Raising the Stakes in International Arbitration

International arbitration of high-value disputes involving claims of $100 million to over $1 billion is on the rise. The largest international arbitration institutions are consistently reporting year-on-year growth in the number and size of disputes they administer, and have been doing so for several years. For example, 2011 saw the highest number of investment arbitrations ever filed. *See* United Nations Conference on Trade and Development (UNCTAD), *Latest Developments in Investor-State Dispute Settlement* (2011). According to the American Lawyer's *Arbitration Scorecard 2011*, between 2009 and early 2011, there were 113 known pending international arbitrations where the amount in dispute was $1 billion or more. *See* Michael D. Goldhaber, *2011 Arbitration Scorecard: High Stakes*, The American Lawyer (July 1, 2011) at 1 [hereinafter *2011 Arbitration Scorecard*]. The true figure is probably higher due to the confidentiality of many of these large arbitrations. *The Global Arbitration Review* ("GAR"), a leading publication in the field, reported that its measure of the total value of international arbitration claims and counterclaims that reached the merits stage jumped over 100% this year, from $96 billion a year ago to $206 billion this year. See Sebastian Perry, *The GAR 30 Unveiled*, GAR News (March 12, 2012), available at www.globalarbitrationreview.com/news/article/30389/the-gar-30-unveiled/. There is no sign of this upward trend slowing down.

Why International Arbitration?

International arbitration has become the preferred means of resolving cross-border business disputes. Anecdotal and empirical evidence suggest that the bigger the amount in dispute, the more likely it is that the dispute will be referred to international arbitration. *See* Queen Mary, Univ. of London & PricewatehouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2008, available at* www.pwc.co.uk/forensic-services/publications/international-arbitration-2008.jhtml [hereinafter *Corporate Attitudes and Practices*]. There are a number of important reasons for this phenomenon. First, and perhaps foremost, businesses involved in multi-million and multi-billion dollar cross-border deals do not, generally speaking, feel comfortable leaving dispute resolution in the hands of local courts or local arbitration centers. They want to maximize the chances of having objective, neutral decision-makers resolve any disputes that may arise. Second, the parties can designate arbitral proceedings as confidential, which allows the parties to resolve their disputes outside of the public eye. Third, the parties are able to select the persons who will be deciding their dispute, based on, among other criteria, those persons' particular industry- and sector-specific expertise. Fourth, the flexibility of the procedure is appealing, as the parties can participate in designing the main aspects of their dispute resolution process. Fifth, the decisions of international arbitral tribunals are generally subject to limited review, either on appeal or in annulment proceedings. Sixth, arbitral awards are generally more easily enforceable as compared with foreign court judgments. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), ratified by 146 and 148 countries respectively, provide efficient and effective procedures for enforcing foreign arbitral awards in most countries of the world. In contrast, the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters has only 5 Contracting States, leaving foreign court judgment-holders at the mercy of local court procedures all over the world. These are but a few of the compelling reasons why international arbitration has become the gold standard for resolving international business disputes.

The 2008 study *International Arbitration: Corporate Attitudes and Practices* by the School of International Arbitration at Queen Mary, University of London—the most recent survey of corporate attitudes towards international arbitration—concluded that major corporations overwhelmingly prefer to arbitrate international disputes. This study offers insight into why international arbitration is a preferred method of dispute resolution for many large corporations involved in high stakes disputes:

> Of the companies polled, 88% have used arbitration. Certain industries, such as insurance, energy, oil and gas, and shipping rely on international arbitration as a default resolution mechanism.
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> Of the in-house counsel polled, 86% said they were satisfied with international arbitration. Corporate counsel saw the enforceability of arbitral awards, the flexibility of the procedure, and the depth of expertise of the arbitrators as the major advantages to arbitration.
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> In the vast majority of cases (up to 90% according to interviews with corporate counsel), the non-prevailing party voluntarily complies with the arbitral award. In cases of non-compliance, most companies are able to enforce arbitral awards within one year and usually recover more than 75% of the value of the award.

See Corporate Attitudes and Practices at 2–4.

The recent trend of high-value international arbitration should give companies that are not using international arbitration reason to reexamine the dispute resolution procedures they include in their high-value cross-border agreements.

Why Such an Increase in Billion-Dollar Disputes?
The increase in the size and volume of international arbitrations is correlated to the flow of foreign investment into emerging economies. In recent decades, a large influx of foreign investment poured into emerging economies in several areas, including India, Asia, Latin America, Eastern Europe, and Africa. As *The American Lawyer* put it, recent high-value arbitrations involve disputes ranging from "the Almaty Monorail and Bosphorus tunnel projects to Mongolian gold mines, Uruguayan cigarettes, and Zimbabwean farms seized by the thugs of Robert Mugabe." See *2011 Arbitration Scorecard* at 1. These areas are rich in natural resources, but also often susceptible to economic and political instability, which in turn tends to generate business disputes. For the reasons noted above, international arbitration is a critical risk mitigation tool for companies as they do more business abroad in emerging economies, because it provides foreign investors a more level and manageable dispute resolution playing field in the event of a dispute.

