The International Arbitration Review

Seventh Edition

Editor
James H Carter

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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 by an 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 2016

Chapter 46

UNITED STATES

James H Carter and Claudio Salas[1]

I INTRODUCTION

Courts in the US in the past year have continued to shape the law on 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 American jurisprudence. A new US Supreme Court decision has approved agreements waiving the right to a class arbitration, while regulatory activity proposes to bar such agreements in certain types of transactions. Such issues arise most often in the context of consumer, employee or franchisee cases that have few international aspects. However, 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.

US law on other arbitration issues continues to be strongly supportive of the arbitral process, with new cases of interest addressing the subjects of arbitrability, enforcement, recognition and confirmation of foreign arbitral awards, non-statutory grounds for *vacatur* of awards and arbitrator disqualification, as well as taking of evidence in aid of arbitration abroad.

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,

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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*, 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 (New York Convention) and the Inter-American Convention on International Commercial Arbitration (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.

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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*, 473 US 614 (1985).

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').

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

In the seminal 2011 case *AT&T Mobility LLC v. Concepcion*, the Court found that state laws that invalidate arbitration clauses containing class action waivers are pre-empted, even in contracts of adhesion, by the FAA's directive that arbitration clauses be enforced as written.[11] This past year, the US Supreme Court continued to develop its anti-class arbitration jurisprudence in *DIRECTV, Inc v. Imburgia*. The California Court of Appeal had sought to distinguish the holding in *Concepcion* by treating the issue of class action waiver as one of contract interpretation rather than pre-emption under the FAA. The arbitration agreement at issue stated that the agreement was unenforceable if the 'law of your state' made the waiver of class arbitration unenforceable. The California court interpreted the phrase 'the law of your state' to mean California state law absent pre-emption by the FAA. Because California law in the absence of pre-emption made class waivers unenforceable, the California court found the agreement unenforceable.

The Supreme Court assumed the California court's interpretation of the contract was correct as a matter of state law (because a state's highest court, not the Supreme Court, is the final arbiter of state law). But the Supreme Court held that it still had to determine whether this contract interpretation was permissible under the FAA, which only permits arbitration agreements to be revoked 'upon such grounds as exist at law or in equity for the revocation of any contract'.[12] The Court found that the California court's interpretation of the phrase 'the law of your state' would not apply in any context but arbitration, and therefore singled out

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).

11 See *AT&T Mobility LLC v. Concepcion*, 563 US 333 (2011).

12 *DIRECTV, Inc v. Imburgia*, 136 S Ct 463, 465-66 (2015).

arbitration for improper adverse treatment.[13] The Supreme Court therefore reversed, finding that the California Court's interpretation of the phrase 'law of your state' was not a ground for the revocation of any contract as required by the FAA.[14]

Following its decision in *DIRECTV*, the Court vacated and remanded the decision of the West Virginia Supreme Court of Appeals in *Schumacher Homes v. Spencer*, in which the state court had found that a provision assigning to an arbitrator 'all issues regarding the arbitrability of the dispute' was ambiguous due to the fact that 'arbitrability' is an ambiguous term that can encompass multiple distinct concepts.[15] The West Virginia Court found that the provision did not 'clearly and unmistakably' delegate the issue of whether the arbitration agreement was unconscionable to the arbitrator and accepted the lower court's finding that the agreement was in fact unconscionable.[16] With its instruction that the case be reconsidered in light of *DIRECTV*, the Supreme Court appeared to indicate that the West Virginia Court's interpretation of the term 'arbitrability', even if correct under state law, is pre-empted by the FAA.

Class arbitration

This past year, issues concerning class arbitration were also the subject of several court decisions in New York and California.

In New York, plaintiffs in *Ross v. Citigroup* attacked class action waivers in credit card agreements, not by challenging the class waivers directly – a likely losing proposition given Supreme Court precedent – but by alleging that the banks had colluded in violation of federal law to include class action waivers in these agreements. The Southern District of New York Court found that, while the evidence showed that the banks had engaged in 'conscious parallel action in the adoption and maintenance of arbitration clauses', the banks' 'final decision to adopt class-action-barring clauses was something the [banks] hashed out individually and internally'.[17] Therefore, the plaintiffs failed to prove there had been collusion. The Second Circuit deferred to the District Court's factual findings and upheld the decision.[18]

In *Jock v. Sterling Jewellers*, the Southern District of New York Court assessed an arbitrator's authority to certify a class action arbitration while letting certain members of the class opt out for purposes of declaratory and injunctive relief. The Court found that the agreement at issue made the availability of class arbitration a question for the arbitrator, and therefore the arbitrator had not exceeded her authority in certifying a class. However, the federal statute under which class certification was made does not permit class members to opt out, and therefore the arbitrator 'exceeded her authority in permitting class members to opt out of injunctive and declaratory relief that necessarily affects all class members'.[19]

California state courts in the past frequently have been resistant to the US Supreme Court's class arbitration jurisprudence, but one recent case shows a different trend. In *Sanchez*

13 Ibid. at 469.

14 Ibid. at 471.

15 *Schumacher Homes of Circleville, Inc v. Spencer*, 235 W Va 335, 346 (2015).

16 Ibid. at 340.

17 *Ross v. Citigroup, Inc*, 630 Fed Appx 79, 82 (2d Cir 2015).

18 Ibid. at 83.

19 *Jock v. Sterling Jewellers, Inc*, 2015 WL 7076011 at *2 (SDNY 15 November 2015).

v. Valencia Holdings, in the context of an arbitration clause in a car dealership contract, the California Supreme Court addressed whether California's consumer protection statute's prohibition of class waivers was pre-empted by the FAA.

