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Reshaping Arbitral Proceedings

by David W. Rivkin

Editor's Note: *In the past few decades, international arbitration has become an increasingly important mechanism for the resolution of cross-border disputes, including disputes involving financial institutions. For example, in recent years, banking institutions have more often resorted to international arbitration to resolve complex cross-border disputes involving financial instruments, particularly in emerging markets. In the insurance industry, arbitration has long been a preferred method for the resolution of cross-border reinsurance disputes and other coverage issues. Because arbitration awards are often more easily enforceable across borders under the New York Convention than are court judgments, international arbitration may offer advantages in cross-border contracts even when a financial institution could insist on submission to a court in its own jurisdiction.*

If conducted efficiently, an international arbitration can bring a cross-border dispute to a prompt and cost-efficient resolution. However, as international arbitrations have grown in size and scope, parties have more frequently expressed frustration with delays and high costs associated with the proceedings. To respond to these concerns, in April of this year, Debevoise & Plimpton LLP issued a Protocol to Promote Efficiency in International Arbitration (the "Debevoise Protocol"). The Debevoise Protocol, developed by members of the firm's International Dispute Resolution Group (the "IDRG"), identifies 25 specific procedures intended to make arbitration more efficient. Through the Debevoise Protocol, the firm has expressed its commitment to explore with its clients how such procedures may be applied in each case.

Set forth below is the text of a speech delivered by David W. Rivkin, co-chair of the IDRG, that describes in greater detail the impetus for the Debevoise Protocol and the reasoning for several of its key components. Mr. Rivkin delivered this speech on November 18 at the 25th Anniversary Conference of the Hong Kong International Arbitration Centre. A copy of the Debevoise Protocol is available at www.debevoise.com/arbitrationprotocol, and is also reproduced at the end of this issue of the Financial Institutions Report. We hope that you find these materials useful.

The theme of this conference – Rethinking International Arbitration – is very appropriate for a 25th anniversary conference. At 25 years, a young adult has been raised. We have been shaped by many factors that have contributed to our development: our parents, our education, our culture, and the nature and demands of our times. At 25, we each have a fully-formed character, which is unlikely to change in radical ways for the rest of our lives. On the other hand, most of our life remains ahead of us, and there is ample opportunity to shape what we want to do and how we want to live our life.

We celebrate today the 25th anniversary of the Hong Kong International Arbitration Centre. In many ways, it is appropriate to think of international arbitration itself as a young adult. While arbitration can of course be traced back to ancient times, and some arbitration institutions like the ICC (International Chamber of Commerce) and the AAA (American Arbitration Association) are close to a century old, in many ways the current form of international arbitration began only a couple of decades ago.

So it is appropriate at this stage to think about what we have created, but more importantly, what we want international arbitration to be in its future life. That is also appropriate because never in the history of international arbitration has it been both so frequently used and so frequently criticized. International arbitrations have grown remarkably in number, size and scope. Who would have thought a decade ago that a leading publication could publish details of many dozens of cases with claims valued over $1 billion? Regions like Asia and Latin America now have thriving international arbitration practices where little existed not so long ago. Arbitrators decide not only large commercial disputes but also investment treaty cases dealing with matters of

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Letter from the Editor-in-Chief

The financial crisis was international in scope, and the responses are gradually becoming more global. We have commented before on the ways in which the National Association of Insurance Commissioners is borrowing supervisory concepts from Europe and attempting to implement them in the U.S. system of state regulation of insurers. Of course the U.S. Dodd-Frank Act recognizes the importance of global coordination among supervisors, encourages international agreements by the United States and authorizes the new Federal Insurance Office to preempt any conflicting state insurance regulatory laws, regulations or regulatory practices.

We do not have a global system for resolution of a multi-national financial institutions. Policymakers in Europe are considering ways to reduce the likelihood that, in a future financial crisis, financial institutions would require and receive a government "bail-out," instead looking to facilitate a "bail-in" where the losses are borne by the institution's own constituencies – its equity holders and debt holders – through a reorganization in which debt is converted to equity.

In this month's *Debevoise & Plimpton Financial Institutions Report* lawyers in our Frankfurt office report on a new German law that is among the first in the world to provide a broad array of tools to the supervisor to bring about a "bail-in." The German law allows voluntary restructurings of banks, with the consent of creditors, in some ways similar to Chapter 11 of the U.S. Bankruptcy Code, applicable to U.S. corporations other than banks and insurance companies. If the German regulators intervene, where there is a need for speedy resolution they can transfer a bank's good business to a "bridge bank," for subsequent sale. The U.S. Federal Deposit Insurance Corporation (the "FDIC") has long had similar power to resolve U.S. banks whose deposits it insures through the use of a bridge bank. And now the Dodd-Frank Act for the first time authorizes the Treasury Secretary, on the recommendation of the FDIC and the Federal Reserve Board and after consultation with the President, to appoint the FDIC as receiver of important financial holding companies, supplanting normal bankruptcy law; the FDIC would have the power to implement a speedy resolution of the failed company, including through a transfer to a bridge financial company. It remains to be seen how the markets for fixed-income securities of bank holding companies and other financial institutions will over time react to the regulatory powers that were granted this year in the U.S. and Germany.

On December 16, 2010, Moody's placed on review for possible downgrade 246 subordinate debt securities together with subordinated tranches of debt issued or guaranteed by 24 German banks.

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German Bank Restructuring Act

by Thomas Schürrle and Klaudius Heda

On November 26, 2010, the upper house of the German Parliament (*Bundesrat*) passed the German Bank Restructuring Act (the "Restructuring Act") which calls for (1) the restructuring and orderly liquidation of credit institutions, (2) the establishment of a restructuring fund for credit institutions and (3) the extension of the limitation period of corporate law management liability. The Restructuring Act will now need to be signed by the German President and published in the Federal Law Gazette (*Bundesgesetzblatt*) in order to come into effect. It is expected to be published and to enter into force by January 1, 2011.

The Restructuring Act contains measures designed to mitigate the risk of any future crisis of financial systems due to bank failures while protecting taxpayers.

The Restructuring Act contains a significant number of measures designed to mitigate the risk of any future crisis of financial systems due to the failure of ailing banks while, at the same time, protecting taxpayers. The key elements of the Restructuring Act include (1) a new restructuring and reorganization regime for banks, (2) establishment of a restructuring fund, (3) enhancement of powers of the German financial supervisory authority (the "BaFin") and (4) extension of management liability for failure of a bank.