We may also be witnessing a trend in high-value arbitrations sprouting interrelated cases and follow-on claims in multiple fora, thereby increasing the total overall aggregate value of the dispute. The incidence of parallel contract and investment arbitrations, as well as parallel U.S. and foreign litigation, seems to be increasing. For example, in a long-running dispute with Venezuela, ExxonMobil lodged claims where the amount in controversy (including counterclaims) reached upwards of $20 billion in parallel commercial and investment arbitrations under the rules of the International Chamber of Commerce (ICC) and International Centre for the Settlement of Investment Disputes (ICSID). ExxonMobil recently won a $907.6 million award before the ICC tribunal (subject to discounting), while the ICSID proceeding remains pending. *See Mobil Cerro Negro Ltd. v. PDVSA Cerro Negro S.A.*, Final Award, ICC Case No. 15415/JRF, Dec. 11, 2011; *Mobil Corp. and Others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27).

The recent wave of high-value arbitrations may also be explained in light of regional economic crises. These include the spread of resource nationalism in Russia and Latin America, and the economic upheavals of debt-ridden Europe, where E.U. member states have implemented austerity measures with severe repercussions for foreign investors. Some of the largest arbitrations that were active in 2009 and 2010 centered on gas pricing regulation in Europe. Indeed, as of January 2011, oil and gas cases accounted for more than a third of the billion-dollar arbitrations and eight out of eleven awards of $350 million or more. *See 2011 Arbitration Scorecard* at 1.

Case Studies of Multi-Billion Dollar Arbitrations: 2009-2011
Between 2009 and early 2011, the largest arbitrations generally

concerned disputes in the energy (mostly oil and gas), mining, and high-tech sectors. For example, in the largest reported arbitration to date, the majority shareholders of the defunct Yukos Oil Company sued Russia for over $100 billion in an UNCITRAL arbitration at the Permanent Court of Arbitration in The Hague, and survived jurisdictional challenges. *See Yukos Universal Ltd. v. Russian Fed'n*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227 (Nov. 30, 2009); Catherine Belton, *Yukos Owners Win Ruling*, Financial Times (Dec. 1, 2009). The claimants argue that Russia forced Yukos into bankruptcy by inflating tax claims in a politically-motivated attack on former CEO Mikhail Khodorkovsky.

Separately, ConocoPhillips brought a claim against Venezuela for up to $30 billion alleging breaches of its treaty obligations for its expropriation of a joint-venture project to produce crude oil from the Orinoco Belt. *See ConocoPhillips Co. and Others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30). The hearing on the merits took place in May-June 2010 and the parties are awaiting the tribunal's final award.

In another example, U.S. and Danish companies Anadarko Petroleum and Maersk Oil sought $10 billion from the Algerian state-owned oil company Sonatrach over its "windfall-profits" tax in parallel proceedings in ad hoc UNCITRAL and ICSID arbitrations. *See Mærsk Olie, Algeriet A/S v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/09/14). In a positive resolution to this long-running dispute, the parties agreed to settle the arbitrations in March of this year in exchange for concessions on both sides, including large shipments of crude oil worth $1.8 billion to Anadarko and an additional $920 million in crude to Maersk. *See* Kyriaki Karadelis, *Anadarko and Maersk Settle with Sonatrach*, GAR News (Mar. 15, 2012), *available at* http://www.globalarbitrationreview.com/news/article/30402/anadarko-maersk-settle-sonatrach/. The parties also agreed to continue their profit-sharing agreements under revised terms, ultimately restoring their business relationship.

These are just a few examples of the high-stakes arbitrations that topped the charts between 2009 and early 2011.

2012 and Beyond

The trend toward high-value international arbitration disputes has continued in 2012. In May, an ICC tribunal awarded Dow Chemical Co. $2.16 billion plus costs and interest from Petrochemical Industries Company of Kuwait. *See* Sebastian Perry, *Dow Wins US$2 Billion Over Cancelled Kuwaiti Venture*, GAR News (May 24, 2012), *available at* www.globalarbitrationreview.com/news/article/30567/dow-wins-us2-billion-cancelled-kuwaiti-venture/. Dow Chemical filed the claims based on the cancellation of a planned joint venture to create the world's biggest polyethylene manufacturer ("K-Dow") after the plan was thwarted by parliamentary opposition.

