UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ABU DHABI INVESTMENT AUTHORITY,

Petitioner,

against

CITIGROUP INC.,

Respondent.

No. 1:12-cv-00283 (GBD)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION TO VACATE ARBITRATION AWARD AND IN OPPOSITION TO CROSS-MOTION TO CONFIRM ARBITRATION AWARD

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Petitioner Abu Dhabi Investment Authority ("ADIA") respectfully submits this Memorandum of Law in Further Support of ADIA's Petition To Vacate Arbitration Award and in Opposition to the Cross-Motion To Confirm Arbitration Award of Respondent Citigroup Inc. ("Citigroup"), together with Declaration of Curtis R. Waldo ("Waldo Dec."), dated June 27, 2012, and accompanying exhibits.[1]

INTRODUCTION

ADIA's petition seeks to correct violations of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and wrongs inflicted upon ADIA arising from its rescue of Citigroup in December 2007, when the U.S. financial system and economy were beginning to show signs of collapse as a result of the high-risk subprime assets created, sold and held by the largest Wall Street banks. ADIA invests the sovereign wealth of Abu Dhabi for the future welfare of its people. In November 2007, shortly after revealing publicly for the first time its massive exposure to subprime securities, Citigroup induced ADIA to bail out Citigroup by investing $7.5 billion in Citigroup. That month, Citigroup stated in writing to ADIA that its estimated subprime losses were still within the range of $8 to $11 billion that it had disclosed publicly. Citigroup further stated that it would not bring certain Structured Investment Vehicles ("SIVs") onto its balance sheet, or raise significant additional capital after ADIA's investment. Based on these representations, ADIA purchased $7.5 billion in Citigroup securities on December 3, 2007. Citigroup then promptly did exactly the opposite of what it had said. On December 13, merely ten days after obtaining ADIA's critical investment, Citigroup announced that it would bring the SIVs onto its balance sheet. Within the next month, Citigroup wrote off $18.1 billion in

[1] For the Court's convenience, ADIA cites previously-filed exhibits where possible. Exhibits to the Declaration of Judd R. Spray, dated February 29, 2012, are referred to herein as "Spray Dec., Ex. __." Exhibits to the Declaration of Daniel J. Toal, dated April 3, 2012, are referred to herein as "Toal Dec., Ex. __."

subprime loses, and raised a further $20 billion in capital. *Id.* at 9. All of these actions flatly contradicted what Citigroup had just told ADIA, diluted ADIA's investment in Citigroup, drove down Citigroup's stock price, and harmed ADIA.

Pursuant to their arbitration agreement, ADIA brought an arbitration against Citigroup, alleging, *inter alia*, fraud and negligent misrepresentation. ADIA subsequently moved the tribunal to apply the laws of the Emirate of Abu Dhabi and the UAE, as applied to Abu Dhabi, to those claims. In what can only be described as a hometown decision, the tribunal of three U.S.-based attorneys denied ADIA's motion. It ignored clear choice of law rules that the tribunal itself identified as applicable, and thereby selected the wrong body of substantive law—New York law—over the proper body of law—Abu Dhabi law. New York law contained additional elements of proof that Abu Dhabi law did not require, and which ADIA could not meet.

The Award here should be vacated for manifest disregard of the law because the tribunal ignored clear choice of law rules and consequently reached an erroneous outcome. Contrary to Citigroup's contentions that New York choice of law rules are unclear and did not apply, the tribunal held that New York choice of law rules applied and explicitly identified the rule that the law of the state with the greatest interest governed the fraud and negligent misrepresentation claims. It then manifestly disregarded the very choice of law rules it identified. The fraud occurred in Abu Dhabi, where ADIA received Citigroup's misrepresentations and the parties met face-to-face to negotiate and finalize the Investment Agreement. The harm also occurred in Abu Dhabi, where ADIA invests the sovereign wealth of Abu Dhabi, without any presence in the United States or New York. Even though Abu Dhabi thus had the greater interest in the fraud, the tribunal selected New York law as the governing law. By applying New York law over Abu

Dhabi law, the tribunal applied a higher threshold for fraud than the lower Abu Dhabi legal standard, as explained by ADIA's expert witness on Abu Dhabi law. This prevented ADIA from proving its case and left it with no remedy against Citigroup's fraud. Although manifest disregard of the law—whether as a common law basis for vacatur or a judicial gloss on the enumerated grounds for vacatur under the FAA—is a high standard that is rarely met, the Second Circuit has instructed that where, as here, a tribunal has actual knowledge of a clear law and improperly applies the law to reach an erroneous outcome, the Award must be vacated.