First Stage of the New Regime: Voluntary Restructuring

The first stage of the new regime will permit a bank to submit a voluntary application to the BaFin to launch a restructuring procedure that enables the bank to self-manage the crisis. A bank applying for this restructuring procedure must provide a restructuring plan setting out the respective restructuring steps and nominating a restructuring adviser. If the BaFin considers the submitted restructuring plan to be an appropriate response to the bank's situation, the BaFin will immediately file for the commencement of the restructuring procedure with the competent Higher Regional Court (the "Higher Regional Court") (*Oberlandesgericht*). The Higher Regional Court will order the commencement of the restructuring procedure and appoint the restructuring adviser. The restructuring adviser is responsible for the implementation of the restructuring plan.

It is important to note that, as a general principle, the restructuring procedure does not aim to affect any creditors' claims against the bank. It is therefore the least powerful tool within the new regime. The only noteworthy feature of the restructuring plan is the option of the bank to provide that the loans taken up for the purposes of the implementation of the restructuring plan would take priority over the claims of any other creditors in insolvency proceedings that are commenced within three years following the commencement of the restructuring procedure. However, this would not apply to shareholder loans. To support the restructuring, the Higher Regional Court may order, among other things, the limitation or prohibition of distribution of dividends to shareholders or limitations to the management compensation structure. It is expected that the restructuring procedure will rarely be used because of the lack of protection from creditors' claims and the significant restrictions imposed on management by the powers granted to the restructuring adviser, the BaFin and the relevant courts under the Restructuring Act.

Second Stage of the New Regime: Voluntary Reorganization

The second stage of the new regime permits the reorganization of the bank, providing for a significantly higher level of intervention against creditors and shareholders. A reorganization procedure can be initiated if the restructuring procedure has failed or is without any prospect of success. As the reorganization is voluntary, it must be initiated by the ailing bank or, in case of a failed stage one restructuring, by the restructuring adviser. The reorganization plan approved by the BaFin must be filed with the Higher Regional Court, which will in turn release an order to commence the reorganization procedure.

In contrast to the restructuring procedure, the reorganization procedure permits a number of measures which would curb the rights of creditors and shareholders. The reorganization procedure can therefore only be applied by banks (1) whose existence is endangered and (2) whose failure would endanger the stability of the financial system. A bank's existence is considered endangered if the bank's own capital funds or liquidity have fallen below 90 per cent of the required ratios. The stability of the financial system is considered endangered if the bank's failure is expected to have substantial negative impact on other institutions in the financial sector, the financial markets or the igeneral confidence of depositors or other market players.

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A reorganization would be based on a reorganization plan that is to be approved by creditors and, in contrast to principles govering plan procedures, also the shareholders. It may provide, among other things, for the following features:

(a) a debt-equity swap in relation to creditors' claims, subject to approval by the creditors;

(b) reduction or deferral of creditors' claims (this does not apply to claims secured by the German deposit protection fund);

(c) automatic implementation of certain corporate actions such as amendments to articles of association or transfer of shareholders' rights when effecting the reorganization plan;

(d) spin-off of all or parts of the assets and liabilities to an existing or a newly established bank in order to separate a bank's assets and liabilities into a "good bank" and a "bad bank"; or

(e) ultimately, the liquidation of the bank.

The approval of the reorganization plan by the involved creditors must be provided through creditor groups (*e.g.*, secured, unsecured senior, unsecured subordinated). Generally, the each group must approve by a majority in number of creditors and amount of claims. In case a creditor group does not approve, such approval may be deemed granted if (1) the reorganization plan does not leave the creditors of such group in a worse position than would be the case without the reorganization plan, (2) they adequately participate in the assets to be distributed under the reorganization plan and (3) a majority in number of all other groups (the shareholder group and other creditor groups) have approved the reorganization plan. Such deemed approval of a creditor group is subject to examination by the Higher Regional Court when effecting the reorganization plan.

To prevent the shareholders from obstructing the implementation of the reorganization plan, the Restructuring Act also provides for a deemed approval of the shareholders.

To prevent the shareholders from obstructing the implementation of the reorganization plan, the Restructuring Act also provides for a deemed approval of the shareholders if (1) a majority of all other groups (*i.e.*, the creditors' groups) approved the reorganization plan and (2) the measures under the reorganization plan are intended to avoid significant negative effects to other institutions in the financial sector and the financial system. This deemed approval concept may violate the Second European Court Corporate Law Directive, specifically in the case of a capital increase required to effect the debt-equity swap. The German Government argues that the judgments of the European Court of Justice indicate that the approval of the shareholders meeting is not required in such crisis situations. Nevertheless, uncertainty remains as to whether the courts will follow this approach.

Regulatory Intervention Stage: Involuntary Transfer of Assets and Liabilities to a Bridge Bank

If the BaFin determines that (1) the existence of a bank is endangered, (2) such failure endangers the stability of the financial system and (3) other less severe measures such as restructuring and reorganization procedures are not expected to successfully alleviate the risk of failure of the financial system, BaFin may order the transfer of all or part of the bank's assets and liabilities to a bridge bank. Such a transfer would affect assets needed to maintain the sustaining functions of the bank within the financial system. The goal is to avoid the breakdown of those functions that are integral parts of the financial system and therefore essential for its stability. The transfer order is designed to enable the BaFin to instantly react in case of a major crisis, if necessary even over a weekend.

The bridge bank must be either an existing bank or a bank newly established for the purposes of such transfer, have its seat in Germany and consent to the transfer by a notarized deed. Since the establishment of a new bank may take some time, a "shelf" bridge bank may be maintained for unexpected crisis situations.

To protect the rights of the bank, its shareholders and creditors, the BaFin would give the parties the opportunity, when appropriate, to solve the crisis by setting a deadline to present a recovery plan (*Wiederherstellungsplan*), provided that there is sufficient time.

The BaFin may issue a transfer order also during an ongoing reorganization procedure, even while a reorganization plan is being implemented. The legislators purposely enabled the BaFin to pressure creditors and shareholders involved in the reorganization

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procedure who may attempt to delay the implementation of the reorganization plan.

The transferring bank would be compensated for the transferred assets with shares in the bridge bank or, in appropriate cases, in cash. Such compensation must represent adequate value for the transferred assets.

The Restructuring Act also provides that some of the assets transferred to the bridge bank may be re-transferred to the bank within four months of the transfer. The rationale behind this provision is that the transfer may need to be completed on very short notice. Therefore, the BaFin may not be able to determine exactly which of the assets must be transferred to achieve the ultimate goal. Therefore, the BaFin may transfer all assets broadly appearing as relevant and identify the specifically relevant assets following the transfer.

