prevailed in the courts of country A, enforce that judgment in its own home country B, to collect on its judgment (if it was the plaintiff) or judgment on its counterclaims (if it was the defendant) if its own country refuses to recognize judgments rendered by A's courts? If B was the defendant, who perhaps had no choice and was compelled to litigate in country

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declarations, French law provides for possible imprisonment of up to six months and/or a monetary fine for the conduct of pre-trial third-party discovery in France in connection with foreign civil proceedings. *See, e.g.*, n° 68-678 (1968), amd. n° 80-538 (July 17, 1980).

A, and B prevailed on its defenses in the lawsuit in country A, how can B assure finality over the dispute – in other words, that the losing foreign plaintiff A will not roll the dice by taking a second shot at it in country B or in some other country?

For these and other reasons, out of necessity, European parties seeking to do business across the continent had to develop some method for resolving their disputes. Arbitration was seen as one such viable way to adjudicate transnational business disputes.

In arbitration, if the parties make appropriate provisions in their written contracts, the substantive and procedural rules to govern a future dispute can be established in advance (or the parties can agree in the contract on the "seat" of the arbitration, which will not only impact the convenience of the proceeding for the parties and witnesses, but will determine the procedural rules to be applied[8]); the procedural rules can be negotiated and agreed upon after the dispute arises (although this presupposes an ability to agree, and should take into account the seat chosen), or they can be left to a panel of neutral arbitrators who can take into account the different legal systems of the parties (common law or civil) and who can come up with a procedure that will accommodate both parties (which again imposes an element of chance and requires consideration of the seat of arbitration and its procedural laws). Fears of being home-towned can be addressed by providing in the contract that the arbitration panel will be seated and/or the hearing held in a neutral site, and/or that the panel members will be selected from the industry involved and/or from certain nations to the exclusion of panel members from either parties' respective nations to avoid possible prejudice. Or the contract can simply state

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[8] *See, e.g., Republic of Ecuador v. Occidental Exploration and Production Co.*, 2005 EWHC 774 (Comm) (in arbitration between Ecuadorian and American parties, seated in England, English court found jurisdiction in English courts to determine Ecuador's jurisdictional challenge).

that any dispute will be resolved by and in accordance with any one or more specifically identified and recognized international arbitral bodies, such as the ICC, AAA, or LCIA, or according to certain recognized arbitration rules such as the UNCITRAL Arbitration Rules or UNCITRAL Model Law, to name a few.

Under the New York Convention, the ICA, and other treaties (such as bilateral investment treaties), parties can be more comfortable that arbitral awards, unlike many court judgments, will most likely be enforced by the courts of other signatory nations.[9] This is very important for parties from the United States. Most domestic parties and lawyers take it for granted that a judgment rendered in a federal or State court in the United States will be given full faith and credit in every other court in the United States. As a result, they simply assume that the same will be true in Europe and elsewhere in the world. It is not. It may come as a shock, but many if not most European nations will not enforce judgments entered by United States courts. In part, this is due to the European nations' unease with the American concept of punitive damages. Even where punitive damages are not actually awarded, many foreign nations have adopted prophylactic laws and rules that will operate to preclude the enforcement of American judgments, ostensibly due at least in part to their antipathy toward punitive damages.

As a result, American clients and their American lawyers can spend years and millions of dollars litigating their claims, only to find that at the end of the day all they

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[9] An important caveat is necessary here. The New York Convention is not self-executing. Each signatory nation adopts and ratifies it through its own internal political processes. The translation of the Convention into the native language of each nation, and in which it may have been adopted, may therefore differ from nation to nation. A party or attorney relying upon or resorting to the Convention should consider reviewing a copy of the Convention as actually ratified by the nation in which enforcement of its terms is being sought, in the language in which it was so ratified, to ensure that it is consistent with the party or attorney's own understanding. This article is written solely in reliance upon the author's interpretation of the English language version of the Convention and its enabling legislation in the FAA.

have is a pyrrhic victory. Had they chosen arbitration, they would have an enforcement mechanism under the New York Convention, the ICA, and/or other treaties depending on the jurisdiction where enforcement is sought. Alternatively, they would have had the option of having their arbitration award entered by a European nation whose court judgments are honored by the other nation(s) where the defendant's assets are located or eventual enforcement is sought. For example, an arbitration award rendered in an arbitration held in New Jersey could be entered by a court in London,[10] and that judgment of the London court could then be presented for enforcement to a court on the European continent.

