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5 The *Desputeaux* case was decided under Quebec law, whose Civil Code provides, at Article 2639, that '[d]isputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.'
6 RSC 1985, c C-42.
7 See above, note 4, at para 42.
8 *Dell* at paras 84-86. See also *Rogers Wireless v Muroff*, 2007 SCC 35.
9 See, for instance, *Desputeaux* at para 37: 'Both Parliament and the provincial legislature, however, have themselves recognised the existence and legitimacy of the private justice system, often consensual, parallel to the state's judicial system.'
10 *Jean Estate v Wires Jolley LLP*, 2009, ONCA 339 (*Jean Estate*).
11 RSO 1990, c Section 15.
12 *Acier Leroux Inc* v *Tremblay*, [2004] QJ No 2206 (CA).
13 *Experts en traitement de l'information (ETI) Montréal inc (Syndic de)* 2005 QCCA 1257. See para 54, where the Court notes, in a reference to *Desputeaux*, the significant breadth of an arbitrator's jurisdiction.
14 RSA 2000, c L-12.
15 *EPCOR Power LP v Petrobank Energy and Resources Ltd*, 2010 ABCA 378. See para 27, where the Court refers to the principles established in *Dell*.
16 *Boart Sweden AB v NYA Stromnes AB* [1988] OJ No 2839 (HCJ) at para 10.
17 See, eg, Frederic Bachand, 'Kompetenz-Kompetenz, Canadian Style', (2009) Arbitration International, 25 (3) 431.
18 RSBC 1996, c 457.
19 *Seidel v Telus Communications Inc*, 2008 BCSC 933.
20 *Seidel v Telus Communications Inc*, 2009 BCCA 104.
21 See above, note 1, at para 7.
22 See above, note 1, at para 101.
23 The Model Law provides, in Article 8(1), that a court faced with an action in relation to a matter that is the subject of an arbitration agreement should refer the parties to arbitration 'unless it finds that the agreement is null and void, inoperative or incapable of being performed.' In Canada, the Model Law has been adopted at both the federal and provincial levels.
24 See above, note 1, at para 163.
25 See above, note 1, at para 41.
26 In addition, after the Supreme Court issued the judgment in *Dell*, many commentators observed that the ruling would affect lower courts of the common law provinces in addition to the lower courts in Quebec. See, eg, J Brian Casey, 'Some Comments on the Dell Computer Case', (Winter 2007) 26 Advocates' Soc J No 3, at 29-30; Jacob Ziegel, 'Class Actions to Remedy Mass Consumer Wrongs: Repugnant Solution or Controllable Genie? The Canadian Experience' 27 Penn St Int'l L Rev 879 (2008-2009) at 891. See also Steven P Caplow, 'Arbitration Class Action Waivers in the United States and Canada', (2008) 74 Arbitration 57-64.
27 The BC Court of Appeal and the Court of Appeal for Ontario have come to the same conclusion: *MacKinnon v National Money Mart Company*, 2009 BCCA 103 at paras 62-63; *Jean Estate* at paras 52-54.
28 See, for example, J Melnitzer, 'Legislatures Can Restrict Scope of Arbitration: SCC,' Law Times (28 March 2011) 5 (quoting to this effect several practitioners who were involved in the case).
29 See, for example, Frédéric Bachand's post in the Kluwer Arbitration Blog, 'The Supreme Court of Canada: Pro-Arbitration No More', **http://kluwerarbitrationblog.com/blog/2011/03/31/the-supreme-court-of-canada-pro-arbitration-no-more** (31 March 2011).

UNITED STATES

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US Court of Appeals for the Second Circuit declines to stay Chevron's arbitration against Ecuador

On 17 March 2011, the US Court of Appeals for the Second Circuit handed down its decision in *Republic of Ecuador v Chevron Corp*,[1] affirming the denial of the petition of Ecuador and numerous individual plaintiffs ('appellants') for a stay of an international arbitration that Chevron Corp ('Chevron') commenced against Ecuador under the bilateral investment treaty (BIT) between Ecuador and the United States.[2] The Second Circuit notably declined to decide whether as a matter of law a court had the power under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention')[3] or the Federal Arbitration Act (FAA) [4] to order a stay of arbitration. Instead, the court held that, even if a stay were available under the New York Convention or FAA, the appellants' request

failed on the merits because their claims that Chevron had waived its right to arbitration or was estopped from asserting it were for the arbitrators, not the courts, to determine.

