PRACTICE PERSPECTIVES:
INTERNATIONAL ARBITRATION AND LITIGATION

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ARBTRATION: RAPID, INEXPENSIVE RESOLUTION OF INTERNATIONAL DISPUTES

It is important in any international project to ensure that the relevant contracts include provisions for the resolution of dispute. The fundamental choice is—litigation in court or arbitration? In the absence of any contrary agreement by the parties, their disputes may be heard and settled by any national court having jurisdiction over the matter and the parties. Generally, however, the parties will prefer to agree upon the resolution of disputes by arbitration.

Arbitration has certain distinct advantages over litigation, especially in an international project. The foreign litigant will fear (perhaps justifiably) that a national court may favor the local party. A national court may lack or appear to lack complete independence if one of the parties in the litigation is the government or a state entity. In contrast, international arbitrations are generally conducted in a country that is neutral vis-à-vis the parties. The arbitrators will not be the national judges of one of the parties; they will be an international panel.

One of the most important advantages of arbitration, compared to litigation, lies in international enforcement procedures. The laws governing the enforcement of court judgments are a patchwork of bilateral and multilateral agreements, with many gaps. Certain European countries have gone far in granting enforcement of each other's court judgments, concluding the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. However, the United States is not a party to any such treaty.

In contrast, international arbitral awards may be enforced, inter alia, under the 1958 New York Convention. At present, 134 countries are parties to the Convention.

Arbitration may have drawbacks in the eyes of some parties. For example, the parties in an arbitration must pay certain costs that would not arise in litigation before a court—in particular, the fees and expenses of the arbitrators.
TYPES OF ARBITRATION

The factors that have been reviewed above generally lead parties in an international project to agree upon arbitration to settle their disputes. However, the parties must also determine what type of arbitration they wish to select.

Commercial arbitration may be “institutional” or “ad hoc.” Well-known arbitral institutions, which administer arbitrations under rules that they have developed, include the International Chamber of Commerce (“ICC”), the London Court of International Arbitration (“LCIA”), the American Arbitration Association (“AAA”), and the International Centre for the Settlement of Investment Disputes (“ICSID”). Parties that opt for an ad hoc arbitration often agree to follow the Arbitration Rules of the United Nations Commission for International Trade Law (“UNCITRAL”).

While the parties in an institutional arbitration must pay the institution’s administrative fees, the services provided by the institution generally justify this additional cost. The institution will appoint an arbitrator if a party fails or refuses to do so. The arbitrators’ fees are determined by the institution, thus relieving the parties of direct contact with the arbitrators on this delicate subject.

ISSUES TO CONSIDER

Parties negotiating contracts should consider issues that could arise in an eventual arbitration:

Place of Arbitration. It is advisable to stipulate the place of arbitration in the contract. Generally, it is advisable to select a country that is a party to the New York Convention, because some countries apply the Convention only on a reciprocal basis.

Discovery. Parties from different countries may find that they have very different expectations regarding discovery, the production of documents, etc. Common law discovery procedures are much more extensive than those available in civil law countries. Parties should anticipate the possibility of disputes arising over discovery in an arbitration and consider whether to address the issue in their arbitration clause.

Rules of Evidence. In practice, international arbitral tribunals and the lawyers appearing before them have developed rules of evidence that draw elements from the common law and civil law systems. For example, the civil law practice of exchanging written submissions and documents is combined with the common law practice of permitting examination and cross-examination of witnesses. Any person—whether a party or not—may testify as a witness (as in common law courts, but not all civil law courts), but rules that would exclude evidence, such as the common law’s hearsay rule, are generally not applied in arbitration.

FORMS OF ADR

The desire to find quicker and more cost-effective ways of settling disputes has led to the development of many forms of alternative dispute resolution (“ADR”). Among the leading forms of ADR are the following:

Mediation. Mediation is a settlement technique in which a neutral third party acts as a facilitator to assist parties in dispute to arrive at a negotiated settlement of their dispute. The mediator’s mission may include formulating and presenting to the parties the terms of a settlement. The ICC has recently promulgated new ADR rules.

Mini-Trial. A mini-trial is an informal procedure in which the two parties to a dispute present elements of their case (documents and oral arguments) in a hearing before a neutral adviser (often a retired judge) that may last one or two days. The neutral adviser then gives a preliminary opinion, indicating how a court or tribunal might decide the case. The mini-trial is meant to give the parties a realistic idea of their prospects in a real trial or arbitration.

Expert Determination. When a dispute concerns a technical matter, the parties may wish to refer the matter to an expert or panel of experts for an opinion or decision. The parties may constitute a dispute review board, which will hear disputes and give an opinion that the parties may (or may not) accept. Alternatively, a dispute adjudication board may be established to review disputes and render decisions that will be binding upon the parties unless challenged in arbitration within a specified period of time.