While California's consumer protection statute made the waiver of the right to class action 'contrary to public policy' and unenforceable, the Court found it was pre-empted:

> *Concepcion held that a state rule can be pre-empted not only when it facially discriminates against arbitration but also when it disfavors arbitration as applied. Concepcion further held that a state rule invalidating class waivers interferes with arbitration's fundamental attributes of speed and efficiency, and thus disfavors arbitration as a practical matter.*[20]

In another California pre-emption case, the Ninth Circuit was required to decide whether, in light of *Concepcion*, the FAA pre-empts California's rule barring waiver of representative claims under the State's Private Attorneys General Act (PAGA). The PAGA 'authorizes an employee to bring an action on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees'.[21] In *Sakkab v. Luxottica Retail North America*, the plaintiff brought a putative class action against his former employer alleging various labour law violations. Pursuant to an arbitration clause in the employee contract, the District Court dismissed the lawsuit and compelled arbitration. The arbitration clause prohibited any 'class based lawsuit, court case or arbitration'. The plaintiff argued that while he could be required to arbitrate some of the claims, he could not be denied a forum to bring his PAGA claims.

The issue before the Ninth Circuit was whether state law prohibiting the waiver of PAGA claims is pre-empted by the FAA. The Ninth Circuit found that it was not, distinguishing *Concepcion* by explaining that parties could arbitrate PAGA claims without interfering with the essential attributes of arbitration:

> *Because a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations. [...] PAGA arbitration therefore does not require the formal procedures of class arbitration.*[22]

Arbitrability

Under a long line of cases, including *Granite Rock Co v. International Brotherhood of Teamsters*,[23] whether parties have agreed to arbitrate a particular dispute ('arbitrability' under US law) is

20 *Sanchez v. Valencia Holding Co, LLC*, 61 Cal 4th 899, 924 (2015).

21 *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal 4th 348, 360 (2014) (citing Cal LabCode Section 2698 et seq.).

22 *Sakkab v. Luxottica Retail North America, Inc*, 803 F3d 425, 436.

23 561 US 287 (2010). For a thorough overview of competence, including arbitrability, under US law see Born, *International Commercial Arbitration* (Second Edition, 2014), pp. 1124–206.

typically an issue for judicial determination. However, this determination can be delegated to the arbitrator if the parties 'clearly and unmistakably' agree to do so.[24] The delegation of arbitrability typically is expressed in the arbitration agreement itself.[25]

Two federal appellate cases this past year considered whether the availability of class arbitration is a question for the arbitrator to decide when the arbitration agreement generally delegates questions of arbitrability to the arbitrator, and they came to differing conclusions. In *Robinson v. J&K Admin Management Services, Inc*, the arbitration agreement subjected to arbitration 'claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim'.[26] The Fifth Circuit found that broad language delegating arbitrability issues to the arbitrator, such as the clause in this case, delegates the question of whether class arbitration is permissible to the arbitrator.[27]

In *Chesapeake Appalachia, LLC v. Scout Petroleum*, the Third Circuit considered 'whether an arbitration agreement referring to the AAA rules clearly and unmistakably delegated the question of class arbitrability to the arbitrators'.[28] Rule 7 of the AAA Commercial Arbitration Rules provides in part that the 'arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with respect to the […] validity of the

24 See *Brennan v. Opus Bank*, 796 F3d 1125 (9th Cir 2015) (citing *AT&T Techs v. Communs Workers of Am,* 475 US 643, 649 (1986) and *First Options of Chicago, Inc v. Kaplan*, 514 US 938, 944 (1995)). However, when a clause delegates the question of arbitrability to the arbitrator, but is contradicted by another provision in the contract, courts have declined to enforce the clause. See, for example, *Vargas v. Deliver Outsourcing, LLC*, 2016 WL 946112 at *7 (ND Cal 14 March 2016) ('Here, despite clear language delegating arbitrability to the arbitrator, the issue of delegation is made ambiguous by the language of the arbitration provision that permits modification of the Owner/Operator Agreement should 'a court of law or equity' hold any provision of the Agreement unenforceable'.).

25 However, as recent cases have confirmed, parties can expand the original agreement by submitting issues to arbitration. Once such issues have been litigated in arbitration, a party cannot then claim the issues were not arbitrable under the agreement. *See OMG, LP v. Heritage Auctions, Inc*, 612 Fed Appx 207, 211–212 (5th Cir 2015) ('If OMG did not believe the arbitrator had the authority to decide those issues it should have refused to arbitrate, leaving a court to decide whether the arbitrator could decide the contract formation issue'); *Hamilton Park Health Care Center Ltd v. 1199 SEIU United Healthcare Workers East*, 2016 WL 1274463 at *9 (3d Cir 1 April 2016) .

26 *Robinson v. J&K Admin Management Servs, Inc*, 2016 WL 1077102 at *1 (5th Cir 17 March 2016).

27 Ibid. at **4–5.

28 *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F3d 746, 754 (3d Cir 2016). In *Opalinski v. Robert Half International*, the Third Circuit previously had determined 'that the availability of class arbitration is a 'question of arbitrability' for a court to decide unless the parties unmistakably provide otherwise'. *Opalinski v. Robert Half Int'l, Inc*, 761 F3d 326, 335-36 (3d Cir 2014). The Fourth Circuit came to a similar conclusion in *Dell Webb Communities, Inc v. Carlson* when overturning the lower court's finding that the availability of class arbitration was a procedural issue for the arbitrator to decide. Instead, the Fourth Circuit found that 'because of the fundamental differences between bilateral and class arbitration –

arbitration agreement'.[29] The Third Circuit observed that while this language 'expressly grants the arbitrator the power to rule on objections concerning the arbitrability of any claim', it does 'not mention either class arbitration or the question of class arbitrability'.[30] The Third Circuit reasoned that, because of the significant difference between bilateral arbitration and class arbitration, the question of whether the latter is possible must be expressly delegated to the arbitrators; otherwise, as a 'substantive gateway question', it is for the courts to decide.[31] Thus, under the Third Circuit's ruling, whether class arbitration is available is unlike all other arbitrability questions, which can be delegated to the arbitrator with a general delegation provision. This is an issue on which the Supreme Court may eventually rule.