The Award should also be vacated pursuant to Section 10(a)(3) of the FAA because ADIA was denied a fair hearing when the tribunal prevented it from obtaining key documents that could have enabled it to prove Citigroup's fraud and negligent misrepresentation. Section 10(a)(3) mandates vacatur where one party has been prejudiced by decisions of the tribunal violating fundamental due process. The tribunal denied ADIA discovery into two areas directly relevant to ADIA's fraud and negligent misrepresentation claims. First, it denied discovery concerning the allegations of a whistleblower who, just weeks before ADIA invested $7.5 billion in Citigroup, alerted Citigroup's senior-most executives and officers to "breakdowns of internal controls and resulting significant but possibly unrecognized financial losses" within Citigroup. Second, the tribunal denied discovery of examiner reports that ADIA's expert witness described as "the most definitive way" of determining Citigroup's target capital ratios in November 2007.

Citigroup argues that failing to admit evidence in an arbitration does not ordinarily give rise to vacatur. This misses the point because it does not address the denial of crucial discovery, which is the relevant issue here. Although a tribunal has discretion in discovery decisions, its discretion is not unbounded. Proving fraud often depends on discovery of the defrauder's documents that establish its knowledge. The evidence ADIA requested the tribunal order

Citigroup produce was crucial to proving that Citigroup knowingly misrepresented to ADIA its foreseeable capital needs and that ADIA's investment would meet those needs. Denying this discovery thus helped prevent ADIA from meeting its burden of proving fraud or negligent misrepresentation, whether under New York law, which the tribunal improperly applied, or under Abu Dhabi law, which should have been applied. Denying crucial discovery to prove fraud can, as here, rise to the level of a denial of fundamental due process requiring vacatur.

Separately and together, the tribunal's multiple erroneous decisions violated the Federal Arbitration Act and require vacatur, which would finally give ADIA a fair chance at proving before a new tribunal that ADIA was deceived into bailing out Citigroup.

I. THE TRIBUNAL MANIFESTLY DISREGARDED THE LAW IN REFUSING TO APPLY ABU DHABI AND UAE LAW TO ADIA'S TORT CLAIMS

As the Second Circuit has instructed, and the Court has acknowledged, an award must be vacated where: "(1) the law allegedly ignored was clear and explicitly applicable to the matter before the arbitrator; (2) . . . the law was improperly applied and that application led to an erroneous outcome; and (3) . . . the arbitrator possessed actual knowledge of the law and its applicability to the dispute." *Finkelstein v. UBS Global Asset Mgmt. (US) Inc.*, No. 11 CV 00356 (GBD), 2011 WL 3586437, at *5 (S.D.N.Y. Aug. 9, 2011) (Daniels, J.) (citing *Stoltz-Nielsen SA v. AnimalFeeds Int'l Copr.*, 548 F.3d 85, 93 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010)); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339-40 (2d Cir. 2010) (stating same elements and holding that "manifest disregard remains a valid ground for vacating arbitration awards" (internal quotation marks omitted)); *see also* Petitioner's Memorandum of Law ("Br.") at 19; *accord* Opposition Memorandum of Law ("Opp. Br.") at 21 (citing *dictum* in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011)).

The Award must be vacated because all three requirements are met here. First, New York choice of law rules are clear that the law of the state with the greatest interest governs, and these rules applied to ADIA's fraud and negligent misrepresentation claims. Br. at 17. Second, the tribunal improperly applied New York's interest analysis, leading it to apply the laws of New York, which has virtually no interest in the fraud claims, over the law of Abu Dhabi, which has every interest in the fraud. Br. at 18-19. Third, the tribunal possessed actual knowledge of New York's choice of law rules and their application to the fraud-related claims in the arbitration, because the tribunal identified, cited, and purported to apply these rules in its choice of law analysis. *See* Order On Governing Law Statement of Reasons (Spray Dec., Ex 12) at 3; Br. at 20. Thus, the Award must be vacated for manifest disregard of the law. *See Stolt-Nielsen*, 435 F. Supp. 2d at 385-86 (vacating award for manifest disregard of the law because it failed to conduct proper choice of law analysis), *aff'd on remand*, 624 F.3d 157 (2d Cir. 2010).

Citigroup first argues that ADIA waived its right to apply New York choice of law rules by failing to argue early on that those rules applied. Opp. Br. at 19-20. The waiver argument fails, however, as ADIA had no obligation to identify the controlling law prior to the tribunal's order, on November 22, 2010, that ADIA make a motion on the choice of law issue. *See* Order, 11/22/10 (Waldo Dec., Ex. 1 at 4).

Citigroup next claims that the rules of the arbitral institution displaced New York choice of law rules and permitted the tribunal to apply whatever law it deemed "appropriate," with unfettered discretion that is not subject to vacatur, Opp. Br. at 24, ignoring the principle that the law of the arbitral forum, New York, applies to choice of law issues, and that the Tribunal expressly determined that New York choice of law rules controlled their analysis.