These and other ADR techniques can promote rapid and relatively inexpensive resolution of disputes. They are less confrontational than litigation or arbitration, and so may facilitate

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The growth of cross-border business continues to outpace the world economy, as multinational corporations capture the efficiencies of diminished regulatory barriers, better communications, and lower transport costs. This growing international exchange in goods, services, and capital has increased the exposure of multinational corporations to disputes in various alien national legal systems.

Jones Day has recognized that as business operations become more global and sophisticated, effective legal representations must keep pace. Our litigators possess a combination of talents—excellent adversarial skills, an in-depth knowledge of international law, a command of local court procedures—as well as access to a network of non-U.S. counsel, making us one of the premier law firms representing international businesses in courts and agencies throughout the world.

International Litigation
Jones Day’s ability to call upon experienced litigators in many locations has allowed us to represent numerous Latin American, European, and Asian companies or their U.S.-based subsidiaries in a broad range of disputes before U.S. courts and regulatory agencies.

Our lawyers are well-versed in representing non-U.S. companies in litigation matters in the United States. We combine high levels of litigation strategy and skill with an in-depth understanding of the many aspects of international business litigation. We are also committed to implementing integrated dispute management solutions to extricate our clients from U.S. litigation, whenever possible.

Just as non-U.S. corporations are increasingly dragged into the arena of U.S. litigation, proceedings in the United States can spill over into other countries. Our attorneys have experience in issues such as non-U.S. jurisdiction, enforcement of judgments, and parallel discovery, and they have put that experience to work in international forums on behalf of a variety of companies.

International Arbitration
Jones Day’s International Arbitration team includes lawyers Firmwide who advise on a wide range of legal issues relating to dispute resolution and arbitration. We offer proactive and early counseling for optimal outcomes and provide guidance to navigate through the requirements of foreign laws, the litigation-related exposure of multinational operations, and the options for selecting the most favorable forum for dispute resolution.

Our international arbitration attorneys—resident in Dallas, Frankfurt, Hong Kong, Houston, London, Los Angeles, Madrid, New Delhi, New York, Paris, Singapore, Taipei, Tokyo, and Washington, D.C.—have a depth of experience in the domestic laws of major trading nations and developing countries, as well as in applying multilateral and bilateral conventions and treaties that affect international legal disputes. We are well-versed in issues arising in the cross-border enforcement of judgments and arbitral awards. We also collaborate with co-counsel in countries where Jones Day has no offices.

We have experience in arbitration in various locations in Europe, Latin America, Asia, and North America under many rules, including those of:

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COMING TO THE TABLE: ARBITRATION AND CIVIL LITIGATION IN THE PEOPLE’S REPUBLIC OF CHINA

THE LEGAL SYSTEM

At the time the People’s Republic of China (“PRC” or “China”) unveiled its Open Door policy in 1978, it was operating under what has been described as a legal vacuum. Immense and rapid changes have occurred in almost every aspect of China (including its legal system) in the last 25 years. China has made significant progress in the area of dispute resolution, more than is generally known by the international business community. China’s accession to the WTO is stimulating further ongoing reforms that will bring China’s dispute resolution systems more in line with international practice.

China is a civil law jurisdiction based on a codified system of law similar to many continental European jurisdictions. The National People’s Congress or its Standing Committee enacts national laws in the PRC.

ARBITRATION

Most foreign businesses have favored arbitration as a method of formal dispute resolution in China. This is largely due to lack of confidence or familiarity with the PRC Court system.

Arbitration in China is governed by the PRC Arbitration Law (effective September 1, 1995). Only institutional arbitrations are allowed in the PRC. The following are the arbitral bodies in the PRC:

- China International Economic and Trade Arbitration Commission (“CIETAC”), also known as the Court of Arbitration of the China Chamber of International Commerce (“CCOIC” Court of Arbitration), and China Maritime Arbitration Commission (“CMAC”). CIETAC has been established for nearly 48 years...
It is based in Beijing and has subcommissions in Shanghai and Shenzhen. It is perhaps the most well-known arbitral body in China and one of the most widely used arbitral bodies in the world.

- “Local” arbitration commissions established under the PRC Arbitration Law in large and medium-sized cities in China.

All PRC arbitral bodies may administer both foreign-related and purely domestic arbitrations unless their arbitration rules provide otherwise. CIETAC has extensive experience in administering foreign-related arbitrations, whereas the “local” arbitration commissions tend to have more experience in resolving domestic disputes. However, there is no geographical limit to the jurisdictions of the “local” arbitration commissions (or CIETAC for that matter) so that, for example, if the relevant agreement so stipulates, the Beijing Arbitration Commission could hear a dispute between two Shenzhen companies in relation to a Shenzhen project.

**Commencing the Arbitration.** The arbitration process commences when the claimant submits an application for arbitration together with the applicable fees to the arbitral commission. The amount of the fee usually depends on the amount in dispute. Foreign lawyers are permitted to represent clients and appear in the arbitration, although the PRC Ministry of Justice requires the participation of a local lawyer from a local firm (alongside a foreign law firm, if desired) if there is a need to comment on PRC law issues.