The *Lago Agrio* case and the Ecuador-Chevron arbitration

The decision arose out of a web of litigation between Chevron, Ecuador and individual plaintiffs in Ecuador claiming damages for environmental harm purportedly caused by Chevron's predecessor in interest, Texaco Petroleum Company ('Texaco'), in the Amazon rain forest in Ecuador.

In the mid-1990s, a number of Ecuadorian plaintiffs sued Texaco in the United States District Court for the Southern District of New York. Texaco moved to dismiss the case on grounds of *forum non conveniens*, in favour of litigating in Ecuador. To obtain that relief, Texaco agreed to be sued in Ecuador and 'to satisfy any judgments in plaintiffs' favour, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act.'[5]

Plaintiffs refiled their suit in Lago Agrio, Ecuador (the 'Lago Agrio case'). The Ecuadorian trial court entered an US$8.6bn judgment[6] against Chevron amid accusations of fraud and extraordinary governmental influence. During the pendency of the litigation and prior to the judgment, Chevron commenced arbitration against Ecuador pursuant to the BIT, electing to proceed under the Arbitration Rules of the United Nations Commission on International Trade Law (the 'UNCITRAL Rules'). Chevron sought an award, among other things, determining that it had no liability for the alleged environmental damage, and that either Ecuador or the Ecuadorian state oil company was exclusively liable for any judgment against Chevron.

The arbitration proceeded, with the parties selecting arbitrators and the panel issuing an interim order 'directing Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement… of any judgment against [Chevron Corporation] in the Lago Agrio case".'[7]

Ecuador, joined by the Lago Agrio case plaintiffs, brought a petition in the US District Court for the Southern District of New York seeking a stay of arbitration under the FAA on the grounds that Chevron had waived any right to arbitration or was estopped from raising its claims in that forum. The District Court, in a short opinion, denied the motion on the grounds that even if a stay were available under New York state law,[8] at least some of Chevron's claims would not be barred by waiver or estoppel and would therefore be subject to arbitration in any event.[9]

The Second Circuit affirms denial of a stay

The Second Circuit affirmed the District Court, after delving into the details of the BIT, the appellants' waiver and estoppel arguments and the applicable arbitration rules. The court stated that the availability of a stay of arbitration under the FAA or the New York Convention was an 'open question' in the Second Circuit.[10] The court continued that it was not required to answer that question, because Ecuador would not be entitled to a stay in any event.[11]

The court first determined that the BIT constitutes a 'standing offer [by Ecuador] to arbitrate disputes covered by the treaty'. That offer is accepted when 'a foreign investor [submits a] written demand for arbitration', creating a written agreement to arbitrate that satisfies the requirements of the New York Convention.[12]

The court then turned to Ecuador's argument that Chevron had waived, or was estopped from asserting, any right to arbitrate against Ecuador. In the first instance, the court noted, claims of waiver and estoppel do not go to the arbitrability of the dispute, but are presumptively for the arbitrator.[13] Questions of arbitrability are those '"dispute[s] about whether the parties are bound by a given arbitration clause" as well as "disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy".'[14] Waiver and estoppel do not go to whether the parties are bound by the arbitration clause or whether the clause applies to the dispute, but instead are defences to the claim. They are therefore 'procedural questions which grow out of the dispute and bear on its final disposition', not questions as to whether the dispute is arbitrable, and as such are for the arbitrator.[15]

Nonetheless, for the sake of argument, the court considered the merits of Ecuador's claim. Although under the FAA arbitrability is an issue for a court to determine in the first instance, if there is 'clear and unmistakable evidence from the arbitration agreement… that the parties intended that [it] be decided

by the arbitrator',[16] that issue will be referred to the tribunal. Chevron had, as the BIT permitted, chosen to proceed under the UNCITRAL Rules.[17] Those rules gave the arbitrators 'the power to rule on objections that it has no jurisdiction'. [18] The court held that claims of waiver and estoppel were therefore within the tribunal's jurisdiction, even if they were questions of arbitrability.[19]