In another decision involving the AAA arbitration rules, *Brennan v. Opus Bank*,[32] the Ninth Circuit addressed the question of whether a court or an arbitrator should decide a claim that an arbitration agreement is unconscionable when the parties delegated the issue of arbitrability to the arbitrators. The court held that the arbitration agreement's incorporation of the AAA arbitration rules 'constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability'.[33] This is the conclusion reached by 'virtually every circuit to have considered the issue'.[34]

The Court then applied the 'separability doctrine', under which 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

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which change the nature of arbitration altogether – we hold that whether parties agree to class arbitration is a gateway question for the court'. *Dell Webb Communities, Inc v. Carlson*, 2016 WL 1178829 at *1 (4th Cir 2016).

29 *Chesapeake Appalachia*, 809 F3d at 749 (quoting Active Rules, American Arbitration Association).

30 Ibid. at 762.

31 Ibid.

32 *Brennan*, 796 F3d at 1130 (9th Cir 2015).

33 Ibid.

34 Ibid. (citing *Oracle America, Inc v. Myriad Group AG*, 724 F3d 1069, 1074 (9th Cir 2013). In *Brennan*, the Ninth Circuit limited its holding to the facts of the case, which involved sophisticated parties, but did not foreclose the possibility 'that this rule could also apply to unsophisticated parties'. *Brennan*, 796 F3d at 1130. Indeed, the Ninth Circuit noted that 'the vast majority of the circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' intent to do so without explicitly limiting that holding to sophisticated parties or commercial contracts'. Ibid. at 1130–31. Nevertheless, subsequent decisions in the Ninth Circuit district courts have refused to apply the rule to cases where one of the parties to the arbitration agreement is unsophisticated. *See Meadows, et al v. Dickey's Barbecue Restaurants Inc*, 2015 WL 7015396 (ND Cal 12 November 2015); *Vargas v. Deliver Outsourcing, LLC*, 2016 WL 946112 (ND Cal 14 March 2016); *Galilea, LLC v. AGCS Marine Insurance Co*, 2016 WL 1328920 at *3 (D Montana 5 April 2016) ('An individual not well-versed in arbitration law is unlikely to be aware that AAA rules provide for the arbitrator to determine his own jurisdiction. As any doubts are resolved against delegation, this Court will determine which claims come within the scope of the arbitration clause'.).

the challenged contract.[35] The Ninth Circuit determined that it did not need to reach the question of whether the provision delegating arbitrability was unconscionable because the claimant had only challenged the arbitration agreement as a whole and had failed to challenge the delegation of arbitrability specifically. Following the Supreme Court's decision in *Rent-A-Center, West, Inc v. Jackson*,[36] the Court ruled that when the delegation of arbitrability is a provision within a broader arbitration agreement, the delegation must be challenged itself as unconscionable in order to divest the arbitrator of jurisdiction to consider the unconscionability of the arbitration agreement as a whole.[37]

Enforcement and recognition of foreign arbitral awards

The enforcement of foreign arbitral awards continued to be an important topic in US arbitration jurisprudence this past year, particularly in the realm of investment arbitration.

The most interesting of these cases, because of its broader international implications, was *Micula v. Government of Romania*. The Southern District of New York Court enforced an ICSID award against Romania over the objections of both Romania and the European Union. Romania contended that under the Foreign Sovereign Immunities Act (FSIA) an ICSID Award can be recognised only through a plenary action after service on a foreign state. The Court rejected this argument, explaining that ICSID's enabling statute in the US, while prescribing how awards should be enforced, 'created a statutory gap' concerning the method for recognising awards 'that is appropriately filled by looking to the law of the forum state – in this case, New York'.[38] The Court then observed that an *ex parte* procedure was appropriate for recognising an award under New York's civil practice law.

The Court next addressed the arguments of the Commission of the European Union (Commission) that the award should not be recognised because payment under the award had been deemed illegal by the Commission. The Commission has declared investment treaties between states in the European Union invalid because they are said to provide unfair subsidies to certain investors. As part of the steps it took to join the European Union, Romania voided its bilateral treaty with Sweden in 2004. This treaty had entered into force in 1998 and had a sunset clause, which permitted Micula to invoke it when bringing an arbitration against Romania in 2005.

The Commission argued that the District Court should not recognise the award because of the doctrines of international comity, act of state and foreign sovereign compulsion. Under international comity, a sovereign chooses to recognise within its territory the legislative, executive or judicial acts of another nation. The Commission argued that the District Court should defer to the forthcoming judgment of the EU Court of Justice regarding the award.

35 See *Prima Paint Corp v. Flood & Conklin Mfg Co*, 388 US 395 (1967). Thus, for example, 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 Collections, LLC v. Costco Wholesale Corp*, 698 F3d 58 (2d Cir 2012).

36 561 US 63, 72 (2015) ('[U]nless Jackson challenged the delegation provision specifically, we must treat it as valid').

37 *Brennan*, 796 F3d at 1132–33.

38 *Micula v. Government of Romania*, 2015 WL 4643180 at *3 (SDNY 4 August 2015) (citing *Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela*, 87 F Supp 3d 573 (SDNY 2015)).