**Choosing a Panel.** An arbitral panel will typically consist of three members, one appointed by each party or the chairman of the arbitration commission in the absence of such appointment or, if requested, by the party concerned. The third or presiding arbitrator is appointed jointly by the parties or by the chairman of the arbitral commission at the parties’ joint request. If the third arbitrator fails to be so appointed, the chairman of the commission will make the appointment.

Arbitrators are to be chosen from the lists of arbitrators maintained by the respective commissions. The list maintained by CIETAC comprises more than 500 arbitrators (including a large number from countries such as the U.S., U.K., Germany, France, Japan, Singapore, and Italy as well as Hong Kong).

**Awards and Costs.** Arbitral awards are final and binding on the parties, and there is no right of appeal. The arbitration fees are advanced by the claimant and eventually allocated by the arbitrator(s) in the award. CIETAC arbitrators have the power to order the unsuccessful party to pay “compensation” in respect of the successful party’s legal costs and other expenses provided that such compensation does not exceed 10 percent of the amount awarded.

**Efficiency and Fairness.** Arbitrations in China tend to be quicker than arbitrations in common law jurisdictions. There is no discovery procedure, and hearings tend to be relatively short (typically one to two days). In CIETAC arbitrations, a final award should be made within nine months for a foreign-related case and six months for a purely domestic one from the date the arbitral tribunal is formed (typically not more than five to six weeks after the claim is lodged). However, this time limit may be extended by CIETAC in appropriate cases.

In a survey of U.S. businesses in Beijing conducted by the American Chamber of Commerce in 2001, the majority view of respondents who have had actual experience of arbitration in China is that arbitrations there are less costly, more efficient, and no less fair when compared to arbitrations in other international arbitration centers.

Statistics released by CIETAC also show that foreign parties have similar rates of success in CIETAC arbitrations compared with local parties.

**Enforcement.** China is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and is therefore obliged to enforce awards made in other Convention countries (most countries are parties to the Convention). For the same reason, Chinese arbitral awards are also enforceable in these countries.

Hong Kong arbitral awards are enforceable in Mainland China pursuant to the PRC Supreme People’s Court’s “Arrangement for Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region,” which took effect on February 1, 2000. Mainland Chinese awards are similarly enforceable in Hong Kong by virtue of the Hong Kong Arbitration (Amendment) Ordinance 2000, which took effect on the same date.

Taiwanese arbitral awards are also enforceable in Mainland China under the Supreme People’s Court’s 1998 “Directive for Recognition of Civil Judgments of the Courts of Taiwan Region” (effective May 26, 1998).

Arbitration awards are enforced through the Intermediate People’s Court at the province or city where the unsuccessful
party is situated. Different rules apply to enforcement of foreign-related arbitral awards. A foreign-related arbitral award is subject only to procedural review by the PRC courts and, consistent with international arbitration practice and the principles of the New York Convention, the grounds for refusal of enforcement are very limited. The Supreme People's Court issued a Notice in 1995 stating that a court must seek the approval of a superior court, ultimately to the level of the Supreme People's Court, if enforcement of a foreign-related arbitral award is to be refused.

On March 1, 2002, the “Provisions on Certain Questions Concerning the Jurisdiction of Foreign-Related Civil and Commercial Litigation Cases” (issued by the Supreme People's Court) came into force. The effect of these provisions is to help ensure that foreign-related arbitration cases are dealt with by courts that are likely to have the relevant experience and expertise, including the Intermediate People's Courts in the capital cities of province-level regions or within Economic and Trade Development Zones that are approved by the State Council or Special Economic Zones.

Some foreign commentators have alleged that China's record in terms of enforcement of foreign-related arbitral awards has been poor. However, many of these allegations are based on anecdotal evidence, and they also often do not differentiate between refusal of enforcement and otherwise unsuccessful enforcement. In any litigation or arbitration anywhere in the world, the most likely reason for the successful party's failure to obtain what he is entitled to under the judgment or arbitral award is that the unsuccessful party does not have sufficient or reachable assets to satisfy the same. Also, if the successful party has to resort to enforcement to obtain money under a judgment or award, it is likely that the unsuccessful party falls into the above category. The situation in China is similar.

Although most foreign businesses are cautious about litigating in the Chinese courts, there is a noticeable increase in the number of foreign entities involved in civil litigation in the PRC.

CIVIL LITIGATION

Although most foreign businesses are cautious about litigating in the Chinese courts, the number of foreign entities involved in civil litigation in the PRC has increased noticeably. This is inevitable as foreign businesses continue to expand their operations in the PRC or their trade with PRC entities.