The Second Circuit went on to review the Lago Agrio case plaintiffs' claim that Chevron's pursuit of arbitration was a breach of the promises Texaco had made in the earlier US litigation, and that Chevron was therefore estopped from bringing the arbitration. The court found that there was no 'inherent conflict' between the arbitration and the Lago Agrio case, which involved different parties and claims.[20] Further, Texaco had reserved a limited right to challenge the judgment, and had not limited when, where or how it could exercise that right.[21] The court, examining the plaintiffs' estoppel claims, found in general that any conflict between an ultimate arbitration award and a final judgment in the Lago Agrio Case was hypothetical at that point.[22] If actual conflicts did eventually arise, they could be addressed in later judicial proceedings.[23]

Considerations in seeking a stay of international arbitration

Whether and when a party can obtain a stay of arbitration under the New York Convention or FAA still remains an 'open question' in the Second Circuit. The FAA does not expressly provide for a stay of arbitration. While a party to an international arbitration agreement can seek to compel arbitration under Chapter 2 of the FAA (and the New York Convention), it is unclear whether the statute and treaty give federal courts jurisdiction over efforts to stay arbitration in all cases because they do not expressly provide for it.

Thus, one judge in the Southern District of New York has held that the New York Convention precludes the power to *stay* arbitration because it only references the ability to *compel* arbitration, and nothing in the FAA otherwise grants that power.[24] Another judge of that court, citing earlier Second Circuit and other cases, found to the contrary that the FAA may be applied to stay arbitration where the stay 'would be incidental' to the enforcement of contractual arbitration agreements.[25] And, in dicta, the Second Circuit in *Republic of Ecuador* concluded that arbitration may be stayed under the New York Convention 'where a court acts to protect its prior judgments by staying incompatible arbitral proceedings otherwise governed by' the New York Convention.[26]

Grounds for obtaining a stay of an international arbitration under federal law or the New York Convention are thus likely to be very limited. However, state laws allowing a court to enjoin arbitration may provide other grounds to justify a stay. The First Circuit has found that the authority to enjoin arbitration under state law did not conflict with the FAA's grant of authority only to compel arbitration and was not pre-empted.[27] The practitioner might seek to make the argument under applicable state law, being very mindful of the grounds and prerequisites for such a claim, such as strict limitations on participation in the arbitration.[28]

In conclusion, the dicta in *Republic of Ecuador* leaves the door open to stays of international arbitration under the New York Convention if proceeding with the arbitration could result in a ruling directly inconsistent with a court ruling. Contractual agreements and state laws allowing the stay of arbitrations may offer other options.

Notes

* Ryan Suser, an associate at Seward & Kissel, assisted in the research and preparation of this article.

1 Nos 10-1020-cv (L), 10-1026 (Con), 2011 US App LEXIS 5351 (2d Cir 17 Mar 2011).

2 Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, US-Ecuador, 27 August 1993, S Treaty Doc No 103-15.

3 10 June 1958, 21 UST 2517.

4 9 USC §§ 1–307 (2006).

5 2011 US App LEXIS 5351, at *7 (citing NY CPLR 5301 et seq). NY CPLR 5304(a)(1) provides that a foreign judgment is not conclusive if the legal system of the country rendering the judgment does not provide impartial tribunals or procedural due process. NY CPLR 5304(b)(3) states that a foreign judgment obtained by fraud 'need not be recognized'.

6 The judgment also mandated a doubling of damages if Chevron did not apologise within 15 days of its issuance. *Chevron Corp v Donziger*, No 11 Civ 0691 (LAK), 2011 US Dist LEXIS 22729, at *77 (SDNY 7 March 2011).

7 2011 US App LEXIS 5351, at *12.