Finally, Citigroup acknowledges that the tribunal *did* apply New York choice of law rules, but argues that the tribunal's holding that New York law governed was reasonable because New York choice of law rules are unclear. To make this erroneous argument, Citigroup ignores vast New York case law holding that the law of state with the greatest interest in the dispute governs the claims. Citigroup also ignores the undisputed facts showing that Abu Dhabi has a greater interest than New York in the fraud and negligent misrepresentation claims.

A. ADIA Did Not Waive New York Choice of Law Rules, or the Right To Have Its Claims Heard Under Abu Dhabi Law.

Citigroup claims that ADIA waived its right to have its claims heard under Abu Dhabi law, without citing a single authority for the proposition that a party must designate the controlling law from the outset of a case. Opp. Br. at 19-20. This claim is belied the fact that the arbitration agreement did not waive New York's choice of law rules, and by the arbitration record itself.

Governing law clauses in arbitration agreements frequently designate New York's substantive law to govern the merits of a claim and waive New York choice of law rules. *See, e.g.*, *Cap Gemini Ernst & Young U.S. LLC v. Nackel*, No. 02 CIV 6872 (DLC), 2004 WL 569554, at *2 (S.D.N.Y. Mar. 23, 2004) (arbitration agreement stating that "*[t]his Agreement shall be governed by and construed in accordance with the laws of the State of New York without regard to its conflict of laws provisions.*"). [redacted]; *cf.* Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 2 (tribunal noting that an agreement to which ADIA was *not* a party states that it "shall be governed by such laws without regard to the principles of conflict of laws."). New York choice of law rules are

therefore not waived and apply to issues on the merits to which the parties had not selected the applicable law.

Citigroup's argument that ADIA waived Abu Dhabi law because it did not raise the choice of law issue early in the arbitration proceeding is further undermined by the fact that the ICDR International Dispute Resolution Procedures ("ICDR Rules") do not require a party to identify the law governing its claims in its initial pleading, nor do they direct that the determination on foreign law must be made at any particular point in the proceeding. *See* ICDR Rules, *available at* http://www.adr.org/icdr. On November 22, 2010, the tribunal instructed ADIA to move on the choice of law issue if it wanted Abu Dhabi law to apply. *See* Order, 11/22/10 (Waldo Dec., Ex. 1 at 4) (explicitly directing ADIA to address "how traditional choice of law analysis should be applied to identify applicable law."). The tribunal subsequently identified and purported to apply New York choice of law rules in its order, further undermining Citi's contention that these rules were waived. Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12).

Citigroup also implies that ADIA forfeited its right to the application of Abu Dhabi law when it selected a "New York lawyer" to sit on the tribunal. Opp. Br. at 20. The late Joseph McLaughlin, and the other U.S.-based arbitrators, held themselves out as qualified to sit on an international commercial arbitration panel without regard to the law applicable to the disputes. There is no reason to believe that the tribunal was not capable of considering ADIA's claims under Abu Dhabi law through the assistance of foreign law experts. *See* ICDR Rules, art. 22 (allowing for the tribunal to appoint one or more independent experts, and for the parties to present experts to testify on the points at issue). In any event, the choice of a U.S. attorney was

reasonable even though the fraud and negligent misrepresentation claims were governed by Abu Dhabi law, because ADIA's contract claims were explicitly governed by New York law.

B. New York Choice of Law Rules Apply and Are Not Displaced by Article 28 of the ICDR Rules.

Citigroup argues that New York choice of law rules do not apply because they were displaced by the arbitration rules of the ICDR, which state that the tribunal should apply the "appropriate law." Opp. Br. at 24 (quoting ICDR Rules, art. 28). This contention has no basis in law. As the venue of the arbitration was New York, New York law is the *lex arbitri*, or the law governing the arbitration proceeding. *See JSC Surgutneftegaz v. President & Fellows of Harvard Coll.*, 04 Civ. 6069 (RCC), 2005 WL 1863676, at *6 (S.D.N.Y. Aug. 3, 2005), *aff'd*, 167 F. App'x 266 (2d Cir. 2006) ("The situs of the arbitration is of critical importance because the law of the jurisdiction in which the arbitration is conducted ordinarily provides the procedural law of the arbitration."). Although the *lex arbitri* does not apply to the merits of the dispute, it does presumptively apply to choice-of-law issues. *See* F.A. Mann, *Lex Facit Arbitrum*, reprinted in 2 Arbitration International 241, 248 (1986) ("The law of the arbitration tribunal's seat initially governs the whole of the tribunal's life and work. In particular, it governs . . . the rules of the conflict of laws to be followed by it") (Waldo Dec., Ex. 2). The mere fact that the parties in their arbitration agreement choose the ICDR rules does not displace the *lex arbitri* in resolving choice of law questions.