Civil procedure in the PRC is governed by the PRC Civil Procedure Law (which came into effect in April 9, 1991) and the judicial interpretation of this law made from time to time by the PRC Supreme People's Court. Civil cases relating to a foreign country or Hong Kong, Macau, and Taiwan are subject to distinct rules under Civil Procedure Law. This law is also subject to the provisions of international treaties concluded or acceded to by China.

The Courts. China's court system is established by reference to administrative regions and organized at four levels:

- The District People's Courts (in city districts, counties, and small cities);
- The Intermediate People's Courts (in medium-sized and large cities and autonomous prefectures);
- The High People's Courts (situated in each of the 22 provinces, five autonomous regions, and four municipalities directly under the control of the Central Government); and
- The Supreme People's Court based in Beijing

Each court is divided into divisions that deal with civil, administrative, criminal, and enforcement matters. There are also special courts dealing with specialized matters such as maritime, military, and railway transportation, etc.
All courts have first-instance jurisdiction, and they are assigned first-instance cases depending on the amount in dispute or the nature of the case: the larger the amount, the higher the level of the trial court. Except in the case of special courts, most courts above the District Court level also hear appeals from the courts immediately below them.

Number, Qualification, and Appointment of Judges. Apart from summary proceedings in the district courts, which are usually presided over by a single judge, civil trials in courts of all levels are usually presided over by a panel of three judges, and cases are decided by a majority or unanimous vote of the panel. All appellate cases are also usually heard by a panel of three judges.

The National People’s Congress appoints judges in the Supreme People’s Court. Judges at local levels are appointed by the corresponding local People’s Congress, although there have been suggestions that judges should be appointed, and their tenure decided upon, by the Chief Justice.

Like in other civil law jurisdictions and unlike in common law jurisdictions, judges in China are not typically recruited from the ranks of senior lawyers and may start their judicial career at a young age. Since the early 1990s, the courts have initiated a process of improving the qualifications of its judges, many of whom have hitherto been retired police or army officers who have had no legal training or experience. As of January 1, 2002, a judge will generally be required, as a minimum, to hold a law degree or non-law degrees coupled with legal knowledge acquired elsewhere, and have two years of practical legal experience. To ensure consistency in legal qualifications, a single National Judicial Examination for all entry-level judges, prosecutors, and lawyers was also introduced on January 1, 2002. An increasing number of Chinese judges have been sent to developed countries such as the United States and United Kingdom under various programs to share and gain experience and receive training.

The Trial Process. Trials are conducted in open court except in special cases, such as those involving state secrets or where the privacy of individuals needs to be protected. Cases involving trade secrets may also be conducted in camera at the parties’ request.

Although Chinese courts retain their inquisitorial powers, the present trend is toward limiting the exercise of such powers. Nowadays, the burden of producing requisite evidence lies mainly with the parties. On its own initiative, the court will collect and introduce evidence where the interest of the state, the public, or third parties may otherwise be adversely affected. In addition, the court may exercise its power to collect evidence at a party’s request in relation to (i) material in the possession of government agencies to which such party has no access, (ii) material relating to state or trade secrets or personal privacy or where the parties are otherwise unable for good reason to gather the requisite evidence themselves. In civil cases, witnesses are expected to give oral evidence in court. Witnesses may be questioned by the presiding judges and, with the consent of the judges, by the parties.

There are no time limits for the court to render judgments of foreign-related cases (including those relating to Hong Kong, Macau, and Taiwan). However, especially in major cities, inordinate delay is not common, and a foreign litigant can expect to have a first-instance judgment within a year from commencement of proceedings, if there are no complications.

Appeals. There is a right of appeal on both legal and factual issues to the court immediately above the trial court. The appellate court’s review of factual issues is not limited to evidence adduced in the first instance. It may also review evidence presented by parties and gathered by the appellate court itself but it will usually only do so in respect of new evidence. Otherwise, the appellate court will not review facts but may re-examine the judgment below for procedural irregularity or substantive impropriety.

Costs. The courts do not require a party to post a bond or provide other forms of security for costs and expenses. Court fees are borne generally by the losing party, but the prevailing party’s own fees and expenses, including its lawyers’ fees, are not awarded unless parties have specifically agreed otherwise or this is provided by the governing foreign law.

Enforcement of Judgments. If the unsuccessful party fails to comply with a civil judgment, the successful party is entitled to apply for enforcement. The trial court may transfer the request for enforcement to another court if necessary. The court may take various enforcement measures against the judgment debtor, including freezing the debtor’s bank account(s) and transferring his deposits, detaining or drawing from the debtor’s income, and sealing up, distraining, freezing, auctioning, or selling the debtor’s assets or property to satisfy the judgment. Controversially, the court may also require a third party that is related to the judgment debtor to pay the amount of the debt, although such third party may object within a specified time. A judgment debtor who is able
to satisfy the judgment but simply refuses to do so may be subject to a fine, detention, or even criminal prosecution.