The first half of 2012 has also seen billion-dollar settlements in international arbitrations. In January, the Canadian mining company First Quantum Minerals Ltd. settled multi-party ICSID and ICC disputes with the Democratic Republic of the Congo and the Eurasian Natural Resources Corp. (ENRC) over the government's cancellation of First Quantum's mining permits and nationalization of the mines for $1.25 billion. *See First Quantum Closes Congo Claims Agreement with ENRC*, Reuters (Mar. 2, 2012), *available at* www.reuters.com/article/2012/03/02/firstquantumminerals-idUSL4E8E26B420120302. A few weeks later, two American oilfield services companies, William Cos Inc. and Exterran Holdings, settled their ICSID claim against Venezuela stemming from the nationalization of their natural gas compression facilities for $420 million, slightly over one-third of the $1.2 billion they had claimed in damages. *See* Marianna Parraga, *Venezuela to Pay $420 million to Williams and Exterran*, Reuters (Mar. 24, 2012), *available at* www.reuters.com/article/2012/03/24/us-venezuela-oil-nationalizations-idUSBRE82N0BW20120324.

Full or even partial victory in high-value international arbitration can never be guaranteed, however, and there are recent examples of large claims being defeated before arbitration tribunals. A mutually-appointed sole

arbitrator dismissed Thailand's state-owned CAT Telecom PCL's $735 million claim against rival Total Access Communication PCL for concession fees it claimed to be owed. The sole arbitrator found that Total Access Communication was legally entitled to subtract the fees to pay an excise tax. *See* Phisanu Phromchanya, *Total Access Communication PCL: Arbitrator Dismisses CAT Telecom's THB23 Billion Claim against Total Access*, Dow Jones Newswire (June 7, 2012), *available at* www.totaltele.com/view.aspx?ID=474133. A few days later, on June 5th, an ICSID tribunal dismissed for lack of jurisdiction an estimated $1.2 billion-dollar case brought by Kazakh oil company Caratube against Kazakhstan. The ICSID tribunal found that a U.S. national who owned 92% of the Kazakh-company-claimant lacked a sufficient nexus to the company to allow it to invoke the protections of the U.S.-Kazakhstan bilateral investment treaty. *See Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12); Kyriaki Karadelis, *Caratube Claim Dismissed for Lack of 'Foreign Control,'* GAR News (June 14, 2012), *available at* www.globalarbitrationreview.com/news/article/30613/caratube-claim-dismissedlack-foreign-control/.

Other high-value arbitrations are moving full steam ahead in 2012. At least eight new arbitrations have been publicly announced this year in which the claim value exceeds $1 billion. A number of these claims arise in the energy and telecom sectors. For instance, Norwegian telecom operator Telenor gave notice to the Indian government in March that it would file an international arbitration claim seeking nearly $14 billion in damages unless the government promised to reverse the revocation of its mobile licenses or provide adequate compensation for its expropriated investment. *See Telenor Seeks Arbitration, Claims Damages of $14 Billion from Govt in 2G Case*, The Times of India (Mar. 27, 2012), *available at* timesofindia.indiatimes.com/business/india-business/Telenor-seeks-arbitration-claims-damages-of-14bn-from-govt-in-2G-case/articleshow/12420404.cms. German utility company Vattenfall Europe AG filed a request with ICSID in June seeking $18.7 billion in damages from Germany due to the government's decision to exit nuclear power and shut down Vattenfall's reactors. *See Vattenfall AB and Others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12); *Vattenfall Launches Second Claim Against Germany*, GAR News (June 25, 2012), *available at* www.globalarbitrationreview.com/news/article/30634/vattenfall-launches-second-claim-against-germany/. Similarly, in June of this year it was reported that the southern German state of Baden-Württemberg filed a €2 billion ICC claim over its purchase of a stake in German utility Energie Baden-Württemberg (EnBW) from French power company EDF. *See EDF faces ICC claim over German power company purchase*, GAR News (June 6, 2012), *available at* www.globalarbitrationreview.com/news/article/30593/edf-faces-icc-claim-german-power-company-purchase/. And in July, Reliance Power Ltd. filed for arbitration against eleven state distribution companies claiming $3.14 billion in damages in connection with a delayed 4000-MW power project in southern Indonesia, after changes in export rules by Indonesia raised prices of coal and made the project nonviable. See Sanjeev Choudhary, India's Reliance Power Seeks Arbitration Against Distribution Cos, Reuters (July 2, 2012), available at www.reuters.com/article/2012/07/02/reliancepower-arbitration-idUSWNAS994920120702.

This phenomenon is not going away. While some commentators question whether international arbitration is a better alternative to other forms of dispute resolution, the fact remains that many parties involved in significant cross-border deals and investments rely on, and prefer, international arbitration to resolve their controversies.