In cases where foreign law assets are to be transferred, and such transfer requires additional steps under the applicable foreign law, the Restructuring Act provides that the transferring bank shall hold such assets as fiduciary for the account of the bridge bank until the transfer has been completed.

Establishment of a Restructuring Fund

For the purposes of financing the measures under the Restructuring Act, a new restructuring fund has been introduced. The restructuring fund would be financed by a levy paid by German credit institutions licensed under the German Banking Act (*Kreditwesengesetz*), *i.e.*, all institutions that carry out regulated banking activities such as taking deposits, granting loans and providing principal broking or safe custody services in Germany. Financial services institutions, insurance companies and investment management companies would not be obliged to pay the levy; nor would German branches of foreign banks established under the European Passport regulations. German saving banks (*Sparkassen*) and cooperative banks (*Genossenschaftsbanken*) argue that they have already set up a rescue fund which should be sufficient to prevent their failure. On the other hand, some market participants take the view that investment and insurance companies should contribute to the restructuring fund as well.

For the purposes of financing the measures under the Restructuring Act, a new restructuring fund has been introduced. The restructuring fund would be financed by a levy paid by German credit institutions licensed under the German Banking Act (Kreditwesengesetz), i.e., all institutions that carry out regulated banking in Germany.

The levy would be comprised of annual and special contributions. An annual contribution would depend on the individual "systemic" risk profile of the relevant bank based on the bank's business volume, its size and its degree of integration in the financial markets, specifically taking the liabilities to other banks into consideration. The method of calculation is aimed at providing an incentive for the bank to lower the "systemic" exposure. A regulation to be enacted by the German government in cooperation with the German Federal Bank (*Bundesbank*) would specify the details of the calculation method.

The Restructuring Act expressly authorizes the restructuring fund to establish bridge banks which can be used in case of a transfer order. The restructuring fund may also acquire shares in an existing bank that assumed the assets of a bank which the BaFin ordered to transfer assets. The goal here would be to enable the restructuring fund to inject new capital to stabilize the essential bank functions transferred to an existing bank or a bridge bank.

Extension of the Limitation Period for Corporate Law Management Liability

As an additional component aimed to provide an incentive to management of a bank to reduce the bank's risk profile, the Restructuring Act introduces the extension of the limitation period for management and board member liability from five years to ten years. While there is no reliable empirical evidence that the existing limitation period of five years led to any misaligned incentives for bank management, this regulation can trace its roots to the heated public debate about the responsibility of bank managers for the financial crisis. ■

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The long arm and watchful eye of the UK's Financial Services Authority

by Edite Ligere

Introduction

In November 2010, the United Kingdom's ("UK") Financial Services Authority (the "FSA") published Policy Statement PS10/17 entitled: *Taping of Mobile Phones*. This Policy Statement brings mobile phones and other handheld electronic communications devices within the scope of the FSA's rules in respect of the recording of telephone conversations and electronic communications as set out in the FSA's Conduct of Business Sourcebook ("COBS").

The FSA's existing rules for the recording of telephone conversations and electronic communications

The FSA's existing rules in respect of the recording of conversations and electronic communications as set out in COBS 11.8.1R apply to a firm which:

(i) receives client orders;

(ii) executes client orders;

(iii) arranges for client orders to be executed;

(iv) carries out transactions on behalf of the firm or another person in the firm's trading activities or the trading activities of another person in the firm's group;

(v) executes orders that result from decisions by the firm to deal on behalf of its client; and

(vi) places orders with other entities for execution that result from decisions by the firm to deal on behalf of its client.

The duties under the existing rules on firms are to: (i) take *"reasonable steps"* to record *"relevant telephone conversations"*; and (ii) keep a copy of *"relevant electronic communications made with, sent from or received on equipment provided by the firm to an employee or a contractor; or the use of which by an employee or contractor has been sanctioned or permitted by the firm to enable that employee or contractor to carry out the above activities"* for a period of at least six months.[1] The communications referred to above include *"communications made by way of facsimile, email and instant messaging devices"*.[2]

Manner in which records must be stored

Firms must keep such records in a medium that allows their storage so that the information is accessible for future reference by the FSA. In addition, the following conditions must be met:

(i) the FSA must be able to access the records readily;

(ii) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections and amendments, to be easily ascertained; and

(iii) it must not be possible for the records to be otherwise manipulated or altered.

"Relevant conversation" or "communication" under the existing rules

A "*relevant conversation*" or "*communication*" for these purposes is:

(i) a conversation or communication between an employee or contractor of the firm with a client, or when acting on behalf of a client, with another person, which concludes an agreement by the firm to carry out the activities referred to above as principal or as agent; and/or

(ii) a conversation or communication between an employee or contractor of the firm with a professional client or an eligible counterparty, or when acting on behalf of a professional client or an eligible counterparty, with another person, which is carried on with a view to the conclusion of an agreement referred to above and whether or not it is part of the same conversation or communication as above.

Conversations and electronic communications (except emails) made with, sent from or received on a mobile phone or other mobile handheld electronic communications device were expressly excluded from the existing rules.

Jurisdictional application of the existing rules

The existing rules apply only "*with respect to the firm's activities carried on from an establishment maintained by the firm in the United Kingdom.*"[3] This definition encompasses both subsidiaries and

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branches. The wording also catches cross-border communications where all but one of the parties is outside the UK. Important exceptions to the application of the taping rules include general conversations about: (i) market conditions; (ii) corporate finance; (iii) treasury functions; (iv) activities by service providers; (v) activities by non-directive friendly societies; and (vi) activities by non-directive insurers.

The new rules

The principal change between the old rules and new rules is that the latter extend to mobile telephones and other handheld electronic communications devices. Thus, the new rules will require the recording and storage – for a period of six months – of all "*relevant communications*"[4] made with, sent from or received on mobile phones and other handheld electronic communications devices. The FSA has indicated that it will apply this rule to mobile phones and other handheld electronic communications devices issued by firms for business purposes (i.e., not private mobiles or other handheld electronic communications devices). Emails sent from handheld electronic communications devices are already covered by the existing taping rules as set out in COBS 11.8R. Firms will also be required to take reasonable steps to ensure that such communications do not take place on private communications equipment that firms cannot record, mainly for privacy reasons. This includes private mobiles, private handheld mobile electronic communications devices and private non-mobile electronic communications devices.

The FSA's Policy Statement specifically states that:

"It is our contention that by having as comprehensive a taping regime as possible, we limit the scope or temptation for employees to infringe the market abuse rules on fixed or mobile lines which are not taped. And by taping these previously unrecorded lines, we have an additional source of evidence to draw on, which our experience shows can be of significant value to our investigative and enforcement work.