Further, Article 28(1) of the ICDR Rules, on which Citigroup relies, and which mandates that the tribunal apply the "appropriate" law, is consistent with the selection of New York choice of law rules. Article 28 did not give the tribunal unfettered discretion to apply any law. As explained in the leading treatise on international commercial arbitration:

> The arbitrators' freedom to select the "appropriate" conflicts rule should not be understood to open the door to unfettered discretion. On the contrary, the arbitrators remain obligated to select the conflicts rules that are "appropriate" in light of the procedural law of the arbitration and the parties' arbitration agreement; this is a selection with right answers and wrong answers, and not a purely discretionary matter. For example, an arbitrator cannot select the choice-of-law rules of his home jurisdiction, if it has no connection to the dispute, merely because it is familiar and convenient to him or her.

II Gary B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION* 2135 (2009).

In any event, the tribunal acknowledged that New York choice of law rules applied to determine the correct substantive law for the extra-contractual claims, yet the tribunal then failed entirely to engage in a proper New York choice of law analysis. As discussed below, this identification of controlling law, then blatant disregard of that same law, is plain ground for vacatur.[2]

C. New York Choice of Law Rules, Which the Tribunal Acknowledged, Are Clear.

Citigroup does not dispute that the tribunal was aware of and identified New York's choice of law rules—in particular, New York's "interest analysis"—to determine the law governing ADIA's fraud and negligent misrepresentation claims. Opp. Br. at 23 (*citing Babcock v. Jackson*, 191 N.E.2d 279, 282-83 (N.Y. 1963)); *accord* Br. 20; Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 3 (tribunal stating that it "relied on the choice of law principles followed in New York, as well as choice of law authorities in international arbitration practice," and holding that "the parties chose New York as the seat of the arbitration and there is sufficient apparent conflict between the relevant laws of New York and the

[2] The tribunal also alluded to "choice of law authorities in international arbitration practice." Spray Dec., Ex. 12 at 3. For the reasons stated below, the tribunal's decision was not grounded in international arbitration practice. But even if the tribunal had applied international arbitration principles correctly, that would not excuse the fundamental failure to properly apply the New York choice of law rules that the tribunal expressly stated would be applicable to the question and which it purported to apply.

UAE/Abu Dhabi to lead us also to apply New York's interest analysis."). Instead, Citigroup tries to justify the tribunal's erroneous application of those rules by arguing that the rules are unclear, and thus the tribunal's application of New York's substantive law was reasonable. Opp. Br. at 23 (asserting that New York interest analysis is so dependent on the exercise of "discretion and judgment" that it "cannot be said to preordain a particular result."). That assertion is undermined by the fact that a court's choice of law determination is a question of law, subject to *de novo* review. *See Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998). Erroneous choice of law determinations are frequently reversed on appeal, without giving deference to a trial court's discretion. *See, e.g., id.* ("[T]he district court was mistaken in its choice of law determination and . . . Mexican, rather than New York, law applies in this case.").

In any event, New York choice of law rules are clear. They instruct tribunals to conduct two separate inquiries: "(1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss." *Padula v. Lilarn Props. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994). Fraud is a "conduct-regulating" rule, *Simon v. Philip Morris Inc.*, 124 F. Supp. 2d 46, 57 (E.D.N.Y. 2000), and "'[i]f conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.'" *Padula*, 644 N.E.2d at 1002 (quoting *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993)); *see also Seippel v. Jenkens & Gilchrist, P.C.*, 341 F. Supp. 2d 363, 377 (S.D.N.Y. 2004) ("When a choice of law issue relates to laws regulating conduct, such as fraud, the locus of the tort determines the applicable law."). Here, as in *Stolt-Nielsen*, the choice of law rules "are well established and clear cut," 435 F. Supp. 2d at 385, and the tribunal was aware of and

acknowledged these clear rules. Order on Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 3-4.

D. The Tribunal Ignored the New York Choice of Law Rules It Knew About and Identified.

Having identified the clear rule that the law of the state with the greater interest governs, Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 3 (*citing Curley*, 153 F.3d at 12), the tribunal proceeded to ignore the rule in the face of overwhelming evidence on the record, which Citigroup does not dispute, that Abu Dhabi had a greater interest than New York in this dispute. [redacted]

Thus, Abu Dhabi had a greater interest than New York as regards ADIA's fraud and negligent misrepresentation claims and the tribunal could only have concluded that New York law applies by disregarding the rule that the law of the state with the greater interest governs the dispute.

The tribunal further disregarded New York's interest analysis by citing four purportedly New York-based contacts that are irrelevant under settled New York law:

- First, the tribunal noted that Citigroup made its alleged misrepresentations in New York. Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 4. It is well-settled New York law that, "when a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made." *Sack v. Low*, 478 F.2d 360, 365 (2d Cir. 1973); *accord San Diego*

Cnty. Emps. Ret. Ass'n v. Maounis, 749 F. Supp. 2d 104, 124 (S.D.N.Y. 2010) ("For claims based on fraud, the locus of the fraud is the place where the injury was inflicted, as opposed to the place where the fraudulent act originated . . . .") (internal quotation marks omitted); *see also Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989) ("The locus of a fraud is 'the place where the injury was inflicted,' as opposed to the place where the fraudulent act originated." (*quoting* 19 N.Y. Jur. 2d, Conflict of Laws § 40 (1982)).