A civil judgment of a foreign court is enforceable only where there is an applicable international treaty or a basis for reciprocal recognition and enforcement. On this basis, at the moment, only the judgments of courts in France, Italy, Russia, and Ukraine are recognized and enforceable in China as of right. Judgments of the courts in Taiwan are also recognized and enforceable in the PRC under the Supreme Court’s Directive for Recognition of Civil Judgments of the Courts of Taiwan Region. For other cases, the successful party under the foreign judgment must commence fresh proceedings in China. In such case, the Chinese court will consider the foreign judgment in arriving at a decision.

Features. Compared to courts in common law jurisdictions, the PRC Court is more likely to accede to a request for making an order to preserve the amount or property in dispute upon the posting of security of equivalent amount prior to the commencement of proceedings. This is a feature of litigation in China that is beneficial to plaintiffs. The Chief Justice of China has admitted that there are instances of corruption among judges but stressed that “the Supreme People’s Court is resolute in purging the ranks of judges and judicial officers of corrupt elements.” By and large, judges in the major cities in China display a high degree of competence.

The continuation of commercial relations between the parties. However, successful ADR ultimately depends upon the good faith of the parties and their willingness to compromise. Pursuing ADR may be a waste of time and money if a settlement is clearly beyond reach. If parties agree to ADR, either in their contract or after a dispute arises, their agreement should include appropriate time limits and provisions for the binding settlement of disputes if their ADR does not produce a settlement or a party does not comply with a settlement reached through the ADR procedure.

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1 The mode of participation is flexible.
2 The same fees are payable by the respondent if there is a counterclaim.
5 See report on the work of the Supreme People’s Court to the First Session of the 10th National People’s Congress.
ALIEN TORT STATUTE
28 U.S.C. § 1350

§ 1350—Alien's action for tort

The district courts shall have original jurisdiction of any civil action of an alien for a tort only committed in violation of the laws of the United States.


HISTORICAL AND REVISION NOTES

Enactment and revision


With the words "injury to" substituted for "suit" and in view of Rule 2 of the Federal Rules of Civil Procedure.

INTEREST VICTIM PROTECTION

Note: 18 U.S.C., Mar. 2, 1992, 106 Stat. 15, provided that:

"As 18 U.S.C. 1012b, "[F]or the purposes of the "[R]eport to the President of the Concerns to Promote Peace Act of 1997.""

Note: Subsection (c) added by 18 U.S.C. 1012b, "[F]or the purposes of the "[R]eport to the President of the Concerns to Promote Peace Act of 1997.""

In the absence of evidence to the contrary, or any evidence to the contrary, or any evidence to the contrary, the district court may determine that the individual named in the complaint is the individual named in the complaint.
While Jones Day litigators routinely are involved in representing clients in many “international” disputes pending in United States courts, those disputes generally tend to involve matters of private international law, i.e. breaches of contract, intellectual property claims, and other disputes. In the past few years, however, the Firm increasingly has become involved in representing corporate clients in actions alleging violations of “customary international law,” an amorphous and constantly evolving set of legal principles. A number of significant claims have been filed by alien plaintiffs in federal courts across the United States against U.S. and alien corporations, alleging such wrongs as environmental pollution, property damage, personal injuries, unfair labor practices, violations of human rights, and even rape, torture, and murder.

What these disparate claims have in common is the statute upon which they purportedly are based: the Alien Tort Statute (“ATS”) 28 U.S.C. § 1350. The recent proliferation of claims premised on the ATS has been accompanied by great controversy, as the courts and litigants attempt to define the meaning, purpose, and scope of this statute. As discussed below, recent decisions from the United States Court of Appeals for the Second Circuit and the United States Supreme Court have greatly clarified some aspects of the ATS in ways that are likely to narrow its scope and possibly to restrain its abuse.

**FILARTIGA— THE ATS REVISITED**

Enacted as part of the Judiciary Act of 1789, the ATS provides in full as follows: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” For almost 200 years following its enactment, the ATS was rarely invoked. Then, in 1980, the United States Court of Appeals for the Second Circuit issued the first signif-
Filartiga initially was employed by aliens to pursue claims in United States courts against foreign state actors who had engaged in gross violations of human rights, such as torture and murder.

Significant appellate decision addressing the statute, in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). In Filartiga, the Second Circuit held that the ATS provided federal court jurisdiction for claims by citizens of Paraguay against a former Inspector General of Police for atrocities, including torture, he allegedly committed while in office. In so ruling, the Second Circuit used expansive language, declaring that the ATS requires federal courts to “observe and construe the accepted norms of international law formerly known as the law of nations.”