The District Court rejected this argument, finding that the proceedings in the EU Court of Justice were not sufficiently parallel to the case before it. The District Court reasoned that the narrow issue in front of it was the recognition of the award, while the proceedings in the EU Court of Justice addressed the substance and enforcement of the award. The District Court also stated that:

> *As a party to the ICSID Convention, the United States has a compelling interest in fulfilling its obligation under Article 54 to recognise and enforce ICSID awards regardless of the actions of another state. To do otherwise would undermine the ICSID Convention's expansive spirit on which many American investors rely when they seek to confirm awards in the national courts of the Convention's other member states.*[39]

Under the act of state doctrine, 'the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid'.[40] The District Court noted that the recognition of the award did not invalidate any act of a sovereign; nor was any such act relevant. Moreover, the act of state doctrine can only be used as a defence by a party to the proceedings, and the Commission was not a party.

The foreign sovereign compulsion doctrine reduces the hardship of parties caught between the conflicting demands of more than one nation by allowing a party to raise the demands of another nation as a defence. The District Court was sceptical that a sovereign could raise this defence, but in any case it found that 'any 'compulsion' by the EU is offset by Romania's voluntary submission to the ICSID process through its treaty with Sweden, and that 'whether Romania must pay is not at issue in this proceeding and should be raised instead during proceedings to enforce the Award'.[41]

The case has been appealed to the Second Circuit, and the Commission has filed an *amicus* brief setting forth the arguments it made to the District Court. This is a case that bears watching in view of the likelihood of future attempts to enforce an award deemed illegal by the Commission.

In two cases, *Chevron v. Ecuador* and *Gold Reserve Inc v. Venezuela*, courts in the District Court for the District of Columbia addressed the enforcement of a treaty award under the FSIA and New York Convention. The FSIA generally shields foreign states from jurisdiction subject to certain exceptions, including actions to confirm an arbitration award against a foreign government where the arbitration agreement or confirmation of the award is governed by a treaty in force in the United States.

In *Chevron*, Ecuador argued that the Court lacked jurisdiction under the FSIA because Ecuador had never agreed to arbitrate Chevron's claims. Ecuador contended that lawsuits in the Ecuadorian courts were not 'investments' covered by its bilateral investment treaty (BIT) with the US. The Court disagreed and found that the FSIA granted it jurisdiction because the 'BIT includes a standing offer to all potential US investors to arbitrate investment disputes,

39 *Micula*, 2015 WL 4643180 at *7.

40 Ibid. at *8 (quoting *WS Kirkpatrick & Co v. Envtl Tectonics Corp, Int'l*, 493 US 400, 409 (1990).

41 *Micula*, 2015 WL 4643180 at *8.

which Chevron accepted in the manner required by the treaty'.[42] The Court found that whether the lawsuits were covered by the BIT was properly considered under the New York Convention.

Article V(1)(c) of the New York Convention provides that an award need not be enforced if it 'deals with a difference not contemplated by or not falling within the terms of the submission to arbitration'. The Court observed that this question had been decided by the arbitral tribunal[43] and that the BIT permits disputes to be resolved under the UNCITRAL rules, which give the tribunal the authority 'to rule on objections that it has no jurisdiction'.[44] This ended the Court's inquiry: 'There was no need for the District Court to independently determine that Chevron's suits satisfied the BIT's parameters once it had concluded that the parties had delegated this task to the arbitrator.'[45]

In *Gold Reserve*, the District Court considered Venezuela's similar argument under Article V(1)(c) that the claims were not covered by the treaty because Gold Reserve did not meet the definition of investor. The Court noted that the parties, by agreeing to the ICSID Additional Facility Arbitration Rules, had delegated arbitrability questions to the tribunal.[46] Therefore, the District Court analysed 'Venezuela's arguments in light of the substantial deference owed to the tribunal's own findings concerning its scope to act'[47] and concluded that 'the Tribunal properly determined that Gold Reserve Inc was an investor and that it could thus hear the claim'.[48]

The Court in *Gold Reserve* also considered whether to exercise its discretion under the New York Convention to stay enforcement of the award in light of ongoing set aside proceedings at the seat of arbitration. The court found that it should not stay the award in light of 'the general objectives of arbitration – the expeditious resolution of disputes and the avoidance of protracted and expensive litigation', and the fact that the set aside proceedings in the Paris Court of Appeal were not likely to be resolved soon.[49]

The District Court for the District of Columbia also addressed issues under the FSIA and the New York Convention in *BCB Holdings Ltd v. Government of Belize*, in which the government of Belize (GOB) presented a long list of defences against enforcement of an award. The GOB argued, among other things, that the New York Convention did not apply because the underlying dispute was not commercial in nature and because the GOB was not a signatory to the Convention, and that there was no subject matter or personal jurisdiction under the FSIA. The District Court rejected all of the GOB's arguments, including the New York Convention and FSIA arguments.

First, the Court acknowledged that the New York Convention applies only to the enforcement of 'commercial arbitration agreements', but noted that the 'commercial

42 *Chevron Corp v. Republic of Ecuador*, 795 F3d 200, 206 (DC Cir 2015).

43 Ibid. at 207.

44 Ibid.

45 Ibid. at 208.

46 *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, 2015 WL 7428532 at *5 (DDC 20 November 2015).

47 Ibid.

48 Ibid. at *7.

49 Ibid. at *16.

relationship requirement […] is construed broadly'.[50] The Court then found that the underlying agreement was commercial in nature because it resolved an underlying dispute regarding the purchase and sale of stock. The Court also found that for purposes of the Convention the place of the award, not the citizenship of the parties, is determinative. Because the award was made in the United Kingdom, and both the US and the UK are parties to the Convention, the US is required to recognise and enforce the award even if Belize is not a signatory.