- Second, the tribunal noted that both parties employed New York counsel to render opinions on ADIA's proposed investment in Citigroup. Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 4. It is undisputed, however, that the Investment Agreement was explicitly governed by New York law. The retention of New York counsel to review a contract with a New York choice of law clause should have had no bearing on the choice-of-analysis concerning ADIA's extra-contractual claims.

- Third, the tribunal noted that a due diligence videoconference between the parties "*would have been* a face-to-face due diligence meeting in New York" but for inclement weather in Abu Dhabi. Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 4 (emphasis added). This purported "contact" with New York is simply confounding, as ADIA participated from Abu Dhabi in the due diligence conference that actually took place. *See* Witness Statement of Sanjeev Doshi (Waldo Dec., Ex. 3) at ¶ 42.

- Fourth, and finally, the tribunal noted that Citigroup made misrepresentations in a letter sent from New York *and received in Abu Dhabi*. Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 4. This factor again weighs in favor of Abu Dhabi, not New York. *See, e.g.*, *Maounis*, 749 F. Supp. 2d at 124 ("For claims based on fraud, the locus of the fraud is the place where the injury was inflicted, as opposed to the place where the fraudulent act originated . . . ." (internal quotation marks omitted)).

The well-defined New York choice of law principles discussed above directed the tribunal to apply Abu Dhabi law to ADIA's tort claims. Citigroup claims, in a footnote, that "there are numerous cases in which courts held that New York had the predominant interest notwithstanding that the alleged injury was sustained elsewhere," Opp. Br. at 23, n.13, but the authority Citigroup cites in support of that proposition only underscores the impropriety of applying New York law to ADIA's claims on these facts. The decision in *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267 (S.D.N.Y 2009), is

particularly instructive, given its sharp distinctions from the instant case. The court there acknowledges that, "[f]or tort actions, the jurisdiction with the greatest interest is generally the jurisdiction in which the loss occurred—or where the plaintiff is located." *Id.* at 283-84. The court found that the torts at issue there occurred in New York, however, because "the overwhelming bulk of events surrounding the alleged negligent misrepresentation and the underlying fraud occurred in New York where Refco was headquartered, where key face-to-face meetings were held, and where the [parties' agreement], which contains a New York choice-of-law provision, was signed." *Id.* at 284 (citations omitted). The only resemblance to the instant case is that Citigroup is headquartered in New York. ADIA negotiated the terms of the Investment Agreement in Abu Dhabi, the only face-to-face meetings between ADIA and Citigroup took place in Abu Dhabi, and the Investment Agreement was executed in Abu Dhabi. Not only did the "overwhelming bulk" of relevant events here take place in Abu Dhabi, but essentially *no* relevant events occurred in New York.[3] Citigroup cites no opinion where a defendant made fraudulent misrepresentations to a plaintiff in a foreign country, or sent its most senior executives to the foreign country to negotiate and execute contracts based on those misrepresentations.

It is thus clear that the tribunal ignored applicable New York choice of law rules and instead "simply imposed its own conception of sound policy" to achieve a result totally

[3] The other authority cited by Citigroup does not help its argument. In *Cromer Fin. Ltd. v. Berger*, the court acknowledges that, "for claims based on fraud, a court's 'paramount' concern is the locus of the fraud, that is, the place where the injury was inflicted, as opposed to the place where the fraudulent act originated." 137 F. Supp. 2d 452, 492 (S.D.N.Y. 2001) (internal quotation marks omitted). In *HSA Residential Mortgage Services of Texas v. Casuccio*, 350 F. Supp. 2d 352, 364 (E.D.N.Y. 2003), "all of the audit work and preparation of audit papers" at issue were performed in New York.

inconsistent with New York choice of law rules. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769 (2010).

The history of *Stolt-Nielsen*'s progress through the courts is instructive on why the Court should vacate the Award. The arbitration tribunal there held that the parties' agreements permitted class arbitration. *Stolt-Nielsen*, 435 F. Supp. 2d at 384. In so ruling, the tribunal ignored "well established and clear cut" choice of law rules, leading the District Court to vacate the award for manifest disregard of the law. *Id.* at 384-86; *see also Stolt-Nielsen*, 130 S. Ct. at 1766 ("The District Court vacated the award, concluding that the arbitrators' decision was made in 'manifest disregard' of the law insofar as the arbitrators failed to conduct a choice-of-law analysis."). The Second Circuit reversed, *Stolt-Nielsen*, 548 F.3d 85, and the defendants appealed to the U.S. Supreme Court. The Supreme Court held that, "[b]ecause the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." *Stolt-Nielsen*, 130 S. Ct. at 1768. The Supreme Court reversed the Second Circuit, holding that, "instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers." *Id.* at 1770. On remand, the Second Circuit accordingly affirmed the District Court's setting aside of the award for manifest disregard of the law. *Stolt-Nielsen*, 624 F.3d 157.