Even where individuals are aware they are being recorded, they have been known to incriminate themselves and/or to betray their knowledge and intent which helps to bolster an otherwise circumstantial case. Equally, recorded conversations may support an individual's subsequent defence of his actions, which may lead us to close down an investigation sooner than we may otherwise have done and, in turn, to divert our resources into investigating other potential cases of market abuse.

Additionally, while individuals can conduct relevant conversations on unrecorded lines, our view is that if a firm has audit trails in place covering the receipt of client orders and the conclusions of transactions, this should alert firms to any potential wrong-doing."

To whom will the new rules apply?

The new rules will apply to FSA authorised firms, including investment firms, banks, stockbrokers, investment managers (including collective investment scheme and hedge fund managers) and financial and commodity derivatives firms. The new rules are aimed at business communications that involve taking client orders or dealing in financial instruments. Firms must assess for themselves on an individual, case-by-case basis whether the taping rules apply to their business activities and employees.

If an employee is operating from an office in the European Union (the "EU") and regularly conducting relevant conversations/communications on behalf of a UK-based firm (including EU or third country firms with branches in the UK) on a firm-issued mobile phone or other handheld electronic communications device, the firm should arrange for business communications to that phone to be routed through its internal system so the individual's relevant communications are taped and a record kept. If an employee is working from home but is regularly conducting relevant communications on a firm-issued mobile phone, the firm should arrange for business communications to that phone to be routed through its internal system so that relevant conversations on the employee's mobile line may be taped and a record kept.

When will the new rules come into force?

The new rules will come into force on 14 November 2011. However, firms should take steps to ensure that they are in a position to comply with the new rules before then.

The FSA's rationale for introducing the new rules

The FSA believes the new rules will enhance its ability to carry out its supervisory functions under the EU's financial services legislation. For example, the Market Abuse Directive 2003/6/EC ("MAD") requires a competent authority of an EU Member State, such as the FSA, to be given all

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supervisory and investigatory powers necessary to exercise their functions. Article 12 of MAD specifically provides that such powers "*shall at least include the right to require existing telephone and data records*". Further, the Markets in Financial Instrument Directive 2004/39/EC ("MIFID") includes a similar requirement and permits a competent authority to impose taping requirements at its discretion.[5] It is worth noting that the EU Commission is currently reviewing both MAD and MIFID.

"Reasonable steps" under the new rules

What constitutes "reasonable steps" under the new rules is fundamentally a principles-based question of fact to be determined by the firm in question on a case-by-case basis. The FSA has not set out in any specific detail what it expects from firms. The FSA will, however, issue further guidance on what constitutes "reasonable steps" in respect of mobile phone and other handheld electronic communications device taping in due course. That said, the FSA's fundamental position remains that each firm must determine what is necessary, reasonable and proportionate for the business in question.

At a minimum, the FSA has indicated that it would expect firms to ensure that their employees are made aware of their responsibilities under the new requirements through adequate compliance training. The FSA would also expect proper paper trails to be in place so firms are alerted to any "relevant conversations" that have occurred as a result of communications that have not been recorded but that have resulted in a client order or conclusion of a transaction.

It remains to be seen how this will work in practice. Interestingly, the FSA's Policy Statement states that the "reasonable steps" requirements should:

> *"prevent the need to develop complex technological solutions to record relevant conversations that only take place occasionally in circumstances where recording them would be highly impractical and costly. … Clearly, if an employee only infrequently faces these circumstances and the firm does not have a readily available technological solution to tape relevant conversations carried out on the employee's mobile line, it may not be necessary for the firm to tape the firm-issued mobile."*

Access by the FSA to recorded information

In terms of requesting access to recorded information, the FSA has said that it will use its "*best efforts to identify relevant material as quickly as possible and to focus the scope of their requests so that they are as targeted as possible and proportionate.*"

Reaction from the industry

The general reaction from the industry thus far has been that: (i) the likely benefits from the new rules are hard to quantify; and (ii) such benefits as there may be would not outweigh the cost of implementing the new regime. A global investment bank (which wishes to remain anonymous) has estimated that the cost to the firm of recording all BlackBerry phones issued to front office staff would be over £2.6 million per annum.

Conclusion

The new rules represent a clear step towards the FSA's increasingly intrusive approach to financial regulation. The practical implementation of the new rules appears, on the face of it, to be somewhat problematic. It remains to be seen whether and to what extent the new rules will prove to be a useful, proportionate and cost-effective tool in the battle against market abuse. ■

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1. COBS 11.8.5R.

2. COBS 11.8.7G.

3. COBS 11.8.4R.

4. As set out in COBS 11.8.8R. This definition is the same as the existing one.

5. Article 50 of Directive 2004/39/EC and Article 51(4) of the MIFID Implementing Directive 2006/73/EC.

U.S. Regulators Continue to Focus on Anti-Money Laundering Compliance

by Satish M. Kini and Thomas S. Wyler

Recent enforcement actions and regulatory initiatives demonstrate that anti-money laundering ("AML") requirements and suspicious activity reporting ("SAR") obligations continue to be a regulatory priority and, consequently, demand the attention of financial institutions. To begin with, earlier this fall, the U.S. Financial Crimes Enforcement Network ("FinCEN") and the U.S. Securities and Exchange Commission (the "SEC") brought enforcement actions against a broker-dealer, Pinnacle Capital Markets LLP ("Pinnacle"), and its president and chief compliance officer for AML, customer identification and SAR deficiencies. These enforcement actions were based on Pinnacle's alleged failure to identify and monitor the activities of sub-account holders of certain corporate omnibus accounts. In early December, FinCEN also released a final rule, an advisory and two guidance documents that clarify SAR confidentiality requirements and enhance the ability of financial institutions to share SARs with certain affiliates. Also in early December, FinCEN issued a rule proposal that would require non-bank residential mortgage lenders and originators to establish AML programs and file SARs. In this article, we review each of these enforcement and regulatory developments in turn.