Second, the Court found that the FSIA's arbitration exception to sovereign immunity applied. The GOB had argued that the exception did not apply because Belize's former Prime Minister did not have authority to enter into the underlying agreement. The Court rejected the contention that it needed to 'conduct a *de novo* review of the arbitrability of the dispute to find subject-matter jurisdiction' under the FSIA.[51] The Court also rejected the argument that the GOB did not have sufficient contacts with New York to give the court personal jurisdiction. The Court noted that governments are not 'persons' for purpose of the US Constitution's due process clause, and therefore only proper service under the FSIA was required for the Court to have personal jurisdiction.[52]

There were two notable decisions on the enforcement and recognition of arbitral awards that did not involve sovereigns. In *AVR Communications, Ltd v. American Hearing Systems, Inc*,[53] the Eighth Circuit found that *res judicata* precluded US courts from entertaining a defence against enforcement when a court at the seat of arbitration (Israel) already had considered and dismissed the same defence.

In *Crescendo Maritime Co v. Bank of Communications Co Ltd*,[54] the Southern District of New York Court considered whether it could enforce an arbitration award against assets that had nothing to do with the underlying dispute. Typically, 'the presence of a defendant's property within a court's jurisdiction is insufficient to allow the court to hear claims against the defendant unrelated to that property'.[55] However, the Supreme Court has found that this rule does not apply 'where a petitioner seeks to recover on a judgment already adjudicated in a forum with personal jurisdiction over the respondent'.[56] While the Supreme Court was referring to sister state judgments, the District Court found that the same reasoning applies to arbitration awards.[57]

Confirmation of arbitral awards and attorneys' fees

When considering whether to award a party attorneys' fees incurred in the confirmation of an arbitral award, US courts consistently have applied the 'American Rule': each litigant pays his or her own attorneys' fees, win or lose, unless a statute or contract provides otherwise.[58] Three cases this past year illustrate this rule.

50 *BCB Holdings Ltd v. Gov't of Belize*, 110 F Supp. 3d 233, 242 (DDC 2015).

51 Ibid. at 244.

52 Ibid.

53 793 F3d 847 (8th Cir 2015).

54 2016 WL 750351 (SDNY 22 February 2016).

55 Ibid. at *5 (citing *Shaffer v. Heitner*, 433 US 186, 210–12 (1977).

56 Ibid.

57 Ibid.

58 *Hardt v. Reliance Standard Life Ins Co*, 560 US 242, 252–253 (2010).

In *Crossville Medical Oncology, PC v. Glenwood Systems, LLC*, the Sixth Circuit affirmed the District Court's finding that 'it did not have jurisdiction to award attorneys' fees for post-arbitration litigation'.[59] The Court observed that 'the FAA does not provide for an award of attorney's fees in a confirmation action' and rejected the argument that the arbitration agreement provided for the prevailing party to be awarded costs and attorneys' fees not only in connection with the arbitration but also in connection with post-arbitration proceedings.[60]

In *Zurich American Insurance Co v. Team Tankers AS*, the party that prevailed in the arbitration also argued that it was entitled to costs incurred in seeking to confirm the award. It claimed that the parties had agreed to be bound by an arbitral award and that resisting confirmation of the award was a breach of the agreement justifying the award of costs. The Second Circuit rejected this argument for two reasons. First, it found that the parties' agreement incorporated the FAA with respect to the confirmation of an arbitral award, and the FAA permits a party to make arguments that the award should be vacated, modified or corrected.[61] Second, if the agreement did prohibit a party from resisting the confirmation of an award, it would be unenforceable because it 'would authorize a federal court to confirm the arbitral award while effectively preventing that court from ensuring that the award complied with the FAA', and '[p]arties seeking to enforce arbitration awards through federal court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliances with [section 10(a) of the FAA] and the manifest disregard standard'.[62]

The third case, *Navig8 Chemicals Asia Pte, Ltd. v. Crest Energy Partners, LP*, illustrates one circumstance where courts will grant attorneys' fees and litigation costs. 28 USC Section 1927 authorises a court to assess 'costs, expenses, and attorneys' fees' against any attorney who 'so multiplies proceedings in any case unreasonably and vexatiously'.[63] Courts have interpreted this to mean that the losing party must have engaged in 'conduct constituting or akin to bad faith' to warrant an award of attorneys' fees.[64] In *Navig8 Chemicals*, the Southern District of New York Court found that an award of costs and fees was justified when the losing party 'without justification, failed to abide by the arbitral award issued in Navig8's favour or to respond to Navig8's petition to confirm the award'.[65]

The situation is different with respect to attorneys' fees incurred in the arbitration itself. In *NS United Kaiun Kaisha, Ltd v. Cogent Fibre Inc*, the Southern District of New York Court found that under Second Circuit precedent, 'when an arbitration agreement provide[s] for 'any and all controversies' to be submitted to arbitration, and contain[s] no express limitation with respect to attorney's fees, the arbitrators [are] empowered to consider applications for

59 *Crossville Med Oncology, PC v. Glenwood Sys, LLC*, 610 Fed Appx 464, 467 (6th Cir 2015).

60 Ibid. at 470.

61 *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F3d 584, 590 (2d Cir 2016).

62 Ibid. at 591.

63 Ibid.

64 Ibid.

65 *Navig8 Chemicals Asia Pte, Ltd v. Crest Energy Partners, LP*, 2015 WL 7566866 at *1 (SDNY 24 November 2015).

such fees'.[66] Moreover, to the extent New York law requires arbitration agreements to provide expressly for attorneys' fees, the 'FAA takes precedence over state law and allows arbitrators to award attorney's fees when an agreement's arbitration clause is sufficiently broad'.[67] This is because 'a choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including the right to arbitrate claims for attorneys' fees'.[68]

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 intent is 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 few 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'.[69] 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.[70] 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, 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.*[71]

While this criticism of manifest disregard is itself merely dicta, the Court was clearly sceptical of a merits-based review that threatened to turn arbitration into a mere 'prelude' to a 'more

66 *NS United Kaiun Kaisha, Ltd v. Cogent Fibre Inc*, 2015 WL 4393060 at *8 (SDNY 14 July 2015) (citing *PaineWebber Inc v. Bybyk*, 81 F3d 1193, 1202 (2d Cir 1996)).