II. SOME RECENT DEVELOPMENTS IN INTERNATIONAL ARBITRATION

A. In The U.S.: The Anti-Suit Injunction Stages A Comeback

Many American parties and their lawyers are already familiar with the notion of going to a court to either compel or stay a domestic arbitration.[11] There is a similar procedure under the New York Convention for applying to a court to stay its own proceedings and compel arbitration.[12] Less familiar is the concept of the "anti-suit" injunction.

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[10] *See, e.g.*, England's Arbitration Act 1996, sec. 66, 101.

[11] At least one federal appellate court has allowed a party before it to stay the litigation pending the outcome of an ICC arbitration to which the litigant was only an interested third party. *See Waste Mgmt. v. Residuous Industriales Multiquim*, 372 F. 3d 339 (5th Cir. 2004).

[12] *See* New York Convention, Article II, Sec. 3. Other nations have similar provisions contained within their own domestic arbitration laws and/or enabling legislation for the Convention. *See, e.g.*, England's Arbitration Act of 1996, sec. 9-11 (available at http://www.legislation.hmso.gov.uk/acts/acts1996/1996023.htm).

An anti-suit injunction is not an order by court X compelling another court Y to stay a lawsuit pending before it. Such an order would be of questionable jurisdictional authority and dubious enforceability, especially in an international context. Rather, it is an injunction entered by court X directly against one of the parties appearing before it. The injunction essentially orders one of the parties to immediately cease, or even dismiss, a second lawsuit that it has brought in another court Y. The injunction is enforced through the issuance by court X of contempt sanctions against the enjoined party in the action pending before it if it does not stay or dismiss its second lawsuit.

An anti-suit injunction is an extraordinary remedy. There is not necessarily a conflict in concurrent parallel proceedings. In the event that the foreign proceeding results in a judgment, *res judicata* could be pleaded in the domestic action to avoid inconsistent judgments. In addition, the concept of international comity must be kept in mind when asking a court to do something that would interfere with a foreign sovereign's proceedings. For these reasons, anti-suit injunctions are relatively rare.

Nevertheless, a few recent judicial opinions from the United States District Court for the Southern District of New York, implicating proceedings in Latin America, seem to have resurrected the anti-suit injunction, or perhaps they signify a trend by litigants to resurrect it, at least in the context of international arbitrations.

A prominent feature of these cases seems to be that a motion for an anti-suit injunction may have a better chance of succeeding where the parties are for practical purposes essentially same in both litigations, the issues are the same, the foreign

proceeding presents a threat to the jurisdiction of the domestic court, and important public policy and equitable considerations are implicated.[13]

In one of those cases, a Brazilian company, Tecnimed, refused a Request to Arbitrate before the Inter-American Commercial Arbitration Commission ("IACAC").[14] Instead of proceeding to arbitration, Tecnimed filed two lawsuits. The first suit it filed was in civil court in Brazil seeking a declaration that its agreements with the defendant were invalid, that the agreements had expired and therefore were unenforceable, and seeking rulings on the merits of the dispute. Approximately six months later, Tecnimed filed a petition to stay the IACAC arbitration in New York State Court, which the defendant removed to federal court. The defendant counterclaimed for an order compelling Tecnimed to arbitrate and for an anti-suit injunction enjoining the Brazilian lawsuit. In granting the anti-suit injunction, the District Court found that the defendant would suffer irreparable harm if it were denied its right to arbitrate, and if it were required to litigate both cases in Brazil and New York. In addition, the District Court found that the parties were essentially the same in both actions (the Brazil action, while also naming GE Brasil, contained no independent claims against GE Brasil), as were the underlying issues of arbitrability, liability, and damages. Furthermore, the District Court found that the foreign lawsuit threatened its own jurisdiction and violated New York's public policy of enforcing arbitration agreements.

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[13] *See China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (emphasizing jurisdictional threat to enjoining court of foreign action and public policy considerations); *see also American Home Assur. Co. v. Ins. Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984) (factors to be considered include, among others: (1) commonality of the parties; (2) *res judicata* effect of first action on issues to be resolved in the enjoined action; (3) public policy; (4) threat posed to issuing court's jurisdiction by the foreign action; (5) equitable considerations; and (6) whether the foreign action is vexatious).