Filartiga initially was employed by aliens to pursue claims in United States courts against foreign state actors who had engaged in gross violations of human rights, such as torture and murder. See, e.g., In re Ferdinand E. Marcos Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994). However, Filartiga soon was being invoked to support federal jurisdiction and claims by aliens against private individuals and corporations for a wide variety of torts that were alleged to be violations of international law. See, e.g., Kadic v. Karadzici, 70 F.3d 232 (2d Cir. 1995); Sarei v. Rio Tinto Plc., 2002 WL 1906814 (C.D. Cal. 2002). These claims, which purported to extend both the ATS and Filartiga into uncharted waters, presented two fundamental recurring problems: the lack of any well-settled definition of (i) what constitutes “customary international law,” and (ii) what are the proper sources and evidence of customary international law.

FloRES—THE ATS REFINED

During the summer of 2003, the Second Circuit authoritatively addressed both issues in its most recent ATS opinion in Flores v. Southern Peru Copper Corporation, 343 F.3d 140 (2d Cir. 2003). Plaintiffs in Flores were Peruvians who brought personal injury claims against Southern Peru Copper Corporation (“SPCC”), alleging that the company’s copper mining and refining operations caused plaintiffs’ and their decedents’ severe lung disease. Plaintiffs claimed that SPCC’s conduct violated the law of nations because it infringed on plaintiffs’ “right to life,” “right to health,” and right to “sustainable development.” In support of their contention that these rights were recognized as “customary international law,” plaintiffs relied on declarations of multinational organizations (such as the United Nations), international conventions, nonratified treaties, and affidavits of law professors. The Second Circuit affirmed the District Court’s dismissal of those claims and, in so holding, laid down a definitive test for lower courts to employ in determining “customary international law”:

1. “[I]n order for a principle to become part of customary international law, states must universally abide by it;”

2. “[A] principle is only incorporated into customary international law if states accede to it out of a sense of legal obligation;”

3. Customary international law addresses only those “wrongs” that are “of a mutual, and not merely several, concern to the States;” and

4. In determining customary international law, the court must “look to concrete evidence of the customs and practices of states.” That is, the court should “look primarily to the formal lawmaking and official actions of the States and only secondarily to the works of scholars as evidence of the established practice of States.”

Applying this test to the alleged wrongs at issue in Flores, the Second Circuit rejected plaintiffs’ efforts to prove the existence of customary international law on the basis of scholarly affidavits, unratted treaties, nonbinding resolutions and declarations of the United Nations or any of its agencies, other
multinational declarations of principle, and decisions of multinational tribunals. The court concluded that the purely intranational environmental pollution at issue in *Flores* was not a wrong “clearly and unambiguously” recognized as a violation of customary international law.

**ALVAREZ-MACHAÍN—THE ATS RESTRAINED?**

On June 29, 2004, the Supreme Court issued its decision in a pair of cases arising under the ATS. See *Sosa v. Alvarez-Machain*, Docket No. 03-339, *United States v. Alvarez-Machain*, Docket No. 03-485. Both appeals involved the ATS claims filed by a Mexican citizen, Mr. Alvarez-Machain, who was abducted in Mexico at the behest of the United States Drug Enforcement Administration and transported to the United States to stand trial for his alleged participation in the torture and murder in Mexico of DEA agent Enrico Camarena. Mr. Alvarez-Machain was acquitted at his criminal trial and subsequently filed a civil action pursuant to the ATS against the Mexican national who had seized him, Mr. Sosa, and against the United States federal agents who had assisted Mr. Sosa. The appeals of Mr. Sosa and the United States required the Supreme Court to address several fundamental aspects of the ATS:

**Does the ATS Provide for a Private Cause of Action?** *Filartiga* and its progeny—including *Flores*—impliedly or expressly have concluded that the ATS not only provides for federal court jurisdiction but also provides a private right of action to sue for violations of customary international law. However, invoking the plain language of the ATS, its legislative history, and the intent underlying the enactment of the ATS, the Supreme Court concluded that the ATS was merely a jurisdictional statute and did not expressly or impliedly create a private right of action.

**Does the ATS Apply to Modern Concepts of International Law?** In *Filartiga*, and even *Flores*, the Second Circuit equated modern and evolving concepts of international law with the ATS’s reference to “a tort only, committed in violation of the law of nations.” Reviewing the ATS in its proper historical context, the Supreme Court concluded the ATS provided a United States federal court forum for claims arising under the present-day law of nations to the extent that such claims were based on a “norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [of piracy and offenses against ambassadors].” The Supreme Court stressed that the judiciary had to take special care to avoid adverse foreign policy consequences in crafting remedies for violations of new norms of international law.

**Does the ATS Provide for Liability Against Non-State Actors and/or for Non-Governmental Conduct?** While *Filartiga* dealt with claims against a former Paraguayan government official, for official conduct under color of law, courts have expanded the scope of the ATS to cover claims against private individuals and entities and/or for conduct that is not under color of law. Indeed, *Flores* itself involved pollution claims against a private corporation. Increasingly, such claims have been premised on theories of accessorial liability, such as aiding and abetting. See, e.g., *Doe v. Unocal Corp.*, 2002 Wl 31063976 (9th Cir. 2002), withdrawn pending reh’g en banc. However, there is support for the argument that the ATS, even if it otherwise provides for a cause of action by individuals against state actors, does not extend such liability to non-state actors and/or for non-state action. While the Supreme Court did not have occasion to pass on this question directly, there is considerable support in the decision to preclude such liability.