67 *NS United*, 2015 WL 4393060, at *8.

68 Ibid.

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

70 See, e.g., *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp*, 548 F3d 85, 91-93 (2d Cir 2008), rev'd, 559 US 662, 672–73 (2010).

71 *Hall St Assocs, LLC v. Mattel, Inc*, 552 US 576, 585 (2008) (citations omitted). See also Born (footnote 23), discussing *Hall Street* and 'manifest disregard' under the FAA.

cumbersome and time-consuming judicial review process'.[72] It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived *Hall Street*.[73]

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.[74] 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.[75] Both Circuits have found that a high standard must be met for the doctrine to apply.[76] The Fourth Circuit has ruled that the manifest disregard doctrine is still viable,[77] 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)'.[78] 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

72 *Hall Street*, 552 US at 588 (citation omitted).

73 *Stolt-Nielsen S.A.*, 559 US at 672, n3.

74 See *Citigroup Global Mkts Inc v. Bacon*, 562 F3d 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 F3d 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 recognised 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 F3d 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 (ED Mo 21 January 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').

75 See *Stolt-Nielsen SA*, 548 F3d 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 West Assocs*, 553 F3d 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).

76 See *Biller v. Toyota Motor Corp*, 668 F3d 655 (9th Cir 2012); *AZ Holding, LLC v. Frederick*, 473 Fed Appx 776 (9th Cir 2012); *Goldman Sachs Execution & Clearing, LP v. Official Unsecured Creditors' Comm of Bayou Group, LLC*, 491 F App'x 201 (2d Cir 2012).

77 *Wachovia Sec, LLC v. Brand*, 671 F3d 472 (4th Cir 2012).

78 *Johnson Controls, Inc v. Edman Controls, Inc*, 712 F3d 1021, 1026 (7th Cir 2013) (internal quotation marks omitted).

[their] own brand of industrial justice', by engaging in manifest disregard of the law'.[79] Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence since *Hall Street*.[80] For example, the First Circuit acknowledged that there is a circuit split on whether manifest disregard is a viable doctrine and also noted that, while it had previously stated in *dicta* that the doctrine is no longer available, it had not squarely addressed the issue.[81]

Even where recognised, manifest disregard is difficult to assert with any success. The Second Circuit, for example, recently reaffirmed that an 'award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached'.[82] In *Singh v. Raymond James Financial Services, Inc*, the Second Circuit noted that an arbitrator's alleged misconstruction of a contract was not a manifest disregard of the law, disregard of the evidence is not a proper ground for vacating an award and an arbitrator does not need to explain the rationale of an award.[83]

In *United Brotherhood of Carpenters and Joiners of America v. Tappan Zee Constructors, LLC,* the Second Circuit confirmed that an award will not be vacated for lack of authority or manifest disregard if 'the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority' rather than applying his 'own brand of justice

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

> *A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal 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.)*

80 For the First Circuit, compare *Ramos-Santiago v. United Parcel Servs*, 524 F3d 120, 124 n3 (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 F3d 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 n7 (DDC 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 F3d 1363 (DC 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).

81 *Raymond James Fin Servs, Inc v. Fenyk*, 780 F3d 59, 64-65 (1st Cir 2015).

82 *Singh v. Raymond James Fin Servs*, 2015 WL 8242118 at *1 (2d Cir 2015) (quoting *Wallace v. Buttar*, 378 F3d 182 (2d Cir 2004). See also *NS United*, 2015 WL 439360 at *5 (when an arbitral panel 'relies on multiple arbitration awards as well as on the Restatement of Contracts, […] it provides more than a 'barely colorable' justification for its decision').

83 *Singh*, 2015 WL 8242118, at *2.

in contradiction of the clearly expressed language of the contract'.[84] In that case, the parties' agreement provided that the arbitrator was to issue a short form of the award followed by a written opinion. The arbitrator changed the substance of his initial award in the written opinion. The disappointed party sought to enforce the favourable first award and vacate the unfavourable opinion, treating it as a second award. The Second Circuit, however, held that it had to defer to the arbitrator's interpretation that the agreement permitted him to change the substance of the award in the written opinion even though the 'result was perhaps a bit unusual'.[85]

The Seventh Circuit recently rejected a claim for manifest disregard in *Renard v. Ameriprise Financial Services*. The arbitrator in that case did not apply Wisconsin law requiring 'written notice 90 days prior to the termination of a franchise agreement and 60 days to cure the deficiency at the root of the termination'.[86] The winning party argued that the arbitrators had been right not to apply the Wisconsin law because it was pre-empted by federal securities law. Without determining whether this pre-emption theory was correct, the Seventh Circuit noted that '[i]t is not manifest disregard of a law to consider that law and its relation to other laws and then conclude that the law does not apply in the specific factual situation at issue'.[87]

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 or arbitrators displayed 'evident partiality'. Two cases this past year illustrate the importance of a party raising concerns of 'evident partiality' during the course of the arbitration rather than after the issuance of an award. In *Goldman Sachs & Co v. Athena Venture Partners, LP*, Athena waited until after the arbitrator issued an award against it to investigate the arbitrator's earlier disclosure that he 'had been charged with the unauthorized practice of law in connection with an appearance in a New Jersey municipal court'.[88] Athena's investigation revealed the arbitrator's pattern of unauthorised practice of law and other legal troubles, including allegations of fraud due to the issuance of bad cheques. Nevertheless,

84 *United Bhd Carpenters & Joiners of Am v. Tappan Zee Constructors, LLC,* 804 F3d 270, 276 (2d Cir 2015) (quoting *United Paperworkers Int'l Union v. Misco, Inc*, 484 US 29, 38 (1987); *Local 1199, Drug, Hosp & Health Care Emps Union, RWDSU, AFL–CIO v. Brooks Drug Co*, 956 F2d 22, 26 (2d Cir 1992)). See also *Nat'l Football League Mgmt Council v. Nat'l Football League, Players Assoc*, 2016 WL 1619883 at *8 and 16 (2d Cir 2016) (finding that the decisions of the commissioner of the National Football League, as arbitrator, 'were plausibly grounded in the parties' agreement' and that he was 'arguably construing or applying the contract').