Like the arbitration agreement in *Stolt-Nielsen* that was silent on class action claims, the arbitration agreement here is silent on negligent misrepresentation and fraud claims. Like *Stolt-Nielsen*, the arbitrators' task was thus to identify the rule of law that governs in this situation. Like the tribunal in *Stolt-Nielsen* that substituted the law with its own policy preferences, the

tribunal here imposed its own preferences for the more "familiar and convenient" New York law, II Born, *supra*, at 2135, thereby exceeding its powers. Under the controlling authority of *Stolt-Nielsen*, this alone requires that the award be vacated for manifest disregard of the law. *Stolt-Nielsen*, 435 F. Supp. 2d at 384-86; *Stolt-Nielsen*, 130 S. Ct. at 1769-70. However, here, the case for vacatur is even stronger than in *Stolt-Nielsen*, because here the tribunal identified New York choice of law rules as applicable and purported to apply them when in fact it ignored those rules, thereby squarely fulfilling the Second Circuit's requirements for vacatur.

E. International Arbitration Precedent Supports Vacatur.

Vacating the Award because of the tribunal's failure to apply Abu Dhabi law would also be consistent with international arbitration practice. [redacted]

Similarly, several *ad hoc* committees of the International Centre for Settlement of Investment Disputes ("ICSID") have observed that, "a distinction must be made between the failure to apply the proper law, *which can result in annulment*, and an error in the application of the law, which is not a ground for annulment." Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki, dated June 5, 2007, (Waldo Dec., Ex. 5), at 40 (emphasis added), from *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7; *see also* Decision on the Application for Annulment of the Argentine Republic, dated September 1, 2009, (Waldo Dec., Ex. 6), at 71-72 (stating, "a tribunal may manifestly exceed its powers where

the tribunal disregards the applicable law, or bases the award on a law other than the applicable law under Article 42 of the ICSID Convention."), from *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 (citing annulment decisions from *Klockner v. Republic of Cameroon*, Case No. ARB/81/2 (Waldo Dec., Ex. 7); *Maritime Int'l Nominees Establishment v. Govt. of Guinea*, Case No. ARB/84/4 (Waldo Dec., Ex. 8); *Industria Nacional de Alimentos, S.A. and Indalsa Peru, S.A. v. The Republic of Peru*, Case No. ARB/03/4 (Waldo Dec., Ex. 9); *CMS Gas Transmission Co. v. Argentine Republic*, Case No. ARB/01/8 (Waldo Dec., Ex. 10); and *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Case No. ARB/01/7 (Waldo Dec. 11)). The standard for annulment under the ICSID Convention is similar to the standard for denying recognition of an award under Article V of the New York Convention and for vacating an award under Section 10 of the FAA. *Compare* ICSID Convention, Article 52, *with* New York Convention, Article V, *and* FAA § 10.

The tribunal's claim to have based its choice of law decision on "choice of law authorities in international arbitration practice," Order On Governing Law Statement of Reasons (Spray Dec., Ex. 12) at 3, is simply wrong. Despite its allusion to the "'cumulative' approach to choosing the appropriate conflict of laws principles," *id.*, the tribunal disregarded the elements of such an analysis, which would have entailed examining the choice of law rules of all potentially interested jurisdictions, including Abu Dhabi. *See, e.g.*, Emmanuel Gaillard, "The Role of the Arbitrator in Determining the Applicable Law," *The Leading Arbitrators' Guide to International Arbitration* 204 (Lawrence W. Newman & Richard D. Hill eds., 2004) ("Pursuant to the cumulative method, arbitrators simultaneously consider all of the choice of law rules of all legal systems with which the dispute in question is connected."); *see also* I Born, *supra*, at 483 ("[S]ome arbitral tribunals have applied a so-called 'sequential' or 'cumulative' choice-of-law

analysis, which looks to the rules under every potentially applicable law."). The tribunal's purported cumulative analysis, which did not even consider Abu Dhabi choice of law rules, had no basis in international arbitration practices.

F. The Tribunal's Choice of Law Determination Materially Affected the Arbitration.

The tribunal's misapplication of clear New York choice of law rules not only led to the wrong result, it likely changed the entire outcome of the arbitration and caused ADIA harm that can only be remediated by vacating the Award. With regard to the three key issues before the tribunal—Citi's estimate of its subprime losses, the consolidation of Citi's SIVs onto its balance sheet, and Citi's plans to raise additional capital—there can be no real dispute that Citi's representations to ADIA turned out to be untrue: Citigroup told ADIA that its subprime losses for 4Q07 would amount to $8-$11 billion, but Citigroup actually wrote off many billions more than that; Citigroup told ADIA that it would not consolidate certain SIVs onto its balance sheet, and then it did exactly that just ten days later; and Citigroup told ADIA that it had no plans to raise more than $12 billion in capital and knew of no facts or circumstances that would cause it to change those plans, yet it went on shortly thereafter to raise tens of billions in additional capital. [redacted]

ADIA's challenge at the hearing was thus to prove that Citigroup had not merely misrepresented facts to ADIA, but that it did so in a way that satisfied the elements of New York's substantive law of fraud and/or negligent misrepresentation.