**CONCLUSION**

*Flores* and, to a greater extent, *Alvarez-Machain*, are likely to change the face of ATS litigation significantly. It is all but inevitable that, notwithstanding *Flores* and *Alvarez-Machain*, plaintiffs’ counsel will attempt to revise and adapt their theories of liability for alleged violations of international law so as to retain a footing in the United States federal courts. It is equally inevitable that Jones Day litigators will be there, representing our U.S. and non-U.S. corporate clients at the forefront of this evolving area of international law.
Singapore's strong economy, infrastructure, and cutting-edge communication facilities, coupled with its political and social stability, are some key reasons why many of the world's leading multinational corporations have established their Asian operations there. In a 2002 survey of 60 world economies conducted by the Economist Intelligence Unit, Singapore was voted the best business environment in Asia.

Parallel to this recognition has been Singapore's growing reputation as a world-class forum for international arbitration. According to figures released by Singapore's Economic Development Board, there were more than 60 registered international arbitrations conducted in Singapore in 2002. Of these, 14 arbitrations were administered by the International Chamber of Commerce (“ICC”). This comprises almost 50 percent of the ICC arbitrations conducted in the Asian region in 2002, making Singapore the leading venue in Asia for ICC arbitrations.

The Singapore International Arbitration Centre (“SIAC”), which was established in 1991, spearheads Singapore’s drive to be Asia’s leading international arbitration center. In just over a decade, SIAC has managed more than 700 arbitration cases, of which approximately two-thirds involved non-Singaporean parties.

In addition, there have also been a large number of noninstitutional or ad hoc arbitrations and mediations held in Singapore in recent years that have been facilitated by the Singapore Institute of Arbitrators, the ICC Asia regional office, the Singapore Mediation Centre, and other bodies representing a host of industries from IT, banking, insurance, construction, and commerce.

This article briefly outlines what constitutes an international arbitration in Singapore and reviews recent developments in the law and practice governing international arbitrations in Singapore that have contributed to enhancing the attractiveness of Singapore as a venue for international arbitration in Asia.
WHAT IS INTERNATIONAL ARBITRATION IN THE SINGAPORE CONTEXT?


Under Part II of the IAA, an arbitration is treated as an international arbitration, and thereby governed by the IAA, if:

- the parties expressly agree in writing that Part II of the IAA or the Model Law shall apply to their arbitration (see section 5(1) of the IAA); or
- the arbitration is deemed to be international under section 5(2) of the IAA.

Under section 5(2), an arbitration is deemed to be “international” if it involves international parties of whom at least one has its place of business in a state other than Singapore; or the place of arbitration is outside of Singapore; or a substantial part of the obligations to be performed by one or both parties is outside of Singapore; or the parties have agreed that the subject matter of the arbitration agreement relates to more than one country.

Thus, international parties who choose to arbitrate in Singapore can feel assured by the fact that by default, their arbitrations will be governed by the IAA, which applies the internationally recognized and accepted Model Law adopted by UNCITRAL.

However, international parties who carry on business in Singapore through a locally incorporated subsidiary should be aware that by default, any arbitration involving the locally incorporated subsidiary and other Singapore domestic parties will be governed by the new Arbitration Act (Cap. 10) if the arbitration is not deemed to be “international” under the criteria set out in section 5(2) of the IAA and the parties have not expressly agreed that the IAA will apply.

One way in which a locally incorporated subsidiary can ensure that its disputes are resolved by international arbitration even if section 5(2) of the IAA does not apply is to agree to arbitrate under the SIAC Rules (2nd Edition) October 1997. These rules are based on the UNCITRAL Arbitration Rules and the Rules of the London Court of International Arbitration. Rule 32 also provides that the parties are deemed to have agreed that the IAA shall apply to their arbitration.

Another way is for the parties to specifically agree (in writing) that Part II of the IAA or the Model Law applies to their arbitration (as provided per section 5(1) of the IAA).

WHY ARBITRATE IN SINGAPORE?

There are a number of reasons why Singapore is increasing in popularity as a forum for international arbitration by disputing parties. We list some of the main factors below.