85 *United Brotherhood*, 804 F3d at 276.

86 *Renard v. Ameriprise Fin Servs, Inc*, 778 F3d 563, 568 (7th Cir 2015).

87 Ibid.

88 *Goldman, Sachs & Co, et al v. Athena Venture Partners, LP*, 803 F3d 144, 146 (3d Cir 2015).

the Third Circuit, in a case of 'first impression', ruled consistently with other circuit courts that a party cannot raise a claim of 'evident partiality' after the issuance of an award if it had 'constructive knowledge' of the facts underlying the claim during the arbitration.[89] The 'constructive knowledge' rule, as applied by the Third Circuit, means that 'if a party could have reasonably discovered that any type of malfeasance, ranging from conflicts-of-interest to non-disclosures such as those at issue here, was afoot during the hearings, it should be precluded from challenging the subsequent award on those grounds'.[90]

By contrast, in *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, a cable television sports network (MASN) made its concerns about a potential conflict of interest known several times during the arbitration. The dispute pitted MASN against a baseball club, the Washington Nationals, in a dispute regarding annual rights fees MASN was to pay the Nationals for the broadcasting of its games. The case was heard by three arbitrators who were executives of other baseball clubs in an arbitration administered by Major League Baseball (MLB). MASN raised conflict-of-interest concerns about the Nationals' counsel, which also represented MLB, other baseball clubs and the arbitrators themselves with respect to a variety of other matters. The Court applied the Second Circuit standard of evident impartiality – 'a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration' – and found that the facts were 'unquestionably inconsistent with impartiality', and more importantly that none of MLB, the Nationals, the arbitrators or the Nationals' counsel took any steps to address MASN's concerns.[91] The Court concluded that 'this complete inaction objectively demonstrates an utter lack of concern for fairness of the proceeding that is 'so inconsistent with basic principles of justice' that the award must be vacated'.[92]

Instead of challenging an arbitrator's impartiality, another tactic that parties unhappy with an arbitral award have taken is to sue the arbitrator and the arbitral institution that administered the arbitration. Such attempts are virtually always unsuccessful and can lead to sanctions. In *Landmark Ventures, Inc v. Cohen*, the Court found that a suit against the arbitrator and the ICC was foreclosed both by the ICC rules, which state that the arbitrators and the ICC 'shall not be liable to any person for any act or omission in connection with the arbitration', and by 'well-established Federal common law' that provides 'arbitrators and sponsoring arbitration organizations […] absolute immunity for conduct in connection with an arbitration'.[93] In view of the clarity of the ICC rules and applicable case law, the Court awarded sanctions against the party that brought the suit under the Federal Rules of Civil Procedure, which authorise sanctions against attorneys who put forth frivolous legal positions.

Selection of arbitrators

Section 5 of the FAA authorises courts to intervene in the selection of arbitrators only in limited circumstances: when the arbitration agreement does not provide a method for selecting arbitrators, a party fails to abide by the method provided or if there is a lapse in the

89 Ibid. at 147–48.

90 Ibid. at 149.

91 *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689 at *8 (NY Sup 4 November 2015).

92 Ibid. at 12 (quoting *Pitta v. Hotel Ass'n of NY City, Inc*, 806 F3d 419, 423–24 (2d Cir 1986).

93 *Landmark Ventures, Inc v. Cohen*, 2014 WL 6784397 at *3 (SDNY 26 November 2014) (citing Article 40 of the ICC Rules, 1 January 2012, Kimmelman Decl Ex F).

naming of an arbitrator or arbitrators. The Second Circuit has held that a 'lapse' under Section 5 is 'a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitration process', including a 'deadlock' in the naming of an arbitrator'.[94] In *Odyssey Reinsurance Company v. Certain Underwriters at Lloyd's London Syndicate 53*, the Second Circuit applied this definition to find that the District Court should appoint an arbitration umpire when, as in the case involved, 'the record demonstrates that the parties sharply dispute the meaning of various terms in the parties' arbitration agreements, resulting in a deadlock over whether certain candidates for umpire are qualified'.[95]

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'.[96] Four statutory requirements must be met for a court to grant discovery under Section 1782:

a the request must be made 'by a foreign or international tribunal' or by 'any interested person';

b the request must seek evidence, whether it be 'testimony or statement' of a person or the production 'of a document or other thing';

c the evidence must be 'for use in a proceeding in a foreign or international tribunal'; and

d 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.[97]

Older cases suggested that a foreign arbitration did not fall within the statute's purview, which was thought only to include foreign judicial proceedings.[98] 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.[99] In so finding, the Court noted that in

94 *Odyssey Reinsurance Company v. Certain Underwriters at Lloyd's London Syndicate 53*, 615 Fed Appx 22, 22–23 (2d Cir 2015) (quoting *In re Salomon Inc S'holders' Derivative Litig*, 68 F3d 554, 560 (2d Cir 1995).