8 See NY CPLR 7503(b) (McKinney 2006).

9 *Republic of Ecuador v Chevron Corp*, No 09 Civ 9958 (LBS), 10 Civ 316 (LBS), 2010 US Dist LEXIS 25487, at *5–6 (SDNY 16 March 2010).

10 2011 US App LEXIS 5351, at *15 (citing *Westmoreland Capital Corp v Findlay*, 100 F 3d 263, 266 n 3 (2d Cir 1996)).

11 *Ibid.*
12 *Ibid* at *18–19.
13 *Ibid* at *21–22.
14 *Ibid* at *21 (alterations in original) (quoting *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 84 (2002)).
15 *Ibid* at * 21–22.
16 *Ibid* at *21 (alterations in original) (quoting *Bell v Cendant Corp*, 293 F 3d 563, 566 (2d Cir 2002)).
17 *Ibid* at *23, 26; *see* BIT, art VI ¶ 3(a)(ii).
18 United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, GA Res 31/98, art 21 ¶ 1 (28 April 1976). The rules were amended in 2010; they maintain the tribunal's jurisdiction to determine arbitrability. See UNCITRAL Arbitration Rules (as Revised in 2010), GA Res 65/22, art 23 ¶ 1, UN Doc A/65/465 (6 December 2010) ('The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.')
19 2011 US App LEXIS 5351, at *23–24.
20 *Ibid* at *29.
21 *Ibid* at *31.
22 *Ibid* at *38-39.
23 *Ibid* at *41-42.
24 *Ghassabian v Hematian*, No 08 Civ 4400 (SAS), 2008 US Dist LEXIS 65557, at *4–7 (SDNY 27 August 2008).
25 *Oppenheimer & Co, Inc v Deutsche Bank AG*, No 09 Civ 8154 (LAP), 2009 US Dist LEXIS 117369, at *5–7 (SDNY 16 December 2009).
26 2011 US App LEXIS 5351, at *14 n6; see also *Jock v Sterling Jewelers, Inc*, No 08 Civ 2875 (JSR), 2010 US Dist LEXIS 132759 (SDNY 10 December 2010) (enjoining arbitrations that threatened to moot plaintiffs' appeal of a prior district court decision).
27 *Societe Generale de Surveillance, SA v Raytheon European Mgmt & Sys Co*, 643 F 2d 863, 867–68 (1st Cir 1981); see also *Republic of Ecuador*, 2010 US Dist LEXIS 25487, at *5.
28 See, eg, NY CPLR 7503(b), (c) (McKinney 2006).

UNITED STATES

AT&T Mobility LLC v Concepcion: US Supreme Court upholds the validity of class action arbitration waivers

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In April 2011, the US Supreme Court issued an opinion that effectively upheld the validity of class action arbitration waiver provisions in consumer contracts. Specifically, in *AT&T Mobility LLC v Concepcion,*[1] the Court held, in a divided decision, that Section 2 of the Federal Arbitration Act (FAA)[2] pre-empted a California Supreme Court decision that had found that the waiver in consumer contracts of the right to bring arbitration class actions was unconscionable and unenforceable.

By validating the inclusion of class action arbitration waivers in consumer contracts, the *AT&T Mobility* decision carries significant negative ramifications for the ability of consumers to join together and bring classwide arbitrations against corporate providers of consumer goods and services. Moreover, by pre-empting the states from prohibiting the use of class action arbitration waiver provisions, the decision also signifies a significant doctrinal shift by the Court in favour of parties' freedom to draft arbitration provisions as they like and away from the ability of state courts to fashion their own arbitration contract jurisprudence. No less interesting, the decision demonstrates that a majority of today's Court has considerable scepticism about the very feasibility and expedience of classwide arbitration procedures.

The FAA and California's *Discover Bank* rule

Congress enacted the FAA in 1925 as a direct response to 'widespread judicial hostility to arbitration agreements'.[3] The purpose of the FAA, at its most fundamental level, was to promote the use of arbitration as an alternative method of dispute resolution, and to prevent the courts from interfering with the freedom of parties to choose arbitration in lieu of litigation.

In this regard, Section 2 of the FAA provides that arbitration agreements 'shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity*