The International Arbitration Review

Sixth Edition

Editor
James H Carter

Law Business Research

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2015

Chapter 17

ENGLAND & WALES

Duncan Speller and Francis Hornyold-Strickland[1]

I INTRODUCTION

Arbitrations seated in England and Wales,[2] both international and domestic, are governed by the Arbitration Act 1996 (the Act).[3] The Act, which is based in many respects on the UNCITRAL Model Law, consolidated and reformed the existing arbitration law, introducing a modern and 'pro-arbitration' legislative regime. Although comprehensive, the Act does not codify all aspects of English arbitration law.[4] Practitioners must therefore consult the common law as well as the Act to determine the status of the law on many issues.

i The structure of the Act

The provisions of the Act are set out over four parts:

a Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between mandatory provisions (i.e., those that have effect notwithstanding any

1 Duncan Speller is a partner and Francis Hornyold-Strickland is an associate at Wilmer Cutler Pickering Hale and Dorr LLP.

2 There are three distinct jurisdictions in the United Kingdom, each of which has its own court system and laws. England and Wales together comprise a single jurisdiction; the other two are Scotland and Northern Ireland.

3 English Arbitration Act, 1996, Section 2(1).

4 For example, the Act contains no provisions as to the confidentiality of arbitrations, but the courts have continued to develop and refine the law on this issue: *Ali Shipping Corp v. Shipyard Trogir* [1999] 1 WLR 314; *Glidepath BV v. Thompson* [2005] EWHC 818 (Comm); and *Michael Wilson & Partners Ltd v. Emmott* [2008] EWCA Civ 184.

agreement to the contrary) and non-mandatory provisions (i.e., those that can be opted out of by agreement). The mandatory provisions are listed in Schedule 1 of the Act;

b Part II contains provisions dealing with 'domestic arbitration agreements', 'consumer arbitration agreements', and 'small claims arbitration in the county court';

c the provisions of Part III give effect to the United Kingdom's obligations to recognise and enforce awards under Articles III to VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention); and

d Part IV comprises provisions concerning the allocation of proceedings between courts, the commencement of the Act and the extent of its application.

ii The main principles of the Act

The Act is based on three general principles, set out in Section 1, which have served as a starting point for judicial reasoning and innovation in the application of the Act. A member of the Departmental Advisory Committee on Arbitration (DAC), which helped draft the Act in consultation with arbitration practitioners and users, recently described these principles as the 'philosophy behind the Act'.[5] The principles are:

a fairness ('the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense');[6]

b party autonomy over the arbitration proceedings ('the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest');[7] and

c the restriction of judicial intervention in proceedings ('in matters governed by the [Part I] of the Act, the court should not intervene except as provided by [that] Part').[8]

5 The DAC produced two reports that provide a useful commentary on many of the Act's provisions: (1) The Departmental Advisory Committee on Arbitration Law: Report on the Arbitration Bill (February 1996); and (2) The Supplementary Report on the Arbitration Act 1996 (January 1997), chaired by the Rt Hon Lord Justice Saville. The reports continue to be referred to by the courts (see e.g., *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 at paragraph 31 et seq.; *The London Steam Ship Owners Mutual Insurance Association Ltd v. The Kingdom of Spain* [2013] EWHC 2840 (Comm) at paragraphs 25 and 49).

6 Section 1(a) of the Act.

7 Section 1(b) of the Act.

8 Section 1(c) of the Act.

Section 1 of the Act provides that Part I is 'founded on' these principles and shall be 'construed accordingly', and the English courts continue to refer to the guiding principles in resolving disputes as to how the Act should be interpreted and applied.[9]

iii The scheme of the Act

The general principles are also reflected throughout the provisions of Act. For example, the Act supports the general principle of fairness by imposing upon the parties the duty to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings', and upon the tribunal the duty to act 'fairly and impartially'[10] and to adopt suitable procedures 'avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.[11]

As for party autonomy, the Act reinforces this general principle through the non-mandatory nature of most of the provisions of Part I.[12] In contrast to the provisions specified by the Act as mandatory, the parties can opt out of non-mandatory provisions by agreement.

The courts in turn have emphasised in a number of judgments the importance to the arbitral process of party autonomy. The Supreme Court in *Jivraj v Hashwani*[13] upheld an arbitration clause that required arbitrators to be drawn from a particular religious group, when the Court of Appeal had found the clause void for offending against European anti-discrimination legislation.[14] In that judgment, their Lordships approved the following statement of the International Chamber of Commerce (ICC):

> *The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (eg because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture, or perspectives).*[15]

9 *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, per Lord Justice Rix at paragraph 100, 105; *Itochu Corporation v. Johann MK Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996 at paragraph 17ff; *Bitumex (HK) Co Ltd v. IRPC Public Co Ltd* [2012] EWHC 1065 (Comm) at paragraph 22; *Lombard North Central Plc v. GATX Corp* [2012] EWHC 1067 (Comm) at paragraph 15; *Nomihold Securities Inc v. Mobile Telesystems Finance SA* (No 2) [2012] EWHC 130 (Comm) paragraphs 26, 58; *Turville Heath Inc v. Chartis Insurance UK Limited* [2012] EWHC 3019 (TCC) at paragraph 53; *Jivraj v. Hashwani* [2011] UKSC 40 at paragraph 61ff; *Gujarat NRE Coke Limited, Shri Arun Kumar Jagatramka v Coeclerici Asia (PTE) Limited* [2013] EWHC 1987 (Comm) at paragraph 23.

10 Section 40 of the Act.

11 Section 33(1) of the Act.

12 See Section 4 of the Act.

13 *Jivraj v. Hashwani* [2011] UKSC 40.

14 Employment Equality (Religion or Belief) Regulations 2003.

15 *Jivraj v. Hashwani* [2011] UKSC 40 at paragraph 61.

The Act gives effect to the third principle – limited court intervention – in many of the mandatory provisions of Part I. Whereas the tribunal has substantial powers to decide all procedural and evidential matters,[16] to give directions in relation to property or the preservation of evidence,[17] and to order relief on a provisional basis[18], the court has only a limited power to intervene in certain circumstances that will support the arbitration (such as appointing arbitrators where the agreed process fails[19] and summoning witnesses to appear before the tribunal),[20] and the court has the same powers for the purposes of and in relation to arbitral proceedings as it has in respect of legal proceedings, including in respect of the taking of evidence of witnesses, the preservation of evidence, and the granting of an interim injunction or the appointment of a receiver.[21] In this respect, the Act mirrors the UNCITRAL Model Law.[22]

In addition, the Act confers only limited rights of challenge of an award, including on the ground that the tribunal lacked substantive jurisdiction (under Section 67 of the Act) or on ground of serious procedural irregularity (under Section 68), or by providing an appeal on a point of law (under Section 69). As these provisions are designed to support the arbitral process and reduce judicial involvement in arbitral proceedings,[23] the courts have tended to place a 'high hurdle' on parties seeking to set aside arbitral awards,[24] insisting that such challenges are 'long stop[s] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'.[25] Although challenges of awards on the grounds of serious

16 Section 34 of the Act.

17 Section 38(4) and (6) of the Act.

18 Section 39 of the Act.

19 Section 18 of the Act.

20 Section 43 of the Act.

21 Section 44 of the Act.

22 Section 17 J of the UNCITRAL Model Law.

23 See e.g., *Itochu Corporation v. Johann MK Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996 (The policy of thus restricting appeals, found in Section 18 and a variety of other sections in the Act, is deliberate. It reflects the underlying general principles, as to party autonomy and protection of the parties from unnecessary delay and expense, enshrined in Section (a) and Section 1(b) of the Act).

24 In *Bandwidth Shipping Corporation Intaari (The 'Magdalena Oldendorff')* [2007] EWCA Civ 998, [2008] 1 All ER (Comm) 1015, [2008] 1 Lloyd's Rep 7, Waller LJ stated, at paragraph 38: 'In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an Award or its remission by reference to section 68 and in particular by reference to section 33 [...] It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under section 33 and section 68.'

25 The DAC Report. See also *Lesotho Highlands Development Authority v. Impregilo SpA and Others* [2005] UKHL 43 and more recently *La Societe pour la Recherche La Production Le Transport La Transformation et la Commercialisation des Hydrocarbures SPA v Statoil Natural Gas LLC (Statoil)* [2014] EWHC 875.

procedural irregularity under Section 68, unlike appeals on points of law under Section 69, do not require leave, there is no evidence that this looser requirement has encouraged frivolous litigation.[26]

iv Court relief in support of arbitration

A consistent theme in recent case law, in 2014 as in previous years, has been the English courts' exercise of their power to make orders in support of arbitrations seated in England and Wales. The Supreme Court has noted that the court has jurisdiction to grant an anti-suit injunction under Section 37 of the Senior Courts Act 1981 (SCA) even where there are no arbitral proceedings in contemplation or no statutory basis under the Act for an injunction, in circumstances where the court is seeking to support arbitration by requiring parties to refer their disputes to arbitration.[27]

v Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,[28] namely the Commercial Court (for general commercial arbitration) and the Technology and Construction Court (for construction disputes).

II THE YEAR IN REVIEW

i Developments in Europe

Regulation (EU) No.1215/2012

In May 2014 Brussels Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments, was superseded by (EU) No.1215/2012 (the Regulation). Among a number of new measures the Regulation contains an 'arbitration exception' in Article 1.2(d), which expressly states that the regulation shall not apply to arbitration. This is supplemented by Recital 12, which offers guidance on the interpretation of the Regulation.

The purpose of Article 1(2)(d) is to defer issues concerning arbitration to the New York Convention. Both Recital 12 and a recent opinion from the Advocate-General of the CJEU support this position.[29] It will, however, be interesting to observe how the CJEU itself approaches issues such a domestic court issuing anti-suit injunctions against

26 A recent survey has shown that in 2009, 12 applications were made under Section 68, and 62 under Section 69; and in 2012, challenges under Section 68 were fewer than those under 69, being seven and 11 respectively: www.olswang.com/articles/2013/03/do-the-2012-stat s-reveal-an-abuse-of-the-right-to-challenge-an-arbitral-award-for-serious-irregularity/.

27 *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

28 See the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, as amended.

29 *Gazprom* (C-536/13).

a person or party restraining them from pursuing litigation in breach of an arbitration agreement in another member state.[30]

ii Developments affecting international arbitration in England and Wales

The LCIA

The London Court of International Arbitration (LCIA), established in 1892, remains one of the world's pre-eminent international arbitration institutions.

On 1 October 2014 new LCIA Rules came into effect. The new LCIA Rules apply to any arbitration proceedings commenced after 1 October 2014. These replaced those that had been in effect since 1998 and provide a welcome update which brings the LCIA into line with other international arbitration institutions. Indeed, the LCIA Rules contain a number of important innovations that mirror, and in some cases go beyond, changes in other leading sets of arbitration rules.

It is too early to tell whether this will have or has had a material impact on the popularity of LCIA arbitrations but the new provisions bring the LCIA into line with a number of other international arbitral institutions.

Key among the differences between the 1998 rules and the new rules are six changes. These are: (1) new rules on the appointment of emergency arbitrators; (2), procedural changes to streamline arbitration (which include reducing the deadline for statements of case to 28 days, rather than 30, and allowing parties to submit requests and responses electronically); (3), measures affecting the formation and powers of tribunals; (4) an extension of the definition of the phrase 'arbitration agreement'; (5) issues relating to the default arbitration seat; and (6) a guide to the expected conduct of arbitration parties. Of these points, (1), (3) and (6) merit further explanation. These are discussed consecutively below.

New LCIA rules on emergency arbitrator provisions

> *[I]n the case of emergency any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal.*[31]

This provision is new. If the application for an emergency arbitrator is successful, the LCIA has three days within which to appoint a temporary emergency arbitrator.[32] Once appointed, the arbitrator may decide the claim for emergency relief on the documents only, without a hearing.[33] He or she has 14 days within which to decide the interim

30 See the controversial case C-185/07 *Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, and Generali Assicurazioni Generali SpA v. West Tankers Inc* [2009] OJ C82/4.

31 LCIA Rules, Article 9.4 at www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%209B.

32 LCIA Rules, Article 9.6.

33 LCIA Rules, Article 9.7.

relief claim.[34] The LCIA Rules, unlike some other arbitration rules, envisage that the emergency arbitrator's decision can be issued in the form of an award rather than simply an order.[35] Having decided a claim for interim relief, that order may be 'confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative'.[36]

New LCIA rules on tribunal appointment

A key change to tribunal appointments and powers under the new LCIA rule is that a potential arbitrator must now declare that he or she is 'ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration'.[37] It is hoped this declaration will discourage arbitrators from accepting appointments for which they do not have the time to discharge their duties professionally.

LCIA annexe on guidelines of expected conduct of parties and representatives

The LCIA Rules now include an annexe including guidelines for the expected conduct of parties and their representatives.[38] To ensure parties adhere to these guidelines a tribunal has the power to issue a caution, reprimand, or 'any other measure necessary to fulfil within the arbitration the general duties required of the tribunal'. In addition, tribunals now have an express power to take into consideration the parties' conduct when awarding costs. [39]

Popularity of the LCIA

In 2013, a total of 290 disputes were referred to the LCIA for arbitration, an increase from the 265 disputes referred in 2012.[40] 2013 also saw 11 requests for mediation or another form of ADR. The nature of the contracts seen in the 2012 referrals to the LCIA remained diverse, ranging from emissions trading and sponsorship of sporting events, to oil exploration and the sale and purchase of commodities.[41] Of the three areas that have traditionally given rise to the most significant number of LCIA referrals, commodity transactions accounted for 13 per cent of 2013 referrals (as against 16 per cent in 2012); loan or other financial agreements, including guarantees, accounted for 10 per cent of 2013 referrals (as against 11 per cent in 2012); and joint ventures and shareholders' agreements accounted for 12 per cent of 2013 referrals (as against 9 per cent in 2012).[42]

34 LCIA Rules, Article 9.8.

35 Ibid.

36 LCIA Rules, Article 9.11.

37 LCIA Rules, Article 5.4.

38 LCIA Rules, Article 16.2.

39 LCIA Rules, Article 28.4.

40 LCIA Registrar's Report 2013.

41 Ibid.

42 Ibid.

The LCIA appointed 362 arbitrators to a total of 174 tribunals, 80 of which were comprised of a sole arbitrator and 94 of a panel of three arbitrators. [43] This represents a swing from 2012 back in favour of three-member tribunals, the ratio between three-member tribunal and sole arbitrators being 54:46 compared with 46:54 in 2012. On the whole, parties continue to prefer to appoint their arbitrators rather than leaving the task to the LCIA. [44]

ICC arbitration

England and Wales continues to be a popular seat in arbitrations conducted under the rules of other international arbitration institutions, including the ICC.

London was again the second-most-chosen seat of arbitration under ICC rules in 2013, with 70 cases, a marginal decrease on the 71 in 2012. English law was the most popular choice by parties (15.64 per cent) of the 90 per cent of cases registered in 2013 where parties had included a choice-of-law clause in the contract relating to their dispute. British arbitrators remain the most popular nationality, representing 12.79 per cent of confirmed appointments in 2013.[45]

LMAA and other arbitral institutions

England and Wales is also frequently chosen as a seat in arbitrations under rules developed for specific industry sectors, such as the London Maritime Arbitrators Association (LMAA).

In 2014, the LMAA made 3,582 appointments, a notable increase from the 2,966 appointments in 2013 but still less than the 3,849 appointments in 2012. In 2014, 584 awards were rendered under LMAA Rules, compared with 608 in 2013 and 631 in 2012. [46]

iii Arbitration developments in the English courts

In 2013 and 2014 the English courts once again witnessed a significant inflow of arbitration-related cases.

The English courts' willingness to issue anti-suit injunctions

In *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, the Supreme Court confirmed the willingness of the English Courts to issue anti-suit injunctions to protect agreements to arbitrate in England. A notable feature of the case was that the respondent, AES Ust-Kamenogorsk Hydropower Plant LLP (AESUK), had not commenced and had no intention or wish to commence arbitration proceedings against the appellant Ust-Kamenogorsk Hydropower Plant JSC (JSC). The Supreme Court, upholding the injunction ordered by both the High Court

43 Ibid., p. 4.

44 Ibid.

45 ICC, 2013 Statistical Report.

46 LMAA, 2014 statistics, www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

and Court of Appeal, made clear that the English courts will issue anti-suit injunctions to protect the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are afoot or proposed.

The underlying dispute related to a concession agreement between the owner and the operator of hydroelectric facilities in Kazakhstan, which contained an arbitration clause governed by English law and providing for arbitration in London under the ICC Rules. In an earlier dispute in Kazakhstan, the Kazakhstan Supreme Court held that the arbitration clause was contrary to Kazakhstan public policy and thus invalid. Subsequently, the Kazakhstan Economic Court allowed the owner of the hydroelectric facilities to bring a claim against the operator for information about the value of the concession's assets. The operator then obtained from the High Court an anti-suit injunction to prevent the owner from bringing proceedings falling within the arbitration agreement in the Kazakhstan court, and that injunction was upheld by the Court of Appeal.

There were two main strands to the Supreme Court's decision. First, the Supreme Court recognised that an arbitration agreement, in addition to giving rise to a positive right to arbitrate disputes in a particular forum, also contains a negative right not to be sued in any forum other than the forum specified in the agreement. The Supreme Court made clear that the negative aspect is 'as fundamental as the positive' and 'enforceable independently of the existence or imminence of any arbitral proceedings'.[47]

Second, the Supreme Court rejected JSC's contention that the Act had limited the scope, or as a matter of general principle qualified the use, of its general power to issue injunctions under Section 37 of the Senior Courts Act 1980. The Supreme Court explained that Section 37 confers a general power, not specifically tailored to situations where there is an arbitration agreement, under which 'the arbitration clause is not the source of the power to grant an injunction but is merely a part of the facts in the light of which the court decides whether or not to exercise a power which exists independently of it'. In other words, the Supreme Court made clear that the Act is not the exclusive source of relief available to parties in relation to arbitration agreements and proceedings.

In addition, the Supreme Court also made clear that the English courts, following the decision of the European Court of Justice in *Allianz SpA & Anr v West Tankers Inc* (C-185/07) [2009] 1 AC 1138, would not grant such an anti-suit injunction where the court proceedings in question were commenced or continued in foreign jurisdictions within the regime of the Brussels Regulation or the Lugano Convention. The case is therefore an illustration of the wider range of relief that is available against parties domiciled outside that regime.

The English courts' eagerness to issue anti-suit injunctions in support of arbitration agreements was further illustrated in the High Court case *Bannai v Erez (Trustee in Bankruptcy of Eli Reifman)* [2013] EWHC 3689. In *Bannai*, the trustee of a large bankruptcy in Israel (Erez) applied to set aside *ex parte* anti-suit injunctions

47 *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant* LLP[2013] UKSC 35, at paragraphs 21 and 28.

granted to the respondent (Dr Bannai) restraining commencement or pursuance of legal proceedings in Israel in respect of matters falling within the scope of an arbitration agreement. Erez had already commenced insolvency proceedings against Dr Bannai in the Israeli insolvency court for the recovery of sums alleged to be due to the bankrupt under an agreement between Dr Bannai and the bankrupt. Although that agreement was governed by English law and contained a London arbitration clause which it was accepted covered the claims in question, the Israeli court had refused an application by Dr Bannai to stay the insolvency proceedings pending arbitration.

In considering whether to uphold the injunction, Burton J considered *UST Kamenogorsk* and *The 'Angelic Grace'* [1995] 1 Lloyds Law Rep 87 as authority for the proposition that: 'there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them […] the jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.' Burton J rejected Erez's contention that the existence of the Israeli insolvency proceedings amounted to a 'sufficient good reason' for the English court not granting or not continuing an anti-suit injunction. Erez had argued that the Israeli court had the power to disclaim the arbitration clause on the basis that it was an 'onerous asset'. However, Burton J noted that the question of disclaimer of the arbitration clause had not yet arisen in the Israeli proceedings (save in one mention in one pleading); that the Israeli court had not refused Dr Bannai's application for a stay on that basis; and that in any event it was not clear why the provision for arbitration would be an onerous asset that was capable of being disclaimed. Burton J did not appear to attach any weight to Mr Erez's arguments that separate arbitration proceedings would incur considerably more expenses than bringing proceedings within the Israeli insolvency proceedings, and that as the bankrupt was imprisoned in Israel for the foreseeable future there would be practical difficulties in leading evidence from him in a London-based arbitration. Burton J's refusal to set aside the anti-suit injunction against Mr Erez may therefore be taken as yet another example of the High Court's pro-arbitration attitude.

Injunctions to preserve assets or evidence under Section 44(3) of the Act

In three recent cases, the High Court has considered the scope of its power, under Section 44(3) of the Act, in cases of urgency 'to make such orders as it thinks necessary for the purpose of preserving evidence or assets': *Doosan Babcock Ltd v. Comercializadora de Equipos y Materiales Mabe Lda* [2013] EWHC 3010 (TCC), *Seele Middle East FZE v. Drake & Scull International SA CO* [2014] EWHC 435 (TCC), and *Zim Integrated Shipping Services Limited v. European Container KS and European Container KS 11* [2013] EWHC 3581.

In the 2014 case of *Seele Middle East* the High Court intervened to issue an injunction against the defendants preventing them from: 'making any use of [sensitive] documents in the Claimant's site office, from removing an[y] documents from the

Claimant's site office and from disposing of or parting with in any way documents in the Claimant's site office'.[48]

Although the matter was being heard before an ICC tribunal in Hong Kong, at that point no provisions had been introduced in the ICC rules for the appointment of an emergency arbitrator; hence the application for a court injunction.[49]

In *Doosan Babcock*, the court found it had jurisdiction to grant interim relief under Section 44(3) to restrain the beneficiary of a performance-guarantee bond from making a demand under that bond, in circumstances where the clamant was able to show a strong case that the beneficiary was not entitled to make such a demand under the terms of a contract between the parties. The Court reasoned that, where the requirements of urgency and necessity had been met, there was no reason why an order should not be made to preserve a right if its effect was to preserve the value of that right. In this case, the Court found that if the beneficiary issued a demand on the guarantees, much or all of the value of the applicant's contractual rights would be destroyed. The case therefore demonstrates the willingness of the English courts to issue injunctive relief to preserve the value of a party's contractual rights.

By contrast, in *Zim Integrated Shipping* the High Court refused to order an injunction, brought on the application of a party to ongoing arbitration proceedings, to prevent the respondents from assigning their right to hire under various charterparties, and from taking steps to terminate or purporting to terminate any of the charterparties, in particular in the event that the claimants did not make payments of hire under those charterparties. Males J said that to treat the alleged contractual rights that the applicant sought to protect – namely, their right to repayment of the loans that the respondents had been refusing to pay and their right to deduct from charter hire in the event of an event of default – as 'assets' for the purposes of Section 44(3) would stretch that term to breaking point. Although the judge was nevertheless prepared to accept 'with some hesitation' that the case fell within the scope of Section 44(3), the judge in any event refused to issue the injunction. The judge reasoned that to make the order sought, he would first have to decide the very question that fell to be decided in the arbitration – namely, whether the applicant had the contractual rights it claimed to have. In other words, the High Court has shown itself reluctant to grant relief under Section 44(3) in circumstances where its decision would encroach upon matters to be decided by the arbitral Tribunal.

The English courts' continued reluctance to allow challenges to arbitral awards

In two recent cases, *Gujarat NRE Coke Limited and Shri Arun Kumar Jagatramka v. Coeclerici Asia (Pte) Limited* [2013] EWHC 1987 (Comm) and *Statoil v. Sonatrach* [2014] EWHC 875 (Comm), the High Court confirmed once again and in unequivocal

48 *Seele Middle East FZE v Drake & Scull International SA CO* [2014] EWHC 435 (TCC) at paragraph 40.

49 The ICC tribunal was therefore unable to act effectively pursuant to Section 44(5) of the Act; *Seele Middle East* at paragraph 33.

terms that the English courts maintain a high threshold for challenging arbitral awards and will not interfere with the decisions of arbitral tribunals except in 'extreme cases'.

In *Gujarat*, Gujarat NRE Coke Ltd challenged an LMAA arbitral award under Section 68 of the Act, alleging in particular that the Tribunal had failed in its duty under Section 33 of the Act to 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'. The parties were agreed that the correct approach was that summarised by Popplewell J in *Terna Bahrain v. Al Shamsi* [2012] EWHC 3283 (Comm). Popplewell J there said that to make out a case for the court's intervention under Section 68(2)(a) of the Act, the applicant must show: (1) a breach of Section 33 of the Act; (2) amounting to a serious irregularity; and (3) giving rise to substantial injustice. Popplewell J had made clear that '[t]he test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process' and that '[a] balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the court's intervention'. Having re-confirmed this high threshold that must be satisfied for a successful challenge under Section 68 of the Act, the High Court rejected Gujarat's arguments that the Tribunal had breached its obligations under Section 33, finding in fact that the Tribunal had behaved 'impeccably'.

In *Statoil v. Sonatrach*, which was also a challenge under Section 68(2)(a) of the Act, Sonatrach argued that the Tribunal had failed to comply with its duty under Section 33 by overlooking and mischaracterising certain evidence and by improperly delegating authority to its administrative secretary. Flaux J found it doubtful whether a tribunal's evaluation of the evidence and its findings of fact could, as a matter of law, amount to a serious irregularity under Section 68. Flaux J made clear that Section 68 is about whether there has been due process, not whether the tribunal 'got it right', and noted that, upon close analysis, the gravamen of the claimants' complaint was that they considered that the Tribunal had reached the wrong result; that, as Flaux J made clear, is not a matter in relation to which an arbitration award is susceptible to challenge under Section 68. Flaux J was also critical of Sonatrach's suggestion that the Tribunal had improperly delegated authority to the administrative secretary – in his words, this was 'a very serious allegation which is completely without merit and which should never have been made'. The case provides a clear indication that allegations made in this context that a tribunal has made improper use of an administrative secretary must be clearly made out with evidence.

In *Lombard-Knight v. Rainstorm Pictures* [2014] EWCA Civ 356, the Court of Appeal gave short shrift to a challenge to the enforcement of a New York Convention Award which it found to be based on 'hollow formalism.' Rainstorm Pictures had obtained leave from the High Court on a without-notice application to enter judgment against Lombard-Knight on the same terms as an arbitral award made by the Judicial Arbitration and Mediation Service (JAMS) in California. Lombard-Knight successfully applied to have this order set aside, arguing that Rainstorm had not complied with the formal requirements of Section 102 of the Act by failing to provide certified copies of the arbitration agreements on which the award had been made. The matter then came before the Court of Appeal, which reinstated the original enforcement order, noting that there is no requirement in the Act for 'independent' certification; that the certification

of the copy of the arbitration agreement does not go to the validity of the arbitration agreement itself; and that the question of an agreement's authenticity is different from certification. The Court of Appeal found that it was inherent in the statement of truth in the claim form, which attached the arbitration agreement, that the copies provided to the Court were true originals. In reaching this decision, the Court of Appeal expressly took the opportunity to stress its pro-enforcement attitude under the New York Convention, by reference to authorities including the May 2012 edition of the International Council for Commercial Arbitration (ICCA)'s 'Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges' and the academic writings on *van den Berg*.

In *BDMS Limited v. Rafael Advanced Defence Systems* [2014] EWHC 451 (Comm) the English Commercial Court was asked to consider whether a respondent that failed to pay its portion of advanced costs was in repudiatory breach of the arbitration agreement, entitling the claimant to litigate their dispute. The Court decided in this case that, although the failure was clearly a breach of the arbitration agreement it was not repudiatory. As such the Court ordered a stay of the court proceedings.

Having examined the English courts' general reluctance to consider challenges to arbitral awards it is noteworthy that there is one recent case where a Section 68 challenge has been successful – *Secretary of State for the Home Department v. Raytheon Systems Limited* [2015] EWHC 311 (TCC) and [2014] EWHC 4375 (TCC) (*Raytheon*). The case offers helpful guidance to parties looking to better understand the requirements for a successful challenge of an award under Section 68(2)(d) of the Act.

Subsection 68(2)(d) provides that a 'serious irregularity' may be found, among other instances, where there has been: '[a] failure by the tribunal to deal with all of the issues put to it.'

In *Raytheon*, Justice Akenhead echoed the English courts' position on Section 68 challenges, noting that there was a 'high threshold' to meet to succeed in a Section 68(2)(d) challenge. Nevertheless, reasoning through his decision, Akenhead J, remarked that it may be appropriate to remit or discharge an award where there is:

> *A failure to deal with an issue where 'the determination of that 'issue' is essential to the decision reached in the award […] An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes.*[50]

When analysing the above quotation it is important also to consider Justice Akenhead's further point: that a tribunal may deal with an essential issue, badly, or indifferently is not sufficient for a challenge. Furthermore a failure by a tribunal to demonstrate the reasoning in their approach leading to a conclusion does not necessarily equate to a failure to deal with an essential issue.

It is not, however, sufficient of itself to demonstrate that there was a failure to consider an essential issue, to succeed in a Section 68(2)(d) challenge. Assuming a claimant can establish that a tribunal has not considered an 'essential issue', it must

50 *Raytheon* [2014] EWHC 4375 (TCC) at paragraph 33(g)(iv).

then demonstrate that lack of consideration resulted in a 'substantial injustice' to the applicant.[51]

Akenhead J, further explained that the applicant does not need to show that it would have succeeded had the tribunal considered the essential issue, but that: (1) his or her position was 'reasonably arguable'; and (2) that had the tribunal found in his or her favour on that issue it 'might well have reached a different conclusion in its award'.

Reverberations from Dallah v. Pakistan

In recent years, one of the English Court's more controversial arbitration-related decisions has proved to be *Dallah v. Pakistan* [2010] UKSC 46, where the Supreme Court found that an English court is bound to revisit the question of a tribunal's decision on jurisdiction if a party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made.[52]

In a recent decision, *The London Steam Ship Owners Mutual Insurance Association Ltd v. the Kingdom of Spain* [2013] EWHC 2840, the High Court affirmed one aspect of the decision in *Dallah*, which it called the '*Dallah* principle', namely that 'a person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid Award against him.' The Court held that the 'position was not changed by a tribunal purporting to rule that it had jurisdiction' and indeed that the *Dallah* principle is 'so fundamental that it should not be whittled down unless the interests of justice so require'. Accordingly, the English courts have shown their eagerness to preserve a party's right to challenge the jurisdiction of the arbitral tribunal, where that party has elected not to participate in arbitration proceedings. The practical consequence is that a party with strong grounds for challenging the tribunal's jurisdiction may decide not to participate in the arbitral proceedings, instead reserving its right of challenge until such time as a party seeks to enforce an adverse award.

iv Investor–state disputes

The Convention on the Settlement of Disputes Between States and Nationals of Other States 1965 (the ICSID Convention) came into force in the United Kingdom on 18 January 1967.[53] The United Kingdom also ratified the Energy Charter Treaty 1994 on 16 December 1997.[54] In addition, the United Kingdom is currently party to 102 bilateral investment treaties (BITs).[55]

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51 Ibid., paragraph 33(c).

52 See, e.g., http://kluwerarbitrationblog.com/blog/2011/04/07/dallah-and-the-new-york-convention/.

53 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Show Document&language=English.

54 www.encharter.org/fileadmin/user_upload/document/ECT_ratification_status.pdf.

55 See https://icsid.worldbank.org/ICSID/FrontServlet for information about the United Kingdom in the ICSID database.

Under the Treaty of Lisbon, which took effect on 1 December 2009, the EU's competence was extended to cover foreign direct investment, which includes BITs concluded between EU Member States and third countries (extra-EU BITs). The EU subsequently enacted Regulation No. 1219/2012, which came into force on 9 January 2013, in order to clarify the status of the more than 1,200 extra-EU BITs entered into before Lisbon came into force, as well as the ability of Member States to negotiate new extra-EU BITs.

Regulation 1219/2012 confirmed that extra-EU BITs signed before December 2009 will remain in force until they are replaced by new treaties between the EU and the relevant third countries.[56] The Regulation required Member States to notify the Commission of any extra-EU BITs they wished to remain in force by 8 February 2013, and requires new Member States to provide notification within 30 days of their accession.[57] On 8 May 2013, the Commission published a list of the 1,311 extra-EU BITs of which it had been notified by that time, of which 94 were between the United Kingdom and non-EU countries. The Commission intends to update the list every 12 months.[58]. In the event, however, that the Commission considers an existing extra-EU BIT to represent a serious obstacle to the EU's negotiation of a replacement BIT, the Commission will consult with the relevant Member State to resolve the matter, which may result in the revision or termination of the relevant extra-EU BIT.[59] The Regulation is silent about the 'sunset provisions' in many extra-EU BITs, which guarantee protection for existing investments for 10 to 15 years after termination, and these provisions would appear to be unaffected by the Regulation.

The Commission will authorise the entry into force of those extra-EU BITs signed between 1 December 2009 and 9 January 2013, unless it determines that a BIT conflicts with EU law or provisions, or would constitute a serious obstacle to the EU's negotiation of a replacement BIT.[60] Member States may negotiate to enter into new, or to amend existing, extra-EU BITs.[61] However, they must notify the Commission with drafts of the provisions to be negotiated at least five months in advance,[62] and the Commission may require them to include or remove provisions to ensure compatibility with EU law or investment policy.[63]

III OUTLOOK AND CONCLUSIONS

England and Wales continues to consolidate its position as one of the most frequently selected seats for international arbitration. The practical attractions of England and

56 Article 3 of the Regulation.

57 Articles 2, 3 and 5 of the Regulation.

58 Article 8 of the Regulation.

59 Articles 5 and 6(2)-(3) of the Regulation.

60 Article 12(1) of the Regulation.

61 Article 7 of the Regulation.

62 Article 8 of the Regulation.

63 Article 9(1) and (2) of the Regulation.

Wales as a seat are built not just on the firm foundation of the Act but also on judicial willingness to apply the guiding principles that underpin the Act.

With the coming into force of the 2014 LCIA Rules, the LCIA has one of the most innovative and up-to-date sets of institutional rules. The 2014 LCIA Rules contain a range of mechanisms that can be used to support the arbitral process, such as the newly enacted emergency arbitrator provisions.

Chapter 45

UNITED STATES

James H Carter and Claudio Salas[1]

I INTRODUCTION

There have been no significant developments in US arbitration law during the past year resulting from US Supreme Court decisions, but lower court decisions continue to seek to define the extent, if any, to which 'class' arbitrations, conducted by representative claimants on behalf of others on a collective basis, will find a place in US arbitral jurisprudence; and the Supreme Court may decide a case affecting this issue in the coming year. Such cases arise most often in the context of consumer or franchisee cases that have few international aspects. But since US arbitration law is largely uniform in its application to both domestic and international cases, the effect of the resolution of these issues is likely to be significant for both.

This year also saw a number of decisions in which US courts enforced foreign arbitral awards, although one significant case declined enforcement based on an absence of 'commercial' activity in the territory of the respondent state, the Czech Republic.

The existence of the doctrine of 'manifest disregard of the law' by the arbitrators as a ground for *vacatur* of an award remains uncertain, as federal appellate courts continue to take different positions on the matter.

US law continues to be unsettled concerning the availability of discovery in aid of foreign private and investment arbitration tribunals; this past year, the trend appears to have been toward disapproval of such assistance.

In the area of treaty arbitration, a pair of North American Free Trade Agreement disputes involving US and Canadian companies and two cases by investors against Venezuela were of particular interest.

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i The structure of US courts

The United States court system includes a federal system and 50 state systems (plus territorial courts) with overlapping jurisdictions. The federal system is divided into district courts, intermediate courts of appeal referred to as 'circuits' and the Supreme Court, which is the court of last resort. Each state has its own court system, governed by its state constitution and its own set of procedural rules. While state systems vary, most mirror the federal system's three-tiered hierarchy of trial courts, appellate courts and a court of last resort. There are no specialist tribunals in the federal or state systems that deal solely with arbitration law, although New York and Florida have made provision for special handling of international arbitration matters in certain of their state courts. Because of the structure of US law, most cases involving international arbitration are dealt with in the federal courts.

ii The structure of arbitration law in the US

The Federal Arbitration Act (FAA) governs all types of arbitrations in the US, regardless of the subject matter of the dispute. It is by no means comprehensive, however, instead regulating arbitrations only at the beginning and end of their life cycles. Under the FAA, all arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'.[2] Upon the application of any party, judicial proceedings are stayed as to any issues determined to be referable to arbitration.[3] As long as an arbitration agreement is deemed enforceable and a dispute arbitrable, the FAA leaves it to the parties and the arbitrators to determine how arbitrations should be conducted. While the FAA allows for some judicial review of arbitral awards, the grounds upon which an order to vacate the award may be issued are limited and exclusive and, in general, are designed to prevent fraud, excess of jurisdiction or procedural unfairness, rather than to second-guess the merits of the panel's decision.[4]

The FAA's largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts.[5] It was this pro-arbitration policy that led the Supreme Court to interpret an arbitration clause expansively to include statutory antitrust claims in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc*, allowing arbitrators to enforce federal antitrust law alongside judges.[6] In the international context, this pro-arbitration policy is further evidenced by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the

2 9 USC Section 2.

3 9 USC Section 3.

4 An arbitral award may be vacated under the FAA where, for example, the parties or arbitrators behaved fraudulently or where the arbitrators 'exceeded their powers' as defined in the arbitration agreement. For a complete list of grounds of *vacatur*, see the FAA at Section 10.

5 See *Moses H Cone Mem'l Hosp. v. Mercury Constr Corp*, 460 US 1, 24 (1983) ('Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary').

6 See *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

Inter-American Convention on International Commercial Arbitration (the Panama Convention) in Chapters 2 and 3, respectively, of the FAA.[7]

State law, by comparison, plays a limited role in the regulation of arbitrations in the US. The FAA pre-empts state law to the extent that it is inconsistent with the FAA and applies in state courts to all transactions that 'affect interstate commerce' – a term that the Supreme Court has interpreted to include all international transactions and many domestic ones.[8] Thus, for international commercial disputes, state arbitration law is relevant only as a gap-filler where the FAA is silent.

iii Distinctions between international and domestic arbitration law in the US

The FAA enacts the New York and Panama Conventions. Thus, as a general matter, there are no significant distinctions at the federal level between international and domestic arbitration law.[9] The FAA gives federal courts an independent basis of jurisdiction over any action or proceeding that falls under the New York Convention, opening the federal courts to international parties who otherwise would have to demonstrate an independent basis for federal jurisdiction.[10] Some states have international arbitration statutes that purport to govern only international arbitrations taking place in those states. As previously mentioned, however, these state statutes are pre-empted by the FAA to the extent that they are inconsistent with it and are thus of little relevance to international arbitration.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The Supreme Court term

The US Supreme Court has not issued any significant arbitration-related decisions in the current term, but the Court did reject without explanation Argentina's request that the Court again consider the *BG Group PLC v. Republic of Argentina* investment arbitration award that the Court addressed in a 2014 decision, and the Court granted review in *DIRECTV, Inc v. Imburgia*, a class action arbitration case to be heard in the 2015–2016 term. *DIRECTV* challenges a California state court decision applying California law to invalidate an arbitration clause because it contained a class action

7 See FAA, 9 USC Sections 201–208, 301–307.

8 See *Allied-Bruce Terminix Cos v. Dobson*, 513 US 265, 281 (1995) (holding that the FAA pre-empts state policy that would put arbitration agreements on an 'unequal footing').

9 Some authorities argue that, to the extent manifest disregard exists as a judge-made ground for *vacatur*, it applies only to domestic cases and not to international arbitrations conducted in accordance with the New York Convention. For a more detailed discussion of developments in the case law concerning manifest disregard, see passages on 'manifest disregard', below.

10 The Supreme Court has ruled that the FAA does not provide an independent basis for subject matter jurisdiction over a motion to compel arbitration in potentially arbitrable disputes not governed by the New York Convention. See *Vaden v. Discover Bank*, 556 US 49 (2009).

waiver, contending that the decision is contrary to the Court's precedent in *AT&T Mobility LLC v. Concepcion*.[11] In *Concepcion*, the Court found that state law invalidating arbitration clauses containing class action waivers was pre-empted by the FAA's directive that arbitration clauses be enforced as written (even in contracts of adhesion).[12] The respondents in *DIRECTV* argue that the case concerns only contract interpretation rather than raising federal–state pre-emption issues.[13]

While it appears settled under *Concepcion* and its progeny that class action waivers in arbitration clauses are permissible under the FAA, two regulators, under the auspices of different federal laws, have recently taken action, or appear poised to take action, against such waivers in consumer contracts in the financial industry (see subsection ii, *infra*).

Enforcement and recognition of foreign arbitral awards

The Fifth and DC Circuits, as well as the Southern District of New York court, issued significant decisions regarding the enforcement of foreign arbitral awards, particularly in the realm of investment arbitration.

In *Diag Human SE v. Czech Republic – Ministry of Health*,[14] Diag sought enforcement of a US$650 million award against the Czech Republic under the New York Convention. The Fifth Circuit held that it lacked subject-matter jurisdiction and dismissed the case.

The underlying dispute, which was submitted to *ad hoc* arbitration under the UNCITRAL Rules, arose from the Czech government's alleged interference with Diag's relationship with Danish company Novo Nordisk, which allegedly led to the collapse of Diag's business in the Czech Republic. The government had sent a letter to Novo raising questions about Diag's business ethics in the course of a public tender. The arbitral tribunal, seated in the Czech Republic, found in favour of Diag.

The Fifth Circuit adopted the Second Circuit's four-part test for determining whether an arbitration award is enforceable under the New York Convention and Section 202 of the Federal Arbitration Act (FAA): '(1) there is a written agreement; (2) the writing provides for an arbitration in the territory of a signatory of the convention; (3) the subject matter is commercial; and (4) the subject matter is not entirely domestic in scope.'[15] The Court found that the third requirement was not met because the subject matter of the dispute was not commercial in nature: 'While Diag Human endeavored to extend its business into the Czech Republic, it did not have any contract, agreement or transaction with the Czech Republic that could be considered to be commercial.'[16]

This decision, while not involving an investment treaty, raises potential problems for the enforcement of investment treaty awards issued by *ad hoc* rather than ICSID

11 Petition, 2015 WL 5359805 (U.S. 21 October 2014).

12 131 S. Ct. 1740 (2011).

13 Brief in Opposition to Petition, 2015 WL 455815 (U.S. 28 January 2015).

14 2014 U.S. Dist. LEXIS 112666 (5th Cir. 14 August 2014).

15 Id., at 9.

16 Id., at 11.

tribunals and therefore not subject to the enforcement mechanism of the ICSID Covention. It is uncertain whether an investor can enforce such an award arising from a dispute concerning a state's action when there is no underlying commercial relationship with that State.

In *Comm'ns Imp Exp SA v. Republic of the Congo*,[17] the DC Circuit reversed the district court's refusal to enforce a 2010 English judgment recognising a 2000 ICC arbitral award against the Congo. The district court held that the three-year statute of limitations for the enforcement of arbitration awards under Section 207 of the FAA had expired. In reversing the district court's judgment, the DC Circuit found that Section 207 of the FAA should be given its plain meaning and applied only to arbitral awards falling under the New York Convention and not to foreign court judgments, which should benefit from the longer statute of limitations applicable to foreign judgments.

The court considered that even if a court judgment enforcing an award was 'closely related' to an award, 'they are nonetheless "distinct" from one another'.[18] The court went on to say that 'recourse to parallel enforcement mechanisms that exist independently of the FAA' will frequently advance the federal policy in favour of arbitral dispute resolution.[19]

This past year the Southern District New York court issued three significant enforcement decisions. In *Thai-Lao Lignite (Thail) Co, Ltd v. Gov't of the Lao People's Democratic Republic*,[20] the court revisited the issue of whether an award vacated at the seat of the arbitration can nevertheless be enforced in the United States. This was the issue in last year's *Commissa v. Pemex* case,[21] and the Southern District again confirmed that in certain exceptional cases a vacated award can be enforced:

> *The use of the permissive 'may' in Article (V)(1)(e) of the New York Convention gives this Court discretion to enforce a foreign arbitral award where the award has been nullified by a court in the state with primary jurisdiction over the award. That discretion, however, is narrowly confined … [and] may be exercised only when the foreign judgment setting aside the award is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought, or violates basic notions of justice. This standard is high and infrequently met and should be found [o]nly in clear-cut cases.*[22]

The court found that in *Thai-Lao*, unlike *Commissa v. Pemex*, the standard was not met and the award should not be enforced.

In *Mobil Cerro Negro Ltd v. Bolivarian Republic of Venezuela*,[23] the Southern District held that a federal court may look to forum state law on the recognition and

17 757 F.3d 321 (DC Cir. 2014).

18 Id., at 330.

19 Id.

20 997 F. Supp. 2d 2014 (S.D.N.Y. 2014).

21 2013 WL 4517225 (S.D.N.Y. 27 August 2013).

22 Id., at 222–223 (internal quotations and citations omitted).

23 2015 U.S. Dist. LEXIS 17919 (S.D.N.Y. 13 February 2015).

enforcement of foreign judgments to convert an ICSID arbitration award into a Federal court judgment and enforce the award. It also held that the award creditor can start enforcement proceedings on an *ex parte* basis in accordance with New York law.

The court said that, 'the case law overwhelmingly supports looking to the law of the forum state, here, New York, to fill the procedural gap in [Section] 1650a as to the manner in which a recognition proceeding is to occur. And Venezuela's contrary arguments, largely ones of policy, are not persuasive.'[24] In the court's view, the *ex parte* procedure did not affect the substantive rights of Venezuela, especially because: (1) the merits of an ICSID award cannot be reviewed at the enforcement stage; and (2) the state could resist attachment of its assets even if the award was recognised on an *ex parte* basis.[25]

In *Ecopetrol, SA v. Offshore Explorationa and Production LLC*,[26] the Southern District ruled on the enforceability of foreign interim awards. The court recognised that under the New York Convention 'district courts lack authority to confirm arbitral awards that are not final awards.'[27] However, under Second Circuit precedent, an award that does not dispose of all the claims in the arbitration is nevertheless final if it 'finally and definitely disposes of a separate independent claim.'[28] In this case, the arbitral tribunal had issued two 'interim' awards. The first award found that, under the stock purchase agreement in question, the seller had to pay initially the US$75 million in taxes assessed against the assets sold; the second award found that this payment could not be made out of an escrow fund established to secure various potential indemnification claims under the agreement. These awards were issued without prejudice to a final decision on the ultimate liability for the taxes. The court held that both awards were enforceable, reasoning that both 'required specific action, resolved the rights and obligations of the parties with respect to the interim period, and did so without in any way affecting future decisions of the arbitral panel'.[29] The court noted that the stock purchase agreement specifically empowered the arbitral tribunal to provide provisional relief to be enforced separately and independently.[30]

Arbitrability

Under a long line of cases, including *Granite Rock Co v. International Brotherhood of Teamsters*,[31] whether parties have agreed to arbitrate a particular dispute ('arbitrability' under US law) is typically an issue for judicial determination. Under the 'separability'

24 Id., at 21.

25 Id., at 30.

26 46 F. Supp. 3d 327 (S.D.N.Y. 2014).

27 Id., at 336.

28 Id.

29 Id., at 337.

30 Id., at 339.

31 561 US 287 (2010). For a thorough overview of competence-competence, including arbitrability, under US law see Born, *International Commercial Arbitration* (Second Edition, 2014), pp. 1,124–1,206.

doctrine, an arbitration clause is separable from the underlying contract, allowing arbitral tribunals to decide whether the underlying contract is valid even though the arbitration agreement itself is a piece of the challenged contract.[32] These cases separate the question of the validity of the arbitration clause from all other issues related to the agreement, including validity of the overall agreement. Once an arbitration clause is deemed to have been properly entered into, other claims related to the contract containing the clause are referred to arbitration.

This past year, the Second Circuit and Southern District of New York courts decided three interesting arbitrability cases. In *Benihana, Inc v. Benihana of Tokyo*,[33] the Second Circuit reversed in part the district court's preliminary injunction in aid of arbitration enjoining Benihana of Tokyo from, among other things, arguing to the arbitration tribunal that an additional cure period should be granted if the tribunal found that it was in breach of the agreement.

Benihana of Tokyo maintained that whether an additional cure period should be granted was a question for the arbitrators, not the court. Benihana America, on the other hand, argued that it was for the court to determine in first instance what issues and remedies could be considered by the arbitrators. The Second Circuit sided with Benihana of Tokyo, noting the broad language of the arbitration clause submitting 'any other dispute' between the parties to arbitration. The court said that it 'read the plain language of the Agreement to clearly indicate that the parties intended to grant the arbitrator the power to decide questions of arbitrability, including whether Benihana of Tokyo's claim for an extended cure period in lieu of termination is arbitrable'.[34]

The question, according to the court, was 'whether a court may enjoin a party from seeking a particular remedy in arbitration if, in the court's assessment, that remedy would have no basis in the parties' agreement.'[35] In the Second Circuit's view, the injunction was a ruling on the merits that exceeded the court's power. The Court found that '[p]rohibiting a court's assessment of the merits until after an arbitral decision has been rendered is consistent with the structure of the Federal Arbitration Act […] and with the strong federal policy favoring arbitration […].'[36] Ultimately, whether to grant the remedy sought by Benihana of Tokyo was a question for the arbitrators, who – the court recalled – have a broader flexibility in fashioning remedies than do courts.

In *NASDAQ OMX Group, Inc v. UBS, Sec, LLC*,[37] UBS appealed a decision from the district court holding that its claim against NASDAQ was not arbitrable. The Second

32 *Prima Paint Corp v. Flood & Conklin Mfg, Co*, 388 US 395 (1967). Thus, as the Second Circuit recently affirmed, when a contract contains a valid arbitration clause, a claim that the entire contract is invalid because the opposing party never intended to honour it ('fraud in the inducement') must be resolved in arbitration. *Ipcon Collection, LLC v. Costco Wholesale Corp*, 698 F.3d 58 (2d Cir. 2012).

33 2015 U.S. App. LEXIS 7165 (2d Cir. 28 April 2015).

34 Id., at 26.

35 Id., at 29.

36 Id., at 32.

37 770 F.3d 1010 (2d Cir 2014).

Circuit affirmed the district court's ruling, noting that the NASDAQ service agreement stated: '*Except as may be provided in the NASDAQ OMX Requirements*, all claims, disputes, controversies and other matters in question between the Parties to this Agreement […] shall be settled by final and binding arbitration.'[38] The court found that because the parties had subjected their arbitration clause to the limits imposed by NASDAQ rules, and those rules arguably precluded the type of claim that UBS was bringing, the parties had not 'clearly and unmistakably' intended to submit the question of arbitrability to arbitration. Moreover, the incorporation of the American Arbitration Association (AAA) Arbitration Rules in the service agreement only applied to those matters not subject to the service agreement's express carve out. Thus, even though the AAA Rules reserve questions of arbitrability for arbitration, under the service agreement the AAA Rules applied only to the disputes that were arbitrable.[39] For these reasons, the district court was correct in determining the arbitrability of the dispute.

In *VRG Linhas Aereas SA v. MatlinPatterson Global Opportunities Partners II LP*,[40] an arbitral tribunal found that MatlinPatterson was bound by an arbitration clause in a share purchase and sale agreement and was liable for misrepresentation about the purchase price under that agreement. In refusing to enforce the award, the Southern District found that MatlinPatterson had not consented to submit any dispute, on arbitrability or otherwise, to the arbitrators, because it had signed only an addendum to the share purchase and sale agreement, consenting to a specific provision therein, but not to the agreement more generally, and not to the arbitration clause.[41]

Forum selection clauses and default arbitration rules

The Financial Industry Regulatory Authority (FINRA), a non-profit organisation authorised by statute to regulate securities brokerage firms, provides a mandatory arbitration procedure for disputes between customers and securities brokers. In the past year, the Ninth and Second Circuits have found that brokerage firms may supersede FINRA's arbitration procedure by inserting a forum selection clause in their customer agreements that mandates litigation in federal district court.

The forum selection clauses at issue provide: 'the parties agree that all actions and proceedings arising of this Broker-Dealer Agreement or any of the transactions contemplated hereby shall be brought in the United States District Court.'[42]

38 Id., at 1031 (emphasis added by the court).

39 The court distinguished the facts of this case from those cases 'in which we have construed the incorporation of AAA rules into an agreement with a broad arbitration clause to signal the parties' clear and unmistakable intent to submit arbitrability disputes to arbitration.' Id., at 1023.

40 2014 U.S. Dist. LEXIS 141036 (S.D.N.Y. 2 October 2014).

41 Id., at 6 ('MatlinPatterson elected not to sign the Agreement containing the arbitration clause and instead limited its signature to the non-compete provisions referenced and fully restated in Addendum 5.').

42 *Goldman Sachs & Co v. City of Reno*, 747 F.3d 733, 737 (9th Cir. 2013).

In *Goldman Sachs & Co v. City of Reno*, the Ninth Circuit determined that it had jurisdiction to decide whether such a clause superseded the FINRA arbitration procedure (i.e., determined it had jurisdiction to decide arbitrability) because the FINRA arbitration rules do not 'provide "clear and unmistakable" evidence that FINRA members such as Goldman have consented to FINRA determination of the issue of arbitrability'.[43] The Ninth Circuit found that 'a contract between the parties can supersede the default obligation to arbitrate under the FINRA rules' and that the question was therefore 'whether the forum selection clauses at issue here sufficiently demonstrate the parties' intent to do so'.[44]

The Ninth Circuit recalled that there is no presumption in favour of arbitrability when the question is whether there is an agreement to arbitrate. By contrast, there is a presumption in favour of arbitrability 'where the scope of the agreement is ambiguous as to the dispute at hand, and [courts] adhere to the presumption and order arbitration [if] the presumption is not rebutted.'[45] The court found that Goldman was contesting the 'existence, rather than the scope, of an arbitration agreement and, therefore, the presumption in favour of arbitrability [did] not apply'.[46]

With this background, the court interpreted the forum selection clause. The clause does not expressly refer to arbitration and thus the key question was whether the phrase 'all actions and proceedings' includes arbitration or instead refers solely to judicial proceedings involving claims that cannot be arbitrated (such as a proceeding to confirm an arbitral award). The Ninth Circuit, contrary to a decision of the Fourth Circuit, found that the parties 'agreed to litigate their dispute in federal court, and that is incompatible with any prior obligation to arbitrate such disputes in another forum'.[47]

The Second Circuit subsequently came to the same conclusion in *Goldman Sachs & Co v. Golden Empire School Financing Authority*.[48] First, there is no presumption of arbitrability when the question is whether 'an arbitration agreement remains in force in light of a later-executed agreement'.[49] Second, the forum-selection clause, in using the phrase 'all actions and proceedings', specifically precluded arbitration even if arbitration was not expressly mentioned.[50]

The Ninth and Second Circuit decisions interpreting this forum-selection clause are directly contrary to an earlier Fourth Circuit decision, which found that the phrase 'all actions and proceedings' did not include arbitration.[51] The circuit split on this issue bears watching in the future.

43 747 F.3d 733, 739 (9th Cir. 2013).

44 Id., at 741.

45 Id., at 742.

46 Id., at 743.

47 Id., at 745.

48 764 F.3d 210 (2d Cir. 2014).

49 Id., at 215.

50 Id.

51 *UBS Fin Servs Inc v. Carilion Clinic*, 706 F.3d 319 (4th Cir. 2013).

All Writs Act

The All Writs Act[52] empowers federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions'. Some federal courts have used this authority to enjoin arbitrations that relitigate claims previously resolved by a federal court. This past year, the Second Circuit considered for the first time whether the All Writs Act could be used in this fashion. In *Citigroup, Inc. v. Abu Dhabi Investment Authority*,[53] Citigroup sought an order pursuant to the All Writs Act enjoining the Abu Dhabi Investment Authority from initiating a second arbitration against Citigroup when Citigroup had prevailed in a prior arbitration. Citigroup argued that the federal court judgment confirming the first award had preclusive effect and should bar a second arbitration. The Second Circuit rejected this claim, finding that the arbitrators in the second arbitration should determine the preclusive effects of the first arbitration when the federal court judgment merely confirmed the prior award in a summary proceeding and did not review the merits of that award. The Second Circuit left open the possibility that the All Writs Act could in other circumstances authorise a district court to enjoin an arbitration to prevent relitigation of a prior judgment.

Non-statutory grounds for vacatur of awards

The FAA – and the New York Convention, which it implements – strictly limit the grounds upon which a court can vacate an arbitral award. Their goal has been to avoid merits-based judicial review of arbitral awards except in very narrow circumstances. Over the past half-century, a judicially created doctrine called 'manifest disregard' has developed in the United States and has allowed parties to seek an expanded review of the merits of arbitrators' decisions, at least in theory. Successful use of the doctrine is rare, however, and appellate decisions in the past several years have drawn even the existence of that doctrine into question.

The manifest disregard doctrine was born from Supreme Court dicta in 1953: '[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law], are not subject, in the federal courts, to judicial review for error in interpretation'.[54] Over the years since, this passive reference grew in the lower courts into what was commonly considered an additional ground for *vacatur* of arbitral awards, at least in a domestic context, where arbitrators wilfully ignore clearly applicable law in reaching an erroneous result.[55] In 2008 in the *Hall Street* case the Supreme Court – again in dicta – questioned the validity of the manifest disregard ground:

> *Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the [FAA] Section 10 grounds collectively, rather than adding to them […]. Or,*

52 28 U.S.C. Section 1651(a)

53 776 F.3d 126 (2d Cir. 2015).

54 *Wilko v. Swan*, 346 US 427, 436-37 (1953), overruled in part on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc*, 490 US 477 (1989).

55 See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*, 548 F.3d 85, 91-93 (2d Cir. 2008), rev'd, 559 US 662, 672-73 (2010).

> *as some courts have thought, 'manifest disregard' may have been shorthand for [Section] 10(a)(3) or [Section] 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers […].' We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment […] and now that its meaning is implicated, we see no reason to accord it the significance that [petitioner] urges.*[56]

While this criticism of manifest disregard is itself merely dicta, the Court was clearly sceptical of merits-based review that threatened to turn arbitration into a mere 'prelude' to a 'more cumbersome and time-consuming judicial review process'.[57] It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived *Hall Street*.[58]

As a result of the Supreme Court's lack of clear direction, a circuit split has arisen over the continuing vitality of the manifest disregard doctrine post-*Hall Street*. The Fifth, Eighth and Eleventh Circuits (which include much of the American South) have interpreted *Hall Street* as an express rejection of the manifest disregard doctrine.[59] The Second and Ninth Circuits (which include New York and California), meanwhile, have held that manifest disregard is simply a judicial gloss on the FAA's statutory grounds for vacatur and have continued to apply their manifest disregard jurisprudence.[60] Both

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56 *Hall St. Assocs., LLC v. Mattel, Inc*, 552 US 576, 585 (2008) (citations omitted). See also Born (footnote 31, *supra*), discussing *Hall Street* and 'manifest disregard' under the FAA.

57 Id., at 588 (citation omitted).

58 *Stolt-Nielsen SA*, 559 US at 672, n.3.

59 See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) ('*Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA […]. Thus, to the extent that manifest disregard of the law constitutes a non-statutory ground for *vacatur*, it is no longer a basis for vacating awards under the FAA.') (citations omitted); *AIG Baker Sterling Heights, LLC v. Am Multi-Cinema, Inc*, 579 F.3d 1268, 1271 (11th Cir. 2009) (*Hall Street* 'confirmed [… that Sections] 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award'). The Eighth Circuit has stated that it had 'previously recognized the holding in *Hall Street* and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA'. *Med Shoppe Int'l, Inc v. Turner Invs, Inc*, 614 F.3d 485, 489 (8th Cir. 2010). Lower courts have interpreted this statement as a repudiation of manifest disregard. See *Jay Packaging Grp, Inc v. Mark Andy, Inc*, 2011 WL 208947, at 1 (E.D. Mo. 2011) ('The Eighth Circuit has specifically address[ed] this issue, and concluded that a party's attempt to vacate or modify an arbitration award on the basis of an alleged manifest disregard of the law is not a cognizable claim.').

60 See *Stolt-Nielsen SA*, 548 F.3d at 94–95 (noting that the *Hall Street* court speculated that manifest disregard was 'shorthand' for the FAA's statutory grounds for *vacatur*); *Comedy Club, Inc v. Improv W Assocs*, 553 F.3d 1277, 1290 (9th Cir. 2009) (*Hall Street* listed several possible readings of manifest disregard, including the Ninth Circuit's longstanding interpretation that it is equivalent to Section 10(a)(4) of the FAA).

circuits have found that a high standard must be met for the doctrine to apply.[61] The Fourth Circuit has ruled that the manifest disregard doctrine is still viable,[62] while the Seventh Circuit stated that 'manifest disregard of the law is not a ground on which a court may reject an arbitrator's award unless it orders parties to do something that they could not otherwise do legally (e.g., form a cartel to fix prices)'.[63] The Sixth Circuit recently found that, in addition to the grounds provided by the FAA, a court can vacate an arbitral award 'in the rare situation in which the arbitrators "dispense [their] own brand of industrial justice," by engaging in manifest disregard of the law'.[64] Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence since Hall Street.[65]

The First Circuit recently acknowledged that there is a circuit split on whether manifest disregard is a viable doctrine. The First Circuit also noted that in dicta it had previously stated that the doctrine is no longer available, but the court recognised that it has not squarely addressed the issue.[66]

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61 See *Biller v. Toyota Motor Corp*, 668 F.3d 655 (9th Cir. 2012); *AZ Holding, LLC v. Frederick*, 473 F. App'x 776 (9th Cir. 2012); *Goldman Sachs Execution & Clearing, LP v. Official Unsecured Creditors' Comm of Bayou Grp, LLC*, 491 F. App'x 201 (2d Cir. 2012).

62 *Wachovia Secs., LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012).

63 *Johnson Controls, Inc v. Edman Controls Inc*, 712 F.3d 1021, 1026 (7th Cir. 2013) (internal quotation marks omitted).

64 *Physicians Ins Capital v. Praesidium Alliance Grp*, 562 F. App'x 421, 423 (6th Cir. 2014). The Sixth Circuit noted that manifest disregard is a 'limited review.' Id.:

> *'A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established precedent. As long as a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. It is only when no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.') (internal quotation marks omitted).*

65 For the First Circuit, compare *Ramos-Santiago v. United Parcel Services*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) ('[M]anifest disregard of the law is not a valid ground for vacating or modifying an arbitral award […] under the [FAA]'), with *Kashner Davidson Sec Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010) ('[We] have not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*.'). See also *Republic of Arg v. BG Grp PLC*, 715 F. Supp. 2d 108, 116 n.7 (D.D.C. 2010) ('A question remains, however, as to whether this basis [manifest disregard] for vacating an arbitral award survived the Supreme Court's recent decision in *Hall Street*'), rev'd, 665 F.3d 1363 (D.C. Cir. 2012); *Paul Green Sch of Rock Music Franchising, LLC v. Smith*, 389 F. App'x 172, 177 (3d Cir. 2010) ('Based on the facts of this case, we need not decide whether manifest disregard of the law remains, after *Hall Street*, a valid ground for *vacatur*'); *Hicks v. Cadle Co.*, 355 F. App'x 186 (10th Cir. 2009) (no need to decide whether manifest disregard survives *Hall Street* because petitioners have not demonstrated it).

66 *Raymond James Fin Servs, Inc v. Fenyk*, 780 F.3d 59, 64-65 (1st Cir. 2015).

In the Ninth and Fourth Circuits manifest disregard is a recognised doctrine, though it is difficult to assert with any success, as cases this past year have shown.[67] This is also true in the Second Circuit, where a district court's finding of manifest disregard was reversed recently by the appellate court.

In that case, *Sotheby's International Realty, Inc v. Relocation Group LLC*, the Second Circuit reiterated the contours of the doctrine, noting that '[m]anifest disregard is a severely limited doctrine that imposes a heavy burden on the party seeking to vacate an arbitral award. [I]t is a doctrine of last resort—its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.'[68] The court explained that three criteria must be met to find manifest disregard: first, the law the arbitrator ignores must be clear; second, the arbitrator must have erred in applying the law and reached an erroneous result; and third, the arbitrator must have known of the law and its applicability to the facts of the case. The Second Circuit found that in this case the district court failed to apply these criteria; the law in question did not appear to be clear, and the district court failed to look for a colourable justification for the panel's decision.[69] The Second Circuit directed that the arbitration award be confirmed.

Arbitrator disqualification

In light of *Hall Street*'s directive that challenges to arbitration awards must be based on the statutory grounds enumerated in the FAA, parties seeking to vacate an award have sought to raise the four grounds for *vacatur* contained in Section 10 of the FAA in novel ways when attempting to overturn an unfavourable award. The conduct of arbitrators has become a frequent target of litigants who cannot satisfy the high threshold for challenging the substance of an arbitrator's decision, but who believe that procedural challenges may be more effective.

Under Section 10(a)(2) of the FAA, an arbitral award should be vacated if the arbitrator(s) displayed 'evident partiality'. US federal courts will not easily vacate awards on this ground, and an opinion from the Ninth Circuit this year continued to emphasise that *vacatur* under Section 10(a)(2) of the FAA for 'evident partiality' is a difficult standard to meet. However, the Texas Supreme Court found evident partiality in one case and in another annulled an award because a partisan arbitrator had been disqualified improperly by the AAA. The latter result was dictated by the principle that the parties' arbitration agreement must be respected, even if it permits the parties to appoint a non-neutral arbitrator, a principle also affirmed by the First Circuit.

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67 See, e.g., *Ardalan v. Macy's West*, 577 F. App'x 680 (9th Cir. 2014); *Oshidary v. Purpura-Andriola*, 564 F. App'x 325 (9th Cir. 2014); *Henry M Jackson Found for the Advancement of Military Med, Inc v. Norwell, Inc*, 596 F. App'x 200, 201-02 (4th Cir. 2015).

68 *Sotheby's Int'l Realty, Inc v. Relocation Grp, LLC*, 588 F. App'x 64, 65 (2d Cir. 2015) (internal quotation omitted).

69 *Sotheby's Int'l Realty, Inc v. Relocation Grp, LLC*, 588 F. App'x 64, 65–66 (2d Cir. 2015). (See also *A&G Coal Corp v. Integrity Coal Sales, Inc*, 565 F. App'x 41 (2d Cir. 2014); *Zurich Am Ins Co v. Team Tankers AS*, 2014 WL 2945803 (S.D.N.Y. 30 June 2014).)

In *In re Sussex*, the Ninth Circuit issued an 'extraordinary remedy' in the form of a writ of mandamus reversing the district court order removing an arbitrator mid-arbitration for 'evident partiality'.[70] In a dispute over an alleged breach of contract for the purchase of condominium units, a party sought to disqualify an arbitrator appointed by the AAA because he had recently founded a firm focused on raising capital to finance litigation and had not disclosed that information. After the AAA denied the request, the district court issued an order intervening in the ongoing arbitration and removing the questioned arbitrator, noting that any award issued by this arbitrator would likely be vacated based on 'evident partiality.'

The Ninth Circuit, unlike the majority of circuits, permits mid-arbitration intervention by district courts, but only in 'an extreme case that could cause "severe irreparable injury" from an error that "cannot effectively be remedied on appeal from the final judgment" and that would result in "manifest injustice"'.[71] The Ninth Circuit found that this was not such a case. First, the possible benefit to the arbitrator's nascent funding business from a large award would be 'contingent, attenuated, and merely potential'.[72] Second, even if the arbitrator's undisclosed activities did show partiality, the cost and delay of challenging an arbitration after the award issues is not an irreparable injury, so intervention was not warranted.

In *Gambino v. Alfonos*, the First Circuit found that the 'evident partiality' standard does not apply if the arbitration agreement's method for selecting arbitrators permits non-neutral or partisan arbitrators.[73] In that case, an employer challenged an arbitration award because, among other grounds, the arbitrators appointed by the labour-management committee were allegedly biased in the workers' favour. The court held that 'parties can agree to have partisan arbitrators', so the employer was bound to accept the arbitrators appointed through the designated method and could not challenge them as 'evidently partial.' The court added, 'once parties have agreed to a method of arbitration, they can demand no more impartiality than the degree inherent in that method.'[74]

Whether the parties in fact agreed to partisan arbitrators was at issue in *Americo Life Inc v. Myer*,[75] a recent Texas Supreme Court case involving unusual facts. The arbitration agreement in question incorporated by reference the AAA Arbitration Rules, which at the time stated: 'Unless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed arbitrator and not subject to disqualification [for partiality].'[76] However, by the time a dispute arose between the parties, the AAA Rules had changed

70 781 F.3d 1065, 1075-76 (9th Cir. 2015).

71 Id., at 1073.

72 Id., at 1075.

73 *Gambino v. Alfonos*, 566 F. App'x 9 (2014).

74 Id., at 14.

75 440 S.W.3d 18 (Tex. 2014).

76 Id., at 23.

and by default required that '[a]ny arbitrator shall be impartial and independent […] and shall be subject to disqualification for […] partiality or lack of independence.'[77]

In the arbitration, Myer twice challenged Americo Life's chosen arbitrator for partiality; and both times the AAA agreed, disqualifying two successive arbitrators. Americo Life's third choice for arbitrator went unchallenged, and subsequently a unanimous tribunal awarded Myer US$26 million. When Myer tried to confirm the award, Americo Life objected on the premise that the AAA, in disqualifying its first two chosen arbitrators, had failed to follow the arbitrator selection method provided by the parties' agreement. The Texas Supreme Court, reversing the appellate court, agreed with Americo Life. The Supreme Court reasoned as follows:

> *The industry norm for tripartite arbitrators when the parties executed their agreement was that party-appointed arbitrators were advocates, and the AAA rules in place at that time presumed such arbitrators would not be impartial unless the parties specifically agreed otherwise. Given the pervasiveness of the practice, and the clear AAA presumption the parties had to rebut, we believe the parties would have done more than require its arbitrators to be 'independent' if they wished them to be impartial. 'Independent' and 'impartial' are not interchangeable in this context, and therefore we conclude the parties did not intend to require impartiality of party-appointed arbitrators.*[78]

The Texas Supreme Court also reached an interesting result in *Tenaska Energy Inc. v. Ponderosa Pine Energy*. In that case, a party-appointed arbitrator only partially disclosed his dealings with the lawyers for the party who appointed him. The arbitrator disclosed that the law firm had appointed him on three prior occasions, and that he was the director of a litigation services company and attended a meeting at the law firm in that capacity. The arbitrator failed to disclose that, among other things: (1) all his contacts with the law firm were with the two lawyers that appointed him; (2) he owned stock in the litigation services company that was pursuing business opportunities with the law firm; and (3) he allowed one of the two lawyers to edit his disclosure statement to add that his company did not do business with the law firm and was unlikely ever to do so.

The Court found that these undisclosed facts 'might, to an objective observer, create a reasonable impression of the arbitrator's partiality' and annulled an award of US$125 million in favour of Ponderosa Pine Energy.[79] The Court rejected Ponderosa's arguments that Tenaska had waived any objection of partiality when it went forward with the arbitration despite the arbitrator's partial disclosures. The Court reasoned that 'Tenaska did not waive its evident partiality challenge by proceeding to arbitration based upon information it was unaware of at the time. To hold otherwise 'would put a premium on concealment' in a context where the Supreme Court has long required required full disclosure.'[80] The Court did not address whether the partial disclosures were

77 Id., at 21.

78 Id., at 24.

79 437 S.W.3d 518, 529 (Tex. 2014).

80 Id., at 528.

sufficient to put Tenaska 'on notice of a potential conflict,' especially 'in light of [a] duty to reasonably investigate,' as the Fifth Circuit court found a few years earlier in a case of partial disclosure.[81]

Section 1782: taking of evidence in aid of arbitrations abroad

Pursuant to 28 USC Section 1782(a), US federal district courts may order discovery for use in a proceeding in a 'foreign or international tribunal'.[82] Four statutory requirements must be met for a court to grant discovery under Section 1782: (1) the request must be made 'by a foreign or international tribunal,' or by 'any interested person'; (2) the request must seek evidence, whether it be 'testimony or statement' of a person or the production 'of a document or other thing'; (3) the evidence must be 'for use in a proceeding in a foreign or international tribunal'; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.[83]

Older cases suggested that a foreign arbitration did not fall within the statute's purview, which was thought only to include foreign judicial proceedings.[84] Those cases were thrown into doubt, however, with the US Supreme Court's decision in *Intel Corp v. Advanced Micro Devices, Inc*, which found that the Directorate General for Competition of the European Commission was a 'tribunal' under Section 1782.[85] In so finding, the Court noted that in 1964 Congress had replaced the term 'judicial proceeding' in the statute with 'tribunal'. The Court quoted approvingly from the related legislative history, which 'explain[ed] that Congress introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts', but extends also to 'administrative and quasi-judicial proceedings'.'[86] The Court also relied on a definition of tribunal that included arbitral tribunals.[87]

Since *Intel*, courts have split on whether Section 1782 permits discovery in aid of a foreign arbitration. The key issue has been whether a foreign arbitration constitutes a 'proceeding in a foreign or international tribunal' for purposes of the statute.

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81 *Dealer Computer Servs v. Michael Motor Co*, 485 F. App'x 724, 728 (5th Cir. 2012).

82 'The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.' 28 USC Section 1782(a).

83 *In re Consorcio Ecuatoriano de Telecomunicacions SA*, 747 F.3d 1262, 1269 (11th Cir. 2014).

84 See *Nat'l Broad Co v. Bear Stearns & Co*, 165 F.3d 184, 188 (2d Cir. 1999) ('the fact that the term 'foreign or international tribunals' is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that that the term, as used in [Section] 1782 does include both.'). See also *In re Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999); *In re Medway Power Ltd*, 985 F. Supp. 402 (S.D.N.Y. 1997).

85 *Intel Corp v. Advanced Micro Devices, Inc*, 542 US 241 (2004). See also Born, *International Commercial Arbitration 1933–37* (2009), discussing the use of Section 1782 under US law to obtain evidence for use in international arbitration.

86 *Intel* (footnote 12, *supra*) at 248-49.

87 Id., at 258.

This past year courts have continued to differ on this question. In *In re Owl Shipping*, the federal district court in New Jersey considered an *ex parte* petition for subpoenas seeking depositions and production of documents from a the US-based affiliate of the petitioner's UK-based counterparty in a contract dispute under the auspices of the London Maritime Arbitrators Association (LMAA).[88] The petitioners argued that the US-based respondents held financial information relevant to showing bad faith by the UK-based affiliate in entering the contract. The court found that the statutory factors were satisfied, including that an LMAA arbitration qualifies as a foreign tribunal.

District courts in California and Colorado came to the opposite conclusion, holding that an ICC arbitration seated in Miami between two Panamanian parties, heard by foreign arbitrators and governed by Panamanian law, does not qualify as a 'foreign or international tribunal'. The arbitration arose from a dispute between a construction company (GUPC) and the Panama Canal Authority over a contract to expand the Panama Canal. The California district court initially granted GUPC's *ex parte* Section 1782 application seeking written discovery from a third party advising the Authority on environmental issues related to the expansion project.[89] However, when the subpoena was challenged through a motion to quash, the court reversed its prior order because it concluded that 'private arbitrations established by contract are categorically excluded from the meaning of 'tribunal' under Section 1782.'[90] Faced with a similar GUPC subpoena, this time directed at a different third party, the Colorado district court also concluded that Section 1782 was not intended to cover private contractual arbitrations. The court expressed doubts, but did not decide, whether an arbitration seated in Miami was 'international' for purposes of the statute.[91]

The only other case to raise whether Section 1782 could apply to an international arbitration expressly declined to decide the question, but 'note[d] that it ha[d] reservations' whether foreign arbitration was covered by the statute.[92] In that case, a Section 1782 petition was filed seeking discovery connected to a breach of contract dispute being adjudicated in a Cyprus court as well as before a London Court of International Arbitration tribunal. The district court noted the circuit split over whether

88 2014 WL 5320192 (D.N.J. 17 October 2014).

89 *In re Grupo Unidos por el Canal, SA*, 2014 WL 5456520 (N.D. Cal. 27 October 2014).

90 *In re Grupo Unidos por el Canal, SA*, 2015 WL 1815251 (N.D. Cal. 21 April 2015) at 11.

91 *In re Grupo Unidos por el Canal*, SA, 2015 WL 1810135 (D. Colo. 17 April 2015) at 8–9. This decision did hint at the possibility that an investment treaty arbitration could be a foreign tribunal for purposes of the statute. The court found that a distinction could be made 'between purely private arbitrations established by private contract and matters being adjudicated by state-sponsored adjudicatory bodies' and cited approvingly a case finding that UNCITRAL arbitration pursuant to a bilateral investment treaty was a 'foreign or international' tribunal because it had been authorised by sovereigns. Id., at 8 (see *In re Oxus Gold PLC*, 2007 WL 1037387, (D.N.J. 2 April 2007) at 5.

92 *In re Pinchuk*, 2014 WL 348110 (D. Wyo. 31 January 2014) at 2.

private arbitration counts as a 'foreign or international tribunal' but did not decide the issue because the Cyprus court qualified as such.[93]

ii Class action waivers in arbitration clauses in the financial industry

As noted above, Supreme Court precedent permits companies to insulate themselves from class actions by including class action waivers in arbitration clauses in contracts of adhesion. The Court has found that state law prohibiting such waivers is pre-empted by the FAA. This past year, however, two regulators having authority under federal law, the Financianl Industry Regulatory Authority (FINRA) and the Consumer Financial Protection Bureau (CFPB), have taken action, in the case of FINRA, or appear poised to take action, in the case of the CFPB, against class action waivers in arbitration clauses in financial industry consumer contracts. Such action by regulators is not *per se* contrary to Supreme Court precedent since federal law, unlike state law, is not pre-empted by the FAA. Instead, courts must evaluate whether the FAA or the competing federal law most directly governs the issue.

FINRA

In an April 2014 decision, the FINRA board of governors (the board) found that Charles Schwab & Company violated the FINRA Code of Arbitration Procedure for Customer Disputes (the Customer Code) when it amended its customer account agreement to include a class action waiver. The board found that the Customer Code provides 'that class actions may not proceed in FINRA's arbitration forum' and 'preserve[s] investor access to the courts to bring or participate in judicial class actions.'[94] Thus, Schwab had violated the Customer Code. The board then considered whether the Customer Code's rules concerning class action waivers were voided by the FAA's directive that agreements to arbitrate should be 'enforced according to their terms.'

As an initial matter, the board noted that the FAA 'governs virtually every arbitration agreement arising out of a commercial transaction, and Schwab's customer transactions are no exception'. However, the board also noted that, pursuant to Supreme Court precedent, 'the mandate of the FAA is not absolute' and can be superseded by 'contrary congressional command'.[95] In this case, the board found that FINRA rules promulgated under the Securities and Exchange Act override the FAA.[96]

CFPB

In March 2015 the CFPB produced an exhaustive report of more than 700 pages, mandated by section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer

93 Id.

94 Decision, *Dep't of Enforcement v. Charles Schwab & Co*, No. 2011029760201 (FINRA Apr. 24, 2014) at 11, 15.

95 Id., at 18.

96 Id., at 21–22.

Protection Act of 2010, on the use and effects of arbitration clauses in credit card agreements and other consumer financial products or services agreements.[97]

Among its data sources, the CFPB counted 1,847 AAA arbitration cases concerning consumer disputes in six financial product markets: credit cards, checking accounts/debits cards, payday loans, prepaid cards, private student loans, and auto loans. The CFPB also reviewed individual claims and class action claims filed in federal courts, as well as individual claims filed in small claims courts, concerning these same types of disputes.

The data published in the report suggest that consumers who sought relief through arbitration obtained less favourable outcomes than did consumers who were able to file a court claim. In addition, according to the CFPB press release accompanying the report, arbitration clauses hurt consumers by limiting the availability of class actions. The CFBP noted, 'very few consumers individually seek relief through arbitration and the courts, while millions of consumers obtain relief each year through class action settlements.'[98]

Because of the report's findings and the tenor of the CFBP press release, commentators expect the CFBP to issue rules limiting the use of arbitration clauses in consumer financial product agreements. Section 1028(b) of the Dodd-Frank Act specifically authorises the CFBP, if justified by the findings of the report, to 'prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the [CFBP] finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers'.

The actions of the CFPB and FINRA may be beneficial for international commercial arbitration. It could prove preferable for regulators to address squarely the perceived problem of arbitration clauses in consumer contracts of adhesion rather than see the issue controlled by new legislation with language that could inadvertently affect international commercial arbitration.

iii Investment treaty cases involving the US or US nationals

This year several notable investment treaty decisions have involved the United States or United States nationals. Some of these decisions are not publicly available and have only been reported generally in the press.[99] Of the published decisions, the most noteworthy

97 CFPB, 'Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)' (March 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

98 CFBP press release, 'Consumer Financial Protection Bureau Finds That Arbitration Agreements Limit Relief for Consumers,' http://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf.

99 The ICSID case *H&H v. Republic of Egypt* was reportedly dismissed at the jurisdictional stage because the fork-in-the-road provision was triggered; Hassan Awadi was reportedly awarded US$7.7 million for sunk costs in his ICSID case against Romania, but saw most of

have been a pair of decisions involving North American Free Trade Agreement (NAFTA) claims and a pair involving Venezuelan expropriations.

NAFTA cases

The United States achieved a second consecutive NAFTA victory against Canadian pharmaceutical company Apotex.[100] For the first time in a NAFTA arbitration, a tribunal applied the doctrine of *res judicata*. The tribunal applied this doctrine to find that it did not have jurisdictions over claims related to Apotex abbreviated new drug applications, which the first tribunal had found did not qualify as 'investments'.[101]

For the remaining claims, the merits concerned an import alert issued by the US Food and Drug Administration (FDA) stating that two Apotex factories did not meet quality control standards, effectively preventing products from these facilities from entering the United States. One of Apotex's principal claims was that the FDA has treated its factories more harshly than factories of either a US domestic or a different foreign investor, thereby violating the 'national treatment' and 'most favoured nation' standards respectively.[102] To succeed on this claim, Apotex needed to show that domestic or other foreign factories in 'like circumstances' had been treated differently. But the tribunal found that factories in the US were subject to a different legal regime and thus were not in 'like circumstances' to Apotex's Canadian facilities.[103] The tribunal found that the two other foreign factories were in like circumstances to Apotex but had not been subject to import alerts. However, the tribunal accepted testimony from the FDA that, for a variety of reasons, it had used its discretion appropriately in determining not to issue import alerts for these other foreign factories.[104]

The tribunal in *Clayton v. Canada* took a less favourable view of government action.[105] In that case, the investor's plans to operate a quarry and marine terminal in Nova Scotia were frustrated by a joint review panel formed under local environmental legislation to provide a recommendation on whether the project should be approved. The tribunal found that the Canadian government had specifically encouraged the investor's project, fostering the investor's reasonable expectations, but that contrary to those expectations the joint review panel did not provide the project with procedural or substantive fairness, failing adequately to consider the extensive expert evidence submitted by the investor.[106] Rather than following Canadian law and carrying out

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his claim dismissed; and Ohio-based bottle-maker Owens Illinois was reportedly awarded US$347 million plus US$84 million in interest in an ICSID claim against Venezuela.

100 *Apotex Holdings Inc v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014).

101 Id., at paragraph 7.61.

102 Id., at paragraphs 8.1–8.5.

103 Id., at paragraphs 8.40–8.58.

104 Id., at paragraphs 8.59–8.78.

105 *Clayton v. Government of Canada*, NAFTA, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015).

106 Id., at paragraphs 590–592.

a thorough analysis of the project's environmental mitigation plans, the joint review panel created and applied its own standard, based on 'community core values,' that was essentially impossible for the investor to meet.[107] The Canadian and Nova Scotia governments incurred NAFTA liability when they failed to fix the problematic aspects of the joint review panel's recommendation to halt the project.[108] Damages in this case will be determined in the next phase.

The tribunal recognised that this case might be perceived as implicating public concerns about investor–state treaty provisions becoming 'obstacles to the maintenance and implementation of high standards of protection of environmental integrity.'[109] In light of these concerns, the tribunal made the following observations: (1) the NAFTA preamble recognises the importance of environmental law, and NAFTA 'places no inherent limits on how demanding the standards of a domestic statute may be': (2) environmental regulations are of great relevance to many types of investment and do not make investor protections inapplicable; and (3) the tribunal took no issue with the laws of Canada or Nova Scotia, and indeed found that the issue was that the joint review panel 'fundamental[ly] depart[ed] from the methodology required by Canadian and Nova Scotia law.'[110]

Venezuela cases

While the United States and Venezuela have not entered into a bilateral investment treaty (BIT), subsidiaries of US companies have been able to bring claims against Venezuela based on their foreign nationalities. Recent decisions in such cases have explored whether the lack of immediate compensation renders an expropriation unlawful.

In *Tidewater v. Republic of Venezuela*, subsidiaries of US company Tidewater Inc. brought claims against Venezuela under the Barbados–Venezuela BIT.[111] The Tidewater companies owned a Venezuelan subsidiary, SEMERCA, that supplied oil-related marine transportation services in the Gulf of Mexico. They claimed that Venezuela expropriated SEMERCA and its assets through a series of legislative and government actions in 2009 (culminating in the actual seizure of SEMERCA).

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107 Id.

108 Id., at paragraph 593. A vigorous dissent in this case argued that the actions of the review board had not violated Canadian law. Moreover, it expressed concern that a 'chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection.' *Clayton v. Government of Canada*, NAFTA, UNCITRAL, Dissenting Opinion of Professor Donald McRae (17 March 2015), at paragraph 51.

109 Clayton v. Government of Canada, NAFTA, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), at paragraph 595.

110 Id., at paragraphs 596–600.

111 *Tidewater Investment SRL v. Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (13 March 2015).

There was little dispute in the case that an expropriation had taken place. Rather, the main differences between the parties concerned whether the expropriation had been lawful and how to calculate damages. The claimants argued that if the expropriation was unlawful, they were entitled to additional compensation 'in the event that the property that is the subject of the illicit taking has increased in value since the State measures.'[112] Venezuela, on the other hand, argued that compensation would remain the same regardless of whether the expropriation was lawful or not.[113]

Under the treaty, an expropriation was lawful if it was for a public purpose, non-discriminatory, and resulted in prompt, adequate and effective compensation.[114] The parties did not dispute the first requirement, and the tribunal did not find discrimination. Thus, the only question was whether the lack of compensation rendered the expropriation unlawful and if that determination had an impact on compensation.

The tribunal first recalled the *Chorzów Factory* decision of the Permanent Court of International Justice (PCIJ),[115] in which the PCIJ made clear that while lawful expropriations lead to compensation 'limited to the value of the undertaking at the moment of dispossession',[116] in an unlawful expropriation the compensation must be sufficient to 'wipe out all the consequence of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[117]

Importantly, however, the tribunal, relying on *Chorzów Factory* as well as more recent case law and commentary, found that the lack of compensation was not sufficient to render an expropriation unlawful. The tribunal distinguished between 'an expropriation illegal *per se* and expropriation only wanting compensation to be considered legal.'[118] The tribunal concluded that an 'expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation'.[119] In this case, Venezuela had only offered book value for the expropriated assets, and the claimants did not believe this offer reflected 'fair market value' as mandated by the treaty. This was the disagreement to be resolved by the tribunal, and, according to the tribunal, the existence of this disagreement did not render the expropriation unlawful.

As a result, the tribunal calculated compensation as of the date of the expropriation. Of note, the tribunal used a hefty discount rate of 26 per cent that included a significant country premium risk of 14.75 per cent, which the tribunal determined was 'a reasonable, indeed conservative, premium'.[120] The award totalled US$46.4 million plus

112 Id., at paragraph125.

113 Id.

114 Id., at paragraph 122.

115 *Factory at Chorzów* (*Germ v. Pol*), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

116 Id., at paragraph 131.

117 Id., at paragraph 132.

118 Id., at paragraph 136.

119 Id., at paragraph 141.

120 Id., at paragraph 190.

pre-award interest, significantly less than the US$234 million that had been sought by the claimants.[121]

The issue of lawful versus unlawful expropriation also figured prominently in a case brought by Exxon Mobil subsidiaries against Venezuela and resolved this past year.[122] As in Tidewater's case, Venezuela through a series of legislation and executive actions expropriated the claimants' oil projects. Similarly, the claimants alleged that lack of compensation rendered the expropriation unlawful. The tribunal rejected this argument, finding that Venezuela had met with the claimants and made proposals during those negotiations, even if they were inadequate according to the claimants.[123] The total award was for US$1.6 billion, using a discount rate of 18 per cent.[124] However, to avoid double recovery, the claimants have an offset duty to reimburse the Venezuelan state oil company, PDVSA, for payment claimants received pursuant to a prior arbitral award based on the same events.[125]

The *Tidewater* and *ExxonMobil* decisions finding that lack of payment does not render an arbitration unlawful are seemingly contrary to a 2013 liability decision in *ConnocoPhillips Petrozuata BV v. Republic of Venezuela*, which involved facts similar to those of *ExxonMobil* (i.e., similar oil projects were expropriated based on similar government actions).[126] In *ConnocoPhillips*, the tribunal found that the expropriation was unlawful because Venezuela refused to negotiate in good faith the 'market value' of the expropriated assets. In part, the tribunal based its conclusion on Venezuela's failure to offer anything other than book value as compensation.[127] This is the same position that Venezuela took in the *Tidewater* case, and the tribunal in that case concluded the expropriation was lawful.

The *ConnocoPhillips* tribunal found, consistent with its finding of an unlawful expropriation, that the expropriated assets must be valued as of the date of the award. The damages award has not yet issued. The delay has been caused partly by Venezuela's attempts to disqualify the majority of the tribunal. Venezuela's party-appointed arbitrator has recently submitted an opinion dissenting from the majority's finding that Venezuela

121 Id., at paragraphs 202 and 215.

122 *Venezuelan Holdings BV v. Republic of Venezuela*, ICSID Case No. ARB/0727, Award (9 October 2014). The case was brought pursuant to the Dutch-Venezuela BIT. A 2006 Mobil corporate restructuring created a Dutch holding company for the express purpose of obtaining BIT protection. In its prior decision on jurisdiction, the tribunal did not find such strategic restructuring to be impermissible, but ruled that only disputes arising after the restructuring were covered by the BIT. Id., at paragraphs 185–190.

123 Id., at paragraph 305.

124 Id., at paragraphs 367 and 404.

125 Id., at paragraph 404.

126 *ConnocoPhillips Petrozuata BV v. Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013).

127 Id., at paragraphs 400–401.

negotiated in bad faith and that the valuation of the assets should be made as of the date of the award.[128]

III OUTLOOK AND CONCLUSIONS

The past year has been a busy time for the development of arbitration law in the United States, although no high-profile Supreme Court decision in the field was handed down. As a large country with a high volume of international arbitration, the US generates case law that sometimes shows differences among the various circuit courts in one aspect or another of the law. The continuing development of that law nevertheless takes place in the presence of a highly favourable judicial attitude towards international arbitration.

128 *ConnocoPhillips Petrozauta BV v. Republic of Venezuela*, ICSID Case No. ARB/07/30, Dissenting Opinion of Georges Abi-Sab (19 February 2015).

Appendix 1

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