Pinnacle Enforcement Action

According to FinCEN and the SEC, Pinnacle focused its business on providing foreign individuals and institutions with access to U.S. securities markets.[1] Specifically, Pinnacle processed orders with direct market access software for foreign institutions, many carrying omnibus accounts, and foreign individuals. This software enabled both direct accountholders and omnibus sub-account holders to have direct control over securities transactions effected in their accounts. FinCEN found that this direct access model encompassed "uncommon" AML risks. Yet, according to regulators, the firm failed to apprehend those risks and to design AML compliance systems commensurate with those risks.[2]

Among the deficiencies cited by regulators, Pinnacle allegedly lacked an automated transaction monitoring system and did not make use of transaction exception reports from its clearing firm. Pinnacle relied, instead, on manual transaction reviews, which FinCEN alleged were not adequate to detect suspicious wire activity, irregular trading patterns and transactions without an apparent business or lawful purpose. FinCEN also noted that Pinnacle acquired AML procedures from a third-party provider, which, according to FinCEN, were not appropriately tailored to reflect the firm's business activities and risks. FinCEN alleged that, as a result, the procedures did not include "red flags" or other measures to manage the heightened risk present in Pinnacle's foreign customer base. Pinnacle also lacked adequate risk-based procedures under Section 312 of the USA Patriot Act, which requires U.S. broker-dealers and others to implement due diligence programs for correspondent accounts with foreign financial institutions. Finally, FinCEN alleged that Pinnacle failed to recognize that omnibus sub-account holders – because they could transmit transaction orders directly through omnibus accounts – were the firm's "customers" for customer identification purposes. Pinnacle allegedly failed to obtain required customer identification information from, and to verify the identity of, these sub-account holders.

According to FinCEN, the absence of effective AML controls at Pinnacle resulted in violations of the firm's SAR requirement. FinCEN's enforcement order states that, between October 2005 and March 2007, Pinnacle failed to report suspicious transactions involving millions of dollars. These deficiencies, according to regulators, resulted in a lack of timely information being provided to law enforcement and impaired the usefulness of the SAR system.

SAR Rule and Guidance

More recently, on December 3, 2010, FinCEN issued regulations and guidance designed to address the confidentiality of SARs. FinCEN's rule clarifies the scope of the statutory prohibition against the disclosure of a SAR by financial institutions, governmental authorities and others. The rule's confidentiality requirement prohibits disclosure of the content of a SAR and any information indicating its existence, but FinCEN's rule also makes clear that these confidentiality restrictions do not prevent firms from revealing the underlying facts, transactions and documents on which a SAR is based.[3]

In conjunction with the rule, FinCEN issued guidance regarding the sharing of SARs within a banking or other financial organization. The guidance allows depository institutions, broker-dealers, futures commission merchants, mutual funds and introducing brokers in commodities that are subject to FinCEN regulations and that have filed a SAR to share that SAR, or any information related to it, with affiliates, provided that such affiliates also are subject to a SAR requirement. The guidance complements previously issued FinCEN guidance that permitted SARs to be shared with head offices and parent companies. The guidance allows for sharing of a SAR with a

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domestic *affiliate*, provided that the affiliate is (a) itself subject to a SAR rule, (b) linked under common ownership and (c) not the subject of the SAR. The guidance also clarifies that SARs may not be shared with foreign affiliates.[4]

Finally, the guidance notes that, under certain circumstances, the entity sharing the SAR or its affiliate, or both, could be liable for disclosure, whether direct or indirect, by the affiliate of a SAR or information revealing the existence of a SAR. Thus, financial institutions should have policies, procedures and controls in place to ensure that affiliates protect the confidentiality of a shared SAR or related information.

Proposed AML and SAR Requirements for Residential Mortgage Firms

On December 6, 2010, FinCEN issued a rule proposal that would require non-bank residential mortgage lenders to maintain AML programs and to file SARs.[5] Currently, only banks and certain other types of financial institutions such as broker-dealers, futures commission merchants and mutual funds are required to file SARs and maintain AML programs. In light of the attention being paid to the residential mortgage market, FinCEN's action comes as no surprise, and it was presaged by an advance notice of proposed rulemaking, which was issued last year. FinCEN characterized its proposal as a means to "close a regulatory gap" and as necessary to assist in investigating and prosecuting mortgage fraud-related crimes. Comments on the proposal are due to FinCEN by February 7, 2011.

FinCEN's proposal would impose AML and SAR requirements on entities engaged in residential mortgage lending. Specifically, the proposal would apply to entities to which the debt arising from a residential mortgage loan is initially payable and to entities that take residential mortgage loan applications and offer or negotiate terms of a residential mortgage loan for compensation or gain. The proposed AML and SAR requirements for these entities would mirror the requirements in place for other financial institutions.

FinCEN argues that AML and SAR requirements would "complement" efforts underway by these companies to comply with the licensing systems and registry under development since enactment of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act"). FinCEN notes that, as mortgage companies and brokers "implement systems and procedures to comply with the SAFE Act, there will be opportunities for them to review and enhance their educational and training programs to ensure that employees are able to identify and deal with fraud, money laundering, and other financial crimes appropriately."

Conclusion

These various enforcement and regulatory actions highlight the fact that, although the spotlight may be directed chiefly to financial reform and other arenas, money laundering compliance remains a focus of regulatory attention. By all accounts, FinCEN and other federal regulators continue to devote significant attention to ensuring compliance with existing requirements and with clarifying and expanding regulatory mandates. Consequently, financial institutions need to remain vigilant to money laundering risks and to ensure the adequacy of their compliance efforts. ■

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1. See *In re: Pinnacle Capital Markets LLC and Michael A. Paciorek*, SEC No. 3-14026 (Sept. 1, 2010).

2. See *In re: Pinnacle Capital Markets, L.L.C.*, FinCEN No. 2010-4 (Aug. 26, 2010).

3. 75 Federal Register 75593 (Dec. 3, 2010).

4. 75 Federal Register 75607 (Dec. 3, 2010).

5. 75 Federal Register 76677 (Dec. 9, 2010).

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substantial public policy. The size of this audience and those at other conferences shows the growth and popularity of the field. I remind young practitioners who flock to the many different young arbitrator forums now offered to them that, when I was their age, the young arbitrator forum was often Henri Alvarez and me sitting together in the back of the room watching the greats such as Berthold Goldman and Pierre Lalive.

However, this success has come at a price. More and more, one hears the real users of international arbitration – the corporations and the states who are the parties – complain about the process and urge that it is not serving their needs. The length and cost of cases have grown considerably; at least that is the common wisdom, and frequently that is all that matters. The recent Queen Mary International Arbitration Survey (the "Queen Mary Survey") of major companies from around the world – in which more than a third of the respondents were from Asia – showed that 50% of the respondents have been disappointed with arbitrator performance. In some ways, that is precisely the figure one would expect, since roughly half of the parties to international arbitrations lose their cases.