[14] *Paramedics Electromedicina Comercial LTDA v. GE Medical Systems Info. Techs.*, 2003 WL 23641529 (SDNY 2003).

The District Court ordered Tecnimed to dismiss its Brazil lawsuit and imposed a sanction of $1,000 per day that it failed to do so (the penalty escalated to $5,000 per day after a set date). The Second Circuit affirmed, but remanded for reconsideration of the sanction, in part to conform it to the defendant's actual losses. On remand, the District Court entered a sanction of approximately $160,000.

In another case decided that same year, the Southern District of New York was again required to address an application for an anti-suit injunction.[15] In that case, through a serious of agreements, Newbridge agreed to purchase a 50% interest in another company, La Corona, that had previously been wholly-owned by Groupo Corvi. In accordance with their agreements, the parties transferred their shares in La Corona to a trustee with certain instructions concerning how to vote those shares. Disputes arose after Newbridge made its investment. Groupo Corvi began an arbitration in New York, and then filed a lawsuit against Newbridge and the trustee in Mexico City seeking to void the trust agreement. Newbridge brought an action in the Southern District of New York seeking an anti-suit injunction and to compel the arbitration.

The District Court ruled that Groupo Corvi had no real dispute with the trustee, who was merely a stakeholder. Therefore, in part because the parties and issues in the Mexico lawsuit and the New York arbitration were essentially the same, the District Court granted Newbridge's motion to compel the arbitration. Finding that the parties were essentially the same, the resolution of the arbitration would resolve the issues in the Mexico lawsuit, and that Groupo Corvi itself had instituted the New York arbitration, the District Court granted the anti-suit injunction, as well.

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[15] *Newbridge Acquisition I v. Grupo Corvi*, 2003 WL 42007 (SDNY 2003).

The following year, the *Newbridge* court was again called upon to rule on an application for an anti-suit injunction, this time with different results.[16] This case concerned a corporate power struggle, involving the purchase of class C shares in a Mexican company, Axtel, by a Belgian company, Laif X. Laif X had acquired its right to purchase those shares pursuant to an assignment it had received from Laif IV. After Laif X's share purchase, Axtel and another Mexican company, Telinor, transferred their class A shares to Blackstone, which converted those shares into C shares. The end result of these transfers was that Laif X no longer had a majority of Axtel's class C shares and so could not unilaterally elect a majority of Axtel's class C directors.

Laif X and Telinor then began filing a series of actions: (1) Laif X first filed a lawsuit in Mexico, which was dismissed, (2) Laif X instituted a AAA arbitration in New York seeking to nullify the issuance of the class C shares to Blackstone; (3) Telinor responded with a lawsuit in Mexico to nullify the assignment between Liaf IV and Laif X.; and (4) Laif X in turn filed a lawsuit in the Southern District of New York seeking an anti-suit injunction and an order compelling arbitration.

The District Court found that the questions of whether the assignment between Laif IV and Laif X was valid, and hence Laif X's share purchase was valid and whether it had rights as a shareholder, were different from the issues in the arbitration, namely whether the share transfers to Blackstone were valid. In addition, the issues involved in the Laif IV and X transfers, and Laif X's rights thereunder, were issues of Mexican law which should be decided by the Mexican court. Furthermore, the District Court found that the Mexican lawsuit would not interfere with the AAA arbitration, and would not

[16] *Laif X SPRL v. Axtel*, 310 F. Supp. 2d 578 (SDNY 2004).

result in a material delay in the arbitration. Hence, the District Court refused to enter an anti-suit injunction.

One theme running through all three of the above cases seems to be that, while an anti-suit injunction is an extraordinary remedy, the courts, at least in the Southern District of New York, are willing to consider granting them where the parties and issues in the foreign lawsuit and the domestic arbitration are essentially the same. This comports with and upholds the strong public policy in New York that agreements to arbitrate are to be enforced, absent strong evidence that the arbitration clause itself does not cover the subject matter of the controversy or was itself procured through fraud or mistake, especially in the context of international agreements to arbitrate.

B. In Europe: Are There Signs That The International Community May Be Slowly Starting to Relax its Restrictions On Discovery?

As discussed in Part I above, the international community has traditionally been skeptical of the broad, party-directed, pre-trial discovery process that has long been prevalent in the United States. In recent years, though, transnational corporations have grown in a wide range of fields and industries, the number of cross-border transactions have increased, and investments in foreign markets have gained in popularity. Along with those developments have come an increase in the number of United States parties to commercial arbitrations held in Europe and elsewhere. They bring with them their own notions of what constitutes a fair opportunity to be heard,[17] which includes their ingrained

[17] Whether in the context of international arbitration, parties are entitled to "fair" opportunities to be heard, or whether they are entitled to only a "reasonable" opportunity or some other formulation can be debated, and depends in part on the wording, and the interpretations of that wording, in the arbitration laws of the seat of arbitration, international treaties, and/or rules of the applicable arbitral body.

notions of what are proper and appropriate legal processes and procedures. Just as the traditional reluctance to seek out commercial arbitration in the United States has slowly begun to soften with increased exposure to alternative dispute resolution mechanisms, so too may we be seeing very early signs of a softening in the international community's long held resistance to some forms of pre-trial discovery, at least where certain constituencies are involved.

For instance, it is not unheard of for an arbitration panel seated abroad to take the national origins of the parties into consideration in fashioning mutually-agreeable procedures for the arbitration, including certain accommodations to the parties' respective legal traditions and cultures, and their concepts concerning discovery and the examination of witnesses. Along these lines, a few years ago the International Bar Association ("IBA") adopted rules that, among other things, allow parties to submit narrowly tailored requests to the arbitration panel for the production of relevant documents. While the IBA Rules do not contemplate broad generalized discovery on a par with the United States Federal Rules of Civil Procedure or most state court rules of procedure, they do allow for a party to seek categories of documents upon an appropriate showing.[18]

Yet the full impact of this modest change should not be overstated just yet. Despite this expansion in the IBA Rules, most European nations still retain much more restrictive views of discovery, which American attorneys might even consider stifling. American lawyers seeking discovery in international arbitrations would be well advised

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[18] *See* IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999).

to remember that the IBA Rules are still only a few years old, and it is unclear just how arbitrators applying them will exercise their discretion over discovery.[19]

It is still very important for litigants to consider the composition of their respective panels. For instance, if the arbitrators come from common law jurisdictions, they may be more inclined to accommodate focused requests for "categories" of documents, or at least not take an adverse view of the respective party for making such a request. On the other hand, American lawyers and clients must be cognizant of the fact that arbitrators from civil jurisdictions may be relatively lacking in exposure to such forms of discovery. Such arbitrators trained in the civil law may be more reluctant to grant broad requests or may even view them as intrusive or attempts at over-reaching, and the request itself may make the arbitrators feel uncomfortable or a bit overwhelmed.[20] The need for the discovery should be counterbalanced against the effect that the request may have on the demeanor of the arbitration panel in the context of the overall case. As with any aspect of international arbitration, how any request or tactic will impact the ultimate adjudicator should be taken into consideration.

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[19] Again, these are only the rules of the IBA. Litigants must still determine the law of the seat of the arbitration, even when operating under those rules, for the laws of the forum seat may influence the arbitrators' willingness to allow discovery. By way of just one example, a party might be able to obtain third party discovery in the United States in connection with an arbitration seated here or even abroad, but might not be able to obtain such information in England. Compare *Intel Corp. v. Advanced Micro Devices*, 124 S. Ct. 2466, 159 L.Ed.2d 355 (2004) (interpreting 28 U.S.C. § 1782(a)), with *BNP Paribas & Others v. Deloitte & Touche*, E.W.H.C. 2874 (2003) (interpreting Arbitration Act 1996, section 43).

[20] Even when making requests of arbitrators from common law jurisdictions, care should be taken. "American-style" discovery is still far from the norm, and is still of relatively recent introduction to Eurpoean proceedings. For instance, while England allows its arbitrators some discretion as to the scope of discovery, it must be remembered that its Arbitration Act, while consolidating various disparate laws previously in existence, is still itself only ten years old. *See, e.g.*, Arbitration Act of 1996, sec. 33-34; *Compare* Dutch Arbitration Act of 1986 (giving arbitrators discretion to hear witnesses and order production of documents).