- Singapore is seen as a neutral venue in Asia.
- Singapore is politically and socially stable.
- Singapore is an established hub for international travel and has the convenience of efficient and comfortable transportation and leading-edge communications facilities.
- The English language is widely used in Singapore and is the language of government and business.
- Singapore has arbitration-friendly laws and an efficient judiciary where the courts protect and support the international arbitration process. When requested by a party, the courts have the power to: stay proceedings in court that are being carried out in breach of an arbitration agreement; enforce foreign arbitral awards made in New York Convention countries; enforce awards made in international arbitrations taking place in Singapore as if they were ordered by the courts themselves; make orders to preserve the subject matter of the dispute or evidence needed for an arbitration, grant interim injunctions to preserve the status quo, secure the amount in dispute, and/or secure costs of the arbitration; and issue processes to compel witnesses to attend arbitral proceedings.
- Singapore courts do not review the merits of an award in an international arbitration. An award from a New York Convention country can only be reviewed at the request of a party against narrowly defined procedural irregularities as set out in the treaty. International arbitration awards made in Singapore can only be reviewed based on a similar set of criteria.
- Confidentiality of arbitration proceedings is fully protected by the law and the SIAC.
When necessary, the Singapore legislature is and has been quick to amend the arbitration laws to bring them in line with accepted international norms.

Singapore is a party to the New York Convention, meaning arbitral awards made in Singapore can be enforced in 134 countries.

Singapore has a well-established legal service industry that offers parties a good choice of local counsel and a strong pool of arbitrators with international experience. These arbitrators are drawn from the ranks of senior members of the legal and other professions, and many of them are fellows of the Singapore Institute of Arbitrators and the Chartered Institute of Arbitrators.

International arbitrators are actively encouraged to arbitrate in Singapore and enjoy a tax exemption from income tax on fees earned in Singapore where services are rendered in Singapore for less than 183 days per calendar year.

Singapore also allows foreign lawyers to appear and argue cases on behalf of their clients in Singapore. On this point, it is pertinent to note that there are already 62 foreign law firms registered with the Attorney General's chambers in Singapore, including Jones Day.

Finally, the cost of running arbitrations in Singapore is generally lower when compared to arbitrations held elsewhere. This situation is all the more so following the recent announcement by the SIAC that it was substantially reducing its charges for case management and appointment fees. For an international arbitration, SIAC's management fee is now capped at just SG$25,000 (approximately US$14,600).

**RECENT MEASURES ADOPTED BY THE SINGAPORE COURTS**

In addition to the factors above, the Singapore courts have also taken other measures aimed at making Singapore a preferred forum for international arbitration. Two such measures that were implemented earlier this year should be noted.

The first such measure was the appointment of a specialist judge to hear all arbitration-related matters brought before the High Court. This appointment follows the practice of other jurisdictions such as Hong Kong. As a result, parties conducting international arbitrations in Singapore can be more confident that if one party seeks recourse through the Singapore courts in the limited circumstances permitted by the Model Law, the matter will be determined in accordance with the letter and spirit of the Model Law and in a consistent manner.

The second measure is the adoption of anonymous reporting of arbitration cases in Singapore. *ABC Co v XYZ Ltd (2003)* SHGC 107 is the first reported decision in Singapore that adopts this approach. This move brings Singapore's reporting practice in line with other major arbitration centers and will appeal to foreign companies wishing to remain anonymous in arbitration and arbitration-related court proceedings.

**AMENDMENTS TO THE IAA**

Reflecting the commitment of the Singapore legislature to keep the IAA in line with international norms, two amendments to the IAA were passed in 2001 and 2002 in response to three separate judicial decisions where the courts, in interpreting certain provisions of the IAA, had some doubts on the extent to which the parties enjoyed autonomy in their ability to choose the governing rules. These amendments effectively overruled these decisions and now make it clear that parties arbitrating in Singapore are free to apply the rules of any arbitration institution they choose, while also simultaneously applying the Model Law. (The amendments also make it clear that where there is an inconsistency between the specific rules chosen by the parties and the Model Law, then the Model Law shall apply.)

The speed and willingness of the Singapore Legislature to implement these amendments shows that it recognizes the importance of preserving party autonomy in arbitrations held in Singapore.

**CONCLUSION**

Singapore is now well regarded as a forum for fair and expeditious arbitrations. The recent steps taken by the Singapore courts, the Singapore legislature, and the SIAC further enhance this reputation and make Singapore even more attractive for international parties wishing to settle their commercial disputes in a forum where, among other factors, confidentiality and party autonomy are highly valued. Foreign commercial parties should also be reassured by the fact that local enforcement of arbitration awards will be conducted by the Singapore courts, which are rated by a number of agencies as being among the most efficient in the world.
Given these and other advantages, international parties doing business in Asia can confidently choose Singapore as a world-class forum for international arbitration.

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**Jones Day’s Practice** – continued from page 5

- International Chamber of Commerce
- London Court of International Arbitration
- American Arbitration Association
- German Arbitration Institution
- Arbitration Institute of the Stockholm Chamber of Commerce
- Cairo Regional Centre for International Commercial Arbitration
- Netherlands Arbitration Institute
- Belgian Centre for Arbitration and Mediation
- International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna Rules)
- Geneva Chamber of Commerce

In addition, members of our International Arbitration team often serve as arbitrators under the above rules of arbitration.

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