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However, when the Queen Mary Survey asked the respondents for their reasons for disappointment, about half cited problems relating to their management of the case itself, rather than about outcome, poor reasoning or lack of knowledge. They cited overly flexible procedures and a failure to control the process, that the arbitrators themselves caused delays, and the arbitrators' tardiness in rendering the award. It should be noted that more of the respondents blamed the length of proceedings on the parties themselves than on the tribunal and on external counsel. In essence, the respondents asked to be saved from themselves, because they believe that the tribunal is in the best position "to render arbitration expeditious by keeping themselves and the parties to the timetable." A similar percentage felt that the arbitration institution is in the best position to control the time and cost.

It is clearly incumbent on everyone involved in the international arbitration process to rethink, reshape and improve the process. All of us — arbitrators, arbitral institutions like the HKIAC, outside counsel and inside counsel — share responsibility, and all of us are in a position to make the process better and more responsive to the needs of the users. We do not need to throw out the process and start anew. We do need to find ways to restructure and improve it, or it may fall under its own weight of success. The old aphorism that one party wants expedition while the other wants delay is no longer true. Given the pressure of corporate life today, companies and their executives need resolution, closure and certainty. In the days of a 24-hour news cycle, a 24-month arbitration is no longer acceptable.

That is the important subject of this conference, and frankly it may be THE subject of the times. One of my partners was asked to speak about efficiency in arbitration last week at the American Society of International Law in Miami, and another will be speaking on the subject at an ICC conference in London next week.

As many of you know, earlier this year we at Debevoise took a step that we hope will aid that process. We issued the Debevoise & Plimpton Protocol to Promote Efficiency in International Arbitration. In the Debevoise Protocol, we made a public commitment to explore with our clients whether and how each of twenty-five specified procedures can be used in each case to make that arbitration more efficient. We recognize, of course, that the flexibility inherent in international arbitration is one of its significant advantages, so these procedures are not set in stone as inflexible rules. But we hope that, by setting out procedures that promote efficiency and promising publicly to follow them as appropriate in the individual cases, it will help spur others to focus on efficiency as a major goal. We have included the Debevoise Protocol in your conference materials, and I hope that you will have a chance to review it. I will not describe it in detail here, though you will recognize some of the reforms that I will discuss as being reminiscent of the Debevoise Protocol.

Before discussing some particular ways in which international arbitration procedures can be reshaped, let me begin with a more fundamental change in focus. Too often, counsel in international arbitration seek to conduct cases in the same manner they have conducted other arbitrations (or worse, in the same manner in which they conduct state court litigation). We know that some arbitrators have long-form standard procedural orders that they apply in every case. In one case where I sat as chair of a tribunal, the parties presented me at the first procedural conference with a draft procedural order that was simply a mark-up of one that I had used in another case involving one of the same counsel, even though the cases were about very different issues and the clients in the cases had very different needs.

Several years ago, first in a speech in Madrid and then in an article published in Arbitration International,[1] I argued that in each case counsel and arbitrators need to bring their experience to bear in shaping the correct procedure for that case, but they more importantly need to start with a blank slate. I called my approach the Town Elder Model, harking back to the days when arbitration was largely conducted by town elders who heard both sides to the dispute. The town elder would not start with a twenty page procedural order. Rather, he (and it was always a he in those days) would first listen to the parties' description of the dispute. Only after gaining some understanding of the dispute would he then decide whether there might be individuals who could help inform him about the underlying facts or would he ask about certain documentation that might exist. In the same way, I urged then and I urge now, that arbitrators, counsel and parties need to think about what procedure is truly necessary for each dispute. I have conducted cases without any discovery. I have conducted cases without any live witness testimony. I have conducted cases where the written submissions were minimal and the focus was on oral testimony by the witnesses whose credibility the arbitrators needed to determine. In economics, one talks about zero-based budgeting: starting from scratch and building in what is appropriate and necessary for that annual budget, rather than simply carrying over programs from one year to the next. That should be our approach in all of our cases. We can effectively deliver fair and just arbitration with much less procedure than we now generally use. In determining the procedures for each case, we need to ask about each step in the process: Is it

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necessary? Will it provide information that is needed to decide the issues in the case?

Even before one starts to draft procedures on that hypothetical blank piece of paper, the parties and their counsel need to do a better job of shaping the case through the selection of arbitrators. There are, of course, some advantages to three-person tribunals: the parties have an opportunity to name directly one of the decision makers; three heads are often better than one and thus more likely to get the decision correct; and it may be useful to have some different perspectives or experiences on the tribunal. However, even when the contract itself has provided for three arbitrators, we need to consider whether a sole arbitrator might not be better for that particular case. The issues in many cases are sufficiently straightforward that the parties can feel comfortable using a sole arbitrator. Eliminating two conflicting schedules, of course, makes it much easier to find dates for hearings and can reduce a substantial cause for delay.

In selecting arbitrators, quality and experience are no longer by themselves sufficient qualifications. The pool of potential arbitrators has grown considerably in recent years. Availability and commitment have also become necessary qualifications. Parties and their counsel have to do more to confirm the availability of the arbitrator for an early procedural conference and for a hearing at an appropriate date in the not too distant future. Of course, I recognize that even three arbitrators with good availability may not have dates that overlap, but greater availability makes that less likely to happen. One well-known arbitrator says that, before she accepts appointment as chair of a tribunal, she checks her schedule against those of the two party-appointed arbitrators to make sure that there will be sufficient mutual availability. That is an idea worth following. Arbitrators need to be more candid about their schedules and decline cases more frequently when they know that they are heavily booked. As counsel, I will be much happier about and will call more frequently arbitrators who occasionally decline a case because of their schedule than an arbitrator who accepts appointment but whose schedule leads to substantial delays in dealing with procedural issues as they arise, in conducting a hearing or in issuing an award.

In the Debevoise Protocol, we go a step further. We will ask any arbitrator whom we are appointing — party-appointed, chair or sole — to commit to issuing an award within three months of the merits hearing or post-hearing briefs, if any. There is no reason why it should take any tribunal longer than three months to issue an award. The parties, their counsel and their witnesses work hard to bring the case to a hearing and to present the case fully at the hearing. Arbitrators leave the hearing well informed and with fully-formed views of the case. It is incumbent upon them to draft the award while their memories of the hearing, the facts and the testimony, including credibility of witnesses, is still fresh in their minds. Once the parties have done their work, the arbitrators have to do theirs. A recent study showed that an average ICSID (International Centre for Settlement of Investment Disputes) award is rendered 15-18 months after the close of the case, which brings disrepute to the system. Similarly, institutions need to play a more parental role in obtaining commitments from arbitrators about their availability and the time in which they will render an award. Once the hearing is completed, they should be in regular communication with the tribunal to make sure that the award is progressing and that it is rendered as soon as possible. If arbitrators fail to do so, the institutions should simply refuse to reappoint them in future cases.