To prove its fraud claim under New York law, ADIA was required to demonstrate by clear and convincing evidence the existence of "a representation of material fact, the falsity of the representation, *knowledge by the party making the representation that it was false when made*, justifiable reliance by the plaintiff and resulting injury." *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 165 (N.Y. App. Div. 2003) (emphasis added); *see also* Award (Spray Dec., Ex. 8) at 10 (tribunal adopting *Kaufman* standard). Proving a defendant's knowledge of fraud, or *scienter*, by direct evidence is notoriously difficult. *See People v. DeDeo*, 874 N.Y.S.2d 291, 295 (N.Y. App. Div. 2009); *Houbigant, Inc. v. Deloitte & Touche, LLP*, 753 N.Y.S.2d 493, 498 (N.Y. App. Div. 2003); 10B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2730 (3d ed. 1998) ("[I]nformation relating to state of mind generally is within the exclusive knowledge of one of the litigants and can be evaluated only on the basis of circumstantial evidence . . . ."). [redacted]

The outcome would likely have been different under the appropriate legal standard. [redacted]

[4] [redacted]

[redacted] Given the patent falseness of Citigroup's misrepresentations to ADIA during their negotiations, ADIA likely would have met its burden of proof under these standards.

II. THE TRIBUNAL'S EXCLUSION OF EVIDENCE VIOLATED ADIA'S RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS

The tribunal compounded its annullable error of applying New York's more stringent fraud law over Abu Dhabi law by denying ADIA's discovery requests that could have proven fraud, and thereby violating ADIA's basic due process rights. These discovery decisions thus create independent and cumulative grounds for vacatur under Section 10(a)(3) of the FAA. Br. at 20, 22 (citing *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992)).

Citigroup accepts that vacatur is required where ADIA "was denied due process and a fundamentally fair hearing." Opp Br. at 11, but claims that the denial of key discovery requests was not a denial of due process and fundamental fairness, and that the discovery ADIA sought was merely cumulative of other evidence. *Id.* at 12-18. The authority that Citigroup cites, which generally concerns a tribunal's exclusion of cumulative, non-dispositive evidence from a hearing, *see, e.g.*, Opp. Br. at 16 n.10, does not address the situation here, where ADIA was

[5] It must be noted here that the Declaration of Dr. Faraj A. Ahnish In Support of ADIA's Motion To Apply Foreign Law, Spray Dec., Ex. 26, and the Declaration of Dr. Faraj A. Ahnish In Further Support of ADIA's Motion To Apply Abu Dhabi Law, Waldo Dec., Ex. 12, were not full-blown expert reports on the UAE Civil Code. Had the tribunal granted ADIA's motion, the parties would presumably each have produced a significantly more detailed expert report concerning how the tribunal should apply Abu Dhabi law to ADIA's tort claims, and the tribunal could have appointed its own independent expert on the topic. *See* ICDR Rules, art. 22.

prevented by the tribunal from obtaining evidence that would likely have proven its fraud and negligent misrepresentation claims.

A. The Tribunal's Refusal To Compel Discovery Concerning the Bowen Email Effectively Precluded ADIA from Raising Bowen's Allegations at the Hearing.

There is no dispute that the tribunal denied, without explanation, ADIA's request for documents concerning the November 3, 2007, email in which former Citigroup employee Richard Bowen described "breakdowns of internal controls and resulting significant but possibly unrecognized financial losses existing within our organization." Bowen Email (Spray Dec., Ex. 14) at 1. It is hard to imagine better evidence to prove that Citigroup knew its misrepresentations regarding subprime losses and capital were false when it made them than a whistleblower email, sent to many of Citigroup's highest-ranking executives just weeks before ADIA made its $7.5 billion investment, describing large and unrecognized impending losses. The fact that Citi's acting chairman, Robert Rubin, received the email before he traveled to Abu Dhabi to meet with ADIA's Managing Director and execute the Investment Agreement could have proved dispositive on the question of whether Citigroup knowingly misrepresented its foreseeable capital needs to ADIA. Having been denied this key discovery, however, ADIA chose not to use its time at the hearing to focus on Mr. Bowen or his whistleblower allegations.[6]

Citigroup argues that ADIA had sufficient opportunities to seek similar evidence, noting that Gary Crittenden (Citigroup's former CFO), Vikram Pandit (Citigroup's CEO), and Zion

[6] Although ADIA had time left at the conclusion of the hearing, ADIA had by then decided not to ask Mr. Bowen or other witnesses about the allegations in the email. ADIA did not know how witnesses would answer and did not have the documents necessary to contradict any self-serving testimony they might have given. In faulting ADIA for not calling Mr. Bowen at the hearing and for not questioning other witnesses about Mr. Bowen, Opp. Br. at 13-15, Citigroup merely highlights the damage the tribunal did to ADIA's case by denying the discovery it sought.