Parties can also contribute to greater efficiency by presenting more detailed statements of claim and of defense. The more information that is provided early in the case, the easier it is for the tribunal and the parties to determine which procedures are appropriate and which are unnecessary for that particular case. The work that goes into preparing such detailed pleadings has to be done at some point in the case, and by front-loading those efforts, real savings in time and costs can be achieved later in the case.

Once the case begins, the arbitral tribunal needs to take charge. For these reasons, the Queen Mary Survey noted that, "it was pervasive throughout the questionnaire results and interviews that parties prefer proactive arbitrators who take control of proceedings. This is seen as an effective mechanism to limit cost and delay and reduce the risks of later challenge. Parties also prefer proactive arbitration institutions that firmly adhere to deadlines and communicate effectively with the parties."

At an early procedural conference, the tribunal should focus on the issues and the evidence that are truly needed to resolve the dispute. Too many procedural conferences simply ask the parties to describe the procedures they want and the schedule on which they want to proceed. A more detailed examination of the issues helps fill that blank piece of paper — the Town Elder model — in a more appropriate way. In one case where I acted as chair of a tribunal, the parties asked for a schedule of document production and submissions that would last 18 months before a hearing. However, the parties' pleadings had shown that the joint venture over which the parties were fighting was virtually unable to function because of these disputes. We asked the parties to describe those disputes in greater detail,

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and then we sent them out of the room to meet separately and then together to develop a list of the half-dozen most important issues, including particularly contract interpretation issues, that if resolved quickly by the tribunal, could help alleviate the broader dispute. After a couple of hours, the parties presented the tribunal with such a list. We scheduled a hearing in three months, with prior submissions only on those issues. We heard the evidence relevant to those issues and then issued a partial award. Not surprisingly, the parties were able to settle the remainder of their disputes once the tribunal gave them determinations on those issues in a partial award.

It is critically important for in-house counsel, the real parties at interest, to play a more active role in these procedural conferences. They must express their needs as parties directly to the arbitrators, and they need to be involved in setting the procedures that will work best for them, rather than the procedures that will work best for their outside counsel. Moreover, while distance often makes it more expedient to conduct these preliminary conferences by telephone, it has been my experience that the time and cost of holding the conference in person is often saved later in the case. In-person conferences allow a more thorough examination of the issues and a more complete consideration of the procedural questions that could arise during the case. Fewer procedural issues arise unexpectedly in cases when that is done.

A reshaped international arbitration process should include more frequent determinations of preliminary issues. Again, each of these steps is intertwined. More detailed pleadings early in the case allow the tribunal and the parties to see more clearly if there are issues that could dispose of some or all of the case. I do not espouse regular summary judgment motions as are often made in American or English courts. Rather, arbitration offers possibilities that those types of court motions cannot. In court, if there is a genuine issue of material fact, the court needs to hear the entire case. In arbitration, if determining a preliminary issue can assist in the overall resolution of the case, the tribunal has the ability to hear the evidence just on that issue, even when those facts are in dispute. In one case, in which we represented a political risk insurer, the claim of an expropriation raised complex issues of fact and of the law of the country in which the events took place. However, we believed that, even if the events were covered, there was no liability under the policy because the book value of the allegedly expropriated asset was negative at the time of the events, which was the standard for compensation under the policy. The arbitrator agreed with our suggestion to hear that issue first, even though the claimant urged that its net book value was positive. The arbitrator heard evidence on that issue alone and agreed that the net book value was negative. He therefore denied the claims without ever needing to hear the more complex underlying issues on liability. Multiple other cases are often available for this kind of treatment.

We once worried that the international arbitration process would be buried in an avalanche of paper, or as the conference materials put it, a "paper tsunami." Now, we fear that international arbitration could be swallowed in megabytes of data (which of course often translate into that paper tsunami). We are just at the beginning stages of using extranet sites and other technology to reduce that paper. We need to accelerate that process, and quickly. We all carry laptops and have computers in our offices, so I wonder why we cannot more often simply have the parties produce their memorials, witness statements and exhibits electronically, without any paper copies. They are easier to read when we travel and to transport to the hearing.

Again, a more proactive tribunal, aided by more detailed pleadings early in the case, can better restrict requests to produce documents to those issues that are truly necessary for the case. There is now a plethora of protocols on how best to deal with the discovery of electronic documents, which could be the subject of a speech all by itself, so I will not go into details here. They present useful techniques and should be more broadly applied. The revised International Bar Association Rules of Evidence (the "IBA Rules") issued earlier this year also made an important change in this regard. Article 3.3 now makes clear that, in meeting the standards for a request to produce documents set forth in the IBA Rules (which are now generally accepted), a party can simply request search terms or otherwise focus the requests in a manner that makes electronic searching easier.

The methods of presenting expert evidence also need to be streamlined and reshaped. Frankly, the procedures already exist, but they are not used frequently enough. It is a rare case in which a meeting of the experts prior to the hearing does not reduce the areas in which the experts disagree and clarify the areas in which they do. Another change that has not been widely noticed in the new IBA Rules is that such expert meetings may be held prior to the submission of reports and not just afterwards. Some believe that meetings at that stage can be even more useful, because the experts have not yet committed themselves to a position in writing. Whenever the meeting is held, the resulting list of issues on which the experts agree and disagree provides a useful framework for the experts to testify together at the hearing – so called witness conferencing or hot tubbing. Again, this

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technique can be more effective than routine cross-examination in illuminating the bases of the experts' disagreement and in assisting the tribunal in making its own determinations.

Perhaps one of the greatest wastes of time and money, which is nevertheless routine in international arbitration today, is the use of post-hearing briefs. By the time the hearing is over, the arbitrators have usually already determined how they will rule on most, if not all, of the issues in the case. Nevertheless, one party or the other wants another chance to re-plead its case or the arbitrators want a road map to the evidence to write their award. Neither is a sufficient justification for adding a quarter of a million dollars or more to the costs of each side and for delaying the ultimate resolution by several months. It is incumbent on the parties to exercise self-control and for the tribunals to exercise that control if they do not. A closing argument at the end of the hearing allows the tribunal to ask the parties the questions that are most useful to them and to be in a better position to consider the evidence before they deliberate. If there are particular issues of fact or law on which the tribunal would like some further elucidation after the hearing, then the tribunal should direct focused post-hearing briefs on those issues alone.