Shohet (Citigroup's former Treasurer) were "questioned extensively by ADIA about Citigroup's capital needs and its efforts to raise capital." Opp. Br. at 15. Citigroup fails to mention, however, that these witnesses gave frequently evasive or contradictory testimony. [redacted]

In short, while Citigroup made witnesses available to testify about Citigroup's capital needs, those witnesses were a poor substitute for contemporaneous documents discussing Mr. Bowen's concerns and his candid assessment of Citigroup's financial state. Mr. Bowen's email was sent very shortly before ADIA's investment and described exposures that were not publicly

disclosed or disclosed to ADIA; far from being cumulative, evidence concerning Bowen's concerns was unique and potentially critical to ADIA's case. The arbitrators' refusal to compel this evidence from Citigroup was fundamentally unfair to ADIA because it prevented ADIA from adequately presenting its evidence. *See Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) ("[a]n arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument." (internal quotation marks omitted)); *see also* Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, December 23, 2010, at Section IV(B)(e), from *Fraport v. Philippines*, ICSID Case No. ARB/03/25 (annulling award for fundamental procedural violations because the tribunal failed to allow submissions relating to key evidence considered by the tribunal, even though it had otherwise permitted extensive discovery and written submissions) (Waldo Dec., Ex. 14).

B. The Bank Examiner Reports Were Crucial Pieces of Evidence.

There is no dispute that the tribunal also denied, without conducting a hearing, ADIA's motion to compel certain reports from the Federal Reserve, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency. Br. at 22-24. Citigroup does not dispute that these bank examiner reports would have been relevant to ADIA's claims. Instead, Citigroup argues that the reports were privileged, and that in any event ADIA was given access to sufficient other evidence concerning Citigroup's financial state. Opp. Br. at 16-18. Both arguments fail.

Citigroup's claim that the tribunal found the bank examiner reports privileged, Opp Br. at 16, is not supported by the tribunal's November 7, 2010, order. *See* Order, 11/7/10 (Toal Dec., Ex. C). In truth, the tribunal denied ADIA's request for bank examiner reports without reviewing the documents *in camera*, holding a hearing on the scope of the bank examiner

privilege, or determining that the reports here were in fact protected from disclosure by the bank examiner privilege. *Id.*; *see also* Br. at 11. The bank examiner privilege is only a qualified privilege, moreover, and it does not shield factual content from discovery. *See, e.g.*, *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) ("[T]he discovery of bank examination information is not absolutely precluded."); *Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 584 (E.D.N.Y. 1979) (holding that the bank examiner's privilege does not shield "statement[s] with predominant factual content"). Citigroup should have been ordered to produce, at a minimum, reports with genuinely privileged material redacted. The tribunal's preclusion of the reports in their entirety denied ADIA potentially critical evidence and violated fundamental fairness. *See Schreiber v. Soc'y for Sav. Bancorp, Inc.*, 11 F.3d 217, 222 (D.C. Cir. 1993) (district court erred by not examining allegedly privileged bank examiner's documents where plaintiff alleged that a bank's "officers knowingly misrepresented the institution's true financial condition").

Citigroup's assertion that production of the bank examiner's reports was unnecessary and cumulative because ADIA obtained other discovery, Opp. Br. at 17, is similarly unavailing. Numerous courts have held that bank examiners' reports are uniquely probative for proving fraud or misrepresentation by a bank. *See, e.g.*, *Schreiber*, 11 F.3d at 222 (where plaintiff alleged that a bank's "officers knowingly misrepresented the institution's true financial condition," the documents and information held by the bank examiner "could be relevant to the officers' scienter with respect to the alleged public misstatements"); *In re Midlantic Corp. S'holder Litig.*, No. 92-99, 1994 WL 750664, at *3 (D.D.C. Oct. 24, 1994) (reports of supervisory activity and supervisory letters were "clearly relevant to plaintiffs' case in establishing the state of mind of the defendants" because they could bear on whether the bank

"misrepresented or failed to disclose material facts in its public disclosures, especially with regard to its loan portfolios and banking practices."). [redacted]

The tribunal's denial of ADIA's discovery request for these reports prevented ADIA from presenting key evidence relating to its fraud and negligent misrepresentation claims, in violation of Section 10(a)(3) of the FAA, and the Award should therefore be vacated.

CONCLUSION

For the foregoing reasons, ADIA respectfully requests that this Court grant ADIA's Petition To Vacate the Award and deny Citigroup's Cross-Motion To Confirm the Award.

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Respectfully submitted,

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