And finally, as I noted earlier, once the parties and the counsel have done their work, the tribunal needs to do its work — and quickly. That is their duty to the parties. They are paid well to serve as arbitrators, and this is when they earn it.

In conclusion, I have tried throughout this paper to point out that it is the responsibility of *all* of the actors in international arbitration to make efficiency of the process paramount and to reshape the procedure in every case in a manner that is appropriate for that particular case. Outside counsel who focus on this goal and who explain to their clients that not every procedure is necessary for the success of the case or worth the added time and expense will be rewarded by those clients and others for meeting their needs. While outside counsel often have more experience in international arbitration and know how best to shape the procedures, in-house counsel also need to play a role. They need to make sure that the case will be decided in a time frame that meets their goals. As I mentioned in one example earlier, a dispute between two shareholders or joint-venture parties needs to be resolved more quickly than, perhaps, one in which the relationship has ended. However, even in the latter circumstances, it is often important for the business to have closure, one way or the other. Moreover, in-house counsel must explain to outside counsel what is and is not important for them in resolving the dispute – besides winning, of course. As noted, they should attend procedural and other conferences with the arbitrators and make sure that the arbitrators understand the parties' needs and goals.

Arbitrators need to view conducting the arbitration in an efficient manner as one of their duties. It is as important as making the right decision, and efficiency need not in any way reduce their ability to make the correct decision. As I noted earlier, the parties in the Queen Mary Survey, and parties and counsel with whom I have discussed these issues, routinely want tribunals to be more proactive in setting appropriate procedures. When they do so , it also makes it easier for the outside counsel to agree to less procedure. And the arbitrators should continue to do so at each stage of the case. Whatever procedures may have been set initially, the tribunal can continue to question whether certain evidence, witnesses or even submissions are still needed. They can re-order the hearing of evidence to sharpen the issues.

Finally, since this conference celebrates the Hong Kong International Arbitration Centre's 25th Anniversary, let me close with comments about the roles of institutions. In my view, the institutions that will succeed over the next 25 years will be those that best promote these goals of efficiency. Institutions see the procedures and innovations that are successful in achieving prompt resolution of some of their cases and also the problems that lead to schedules of horrors in other cases. They need to post this information on their websites, properly redacted, so that others may make use of them. That will be for more effective communication of these techniques than the apocryphal telling of them at conferences like these. Institutions should also post their statistics, so that users know which ones best create the atmosphere of efficiency. And as I have noted, institutions need to increase their pressure on arbitrators to create and then to adhere to shorter and more innovative time schedules. When arbitrators fail to meet them or fail to deliver an award on a timely basis, the institutions should refuse to re-appoint them, no matter how distinguished they are.

I hope that all of these remarks have been helpful to you. I look forward to hearing the comments of these distinguished commentators and then to discussing them. ■

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1. David W. Rivkin, "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited," Arbitration International, v. 24, no. 3, pp. 375-386 (2008).

New York
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Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration

International arbitration can provide significant advantages for parties to cross-border disputes, such as a neutral forum, input into selecting the decision-maker and nearly worldwide enforceability of awards. With seemingly greater frequency, however, parties to international arbitrations express concerns about increased length and cost of the arbitration process. These concerns have caused some parties to question the value of international arbitration as an efficient dispute resolution mechanism.

To respond to these concerns, the international arbitration practitioners at Debevoise & Plimpton LLP have developed this Protocol To Promote Efficiency in International Arbitration. This Protocol identifies specific procedures that generally make an arbitration more efficient. Through this Protocol, we express our commitment to explore with our clients how such procedures may be applied in each case. In each arbitration, parties, counsel and arbitrators should take maximum advantage of the flexibility inherent in international arbitration and should use only the procedures that are warranted for that particular case. The procedures set out here are therefore not meant to be inflexible rules. However, through their consideration, we believe that we can improve the arbitration process and thereby enable our clients to enjoy the advantages of international arbitration.

Formation of the Tribunal:

1. Before appointing arbitrators, we will ask them to confirm their availability for hearings on an efficient and reasonably expeditious schedule.
2. We will ask arbitrators for a commitment that the award will be issued within three months of the merits hearing or post-hearing briefs, if any.
3. We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators.

Establishing the Case and the Procedure:

4. We will encourage consolidation and joinder of parties and disputes to avoid multiple proceedings when possible.
5. When possible, we will include a detailed statement of claim with the request for arbitration, so that briefing can proceed promptly once the procedural calendar is established.
6. We will propose and encourage the arbitral tribunal to adopt procedures that are appropriate for the particular case and that are designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases.
7. We will request the arbitral tribunal to hold an early procedural conference, usually in-person, to establish procedures for the case. Although in-person meetings may cost more because of travel time and expense, they often ultimately save costs by allowing a more complete discussion of the procedural issues that may arise. We will seek to set the merits hearing date, as well as all other procedural deadlines, in this first procedural conference.

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8. We will request our clients and opposing clients to attend any procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.

9. When appropriate to the needs of the case, we will consider a fast track schedule with fixed deadlines.

10. We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.

Evidence:

11. We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules of Evidence generally provide an appropriate balance of interests.

12. We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.

13. We will, when possible, make filings electronically and encourage paperless arbitrations. When cost-effective, we will use hyperlinks between documentary exhibits and their references in memoranda.

14. We will use written witness statements as direct testimony to focus the evidence and hearings.

15. We will avoid having multiple witnesses testify about the same facts.

16. We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing.

17. We will generally brief legal issues and consider presenting experts on issues of law only when the tribunal and counsel are not qualified to act under that law.

18. We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

The Hearing:

19. We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.

20. We will consider the use of a chess-clock process (fixed time limits) for hearings.

21. We will not automatically request post-hearing briefs, but we will consider in each case whether they would be helpful in promoting the efficient resolution of the issues. When post-hearing briefs are appropriate, we will ask the arbitral tribunal to identify the issues on which it may benefit from further exposition, and then seek to limit the briefing to such issues.

22. We will also consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.

Settlement Consideration:

23. We will investigate routes to settlement, including by suggesting mediation, when appropriate, either at the outset of the case or after an exchange of submissions has further clarified the issues.

24. Where applicable rules or law permit, we will consider making a "without prejudice except as to costs" settlement offer at an early stage. This will not only protect our client's costs position, but it may lead the opposing party to consider potential outcomes more seriously.

25. When appropriate, we will ask arbitrators to provide preliminary views that could facilitate settlement.