95 *Odyssey Reinsurance*, 615 Fed Appx at 23.

96 '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).

97 *Consorcio Ecuatoriano de Telecomunicacions SA v. JAS Forwarding (USA), Inc*, 747 F3d 1262, 1269 (11th Cir 2014).

98 See *NBC v. Bear Stearns & Co*, 165 F3d 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 F3d 880 (5th Cir 1999); *In re Medway Power Ltd*, 985 F Supp 402 (SDNY 1997).

99 *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.

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".[100] The Court also relied on a definition of tribunal that included arbitral tribunals.[101]

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. Some precedents distinguish investment treaty arbitration, which arguably falls within the statute because the fora are state-sponsored, from 'purely private' commercial arbitration, which arguably does not fall within the statute.[102]

This past year the Southern District of New York issued two 1782 decisions that, while not addressing this particular issue, have a bearing on international arbitration. In *Jiangsu Steamship Co, Ltd v. Success Superior Ltd*, the District Court found that the statutory requirements of 1782 were not met when Jiangsu sought discovery from US banks concerning the assets of Success Superior Limited (SSL). While Jiangsu said it intended to pursue an arbitration against SSL in London, it admitted that its discovery request was not meant to assist in the potential arbitration but rather to aid in pre or post-judgment attachment actions to secure assets for satisfaction of a potential arbitral award. The Court denied Jiangsu's discovery request for two reasons. First, under Supreme Court precedent, the foreign proceeding that 1782 discovery is meant to assist must be 'reasonably contemplated', and the District Court found that attachment proceedings in unspecified foreign jurisdictions related to an arbitral award that had not yet been made, in an arbitration that had not even commenced, were not 'reasonably contemplated'.[103] Second, under Second Circuit precedent, the foreign proceeding must be 'adjudicative' in nature, and attachment proceedings are not 'adjudicative' because the merits of the dispute are adjudicated in separate, prior proceedings (in this case the possible London arbitration).[104]

In *In re Republic of Kazakhstan*, the Republic of Kazakhstan (ROK) sought to set aside an arbitral award finding that it had illegally seized a liquefied petroleum gas plant and awarded investors (the Stati Group) US$199 million. ROK argued in the set aside action in Swedish courts that the plant had been substantially overvalued by the arbitral tribunal. In the New York District Court, ROK sought Section 1782 discovery from a law firm that represented some of the Stati Group investors in other proceedings in which, ROK asserted on information and belief, the investors had provided a lower valuation for the plant. The Stati Group intervened in the District Court proceedings and argued that ROK's discovery request should be denied because, among other reasons, a sovereign is not an 'interested person' within the meaning of Section 1782. The Stati Group relied on case law, holding that

100 *Intel*, 542 US at 248–49.

101 Ibid. at 258.

102 For a recent discussion of this issue, see *In re Gov't of Lao People's Democratic Republic*, 2016 US Dist Lexis 47998 (D North Mariana I 7 April 2016).

103 *Jiangsu SS Co. v. Success Superior Ltd*, 2015 US Dist LEXIS 18388 at **9–10 (SDNY 5 January 2015) (citing *Intel*, 542 US at 258–59).

104 *Jiangsu*, 2015 US Dist LEXIS 18388 at **15–17 (citing *Euromepa, SA v. R. Esmerian, Inc*, 154 F3d 24 (2d Cir 1998).

a sovereign is not a 'person' 'who can be ordered to produce documents pursuant to section 1782'. The District Court, however, did not find this precedent dispositive with respect to the question of 'whether a sovereign can use section 1782 to obtain discovery'.[105] The District Court went on to find that Section 1782 did permit a sovereign to obtain discovery for the following reasons: the predecessor statutes permitted discovery by foreign states; one of the underlying aims of the statute was 'to encourage reciprocity by foreign governments', and denying foreign states use of the statute was not conducive to this goal; and the Stati Group on several occasions had used Section 1782 to seek discovery for use against ROK and, again to promote reciprocity, it was necessary to avoid 'an asymmetrical result prejudicial to foreign governments'.[106]

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, even in contracts of adhesion. The Court has found that state law and contract interpretations prohibiting such waivers are pre-empted by the FAA. This past year, however, the US Consumer Financial Protection Bureau (CFPB) proposed rules eliminating class action waivers in arbitration clauses in consumer contracts for financial services and products. 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.

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 Protection Act of 2010, on the use and effects of arbitration clauses in credit card agreements and other consumer financial products or services agreements.[107]

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 statement accompanying the report, arbitration clauses hurt consumers by limiting the availability of class actions. The CFBP noted that 'very few consumers individually seek relief through arbitration and the courts, while millions of consumers obtain relief each year through class action settlements'.[108]

In October 2015, the CFPB published for comment proposed rules regarding arbitration in financial products and services consumer contracts. The rules include making arbitration agreements inapplicable to cases filed in court on behalf of a class; giving consumers the option of litigating class actions in court or in arbitration; and collecting and publishing arbitration claims and awards on the CFPB website. The CFPB has considered but rejected rules prohibiting arbitration agreements altogether or mandating certain safeguards

105 *In re Republic of Kazakhstan*, 110 FSupp3d 512, 515 (SDNY 2015).

106 Ibid. at 516.

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

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

for fundamental fairness for individual disputes.[109] The CFPB noted that 'the proposal to require submission of claims and awards which the Bureau would consider publishing may be sufficient to protect consumers from the risk of harm that may occur without mandated safeguards'.[110]

The actions of the CFPB are limited to certain types of consumer contracts, and by their precision they may prove 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 for new legislation to attempt to deal with them in language that could inadvertently affect international commercial arbitration.

iii Investment treaty cases involving the US or US nationals

This year the two most notable investment treaty-related decisions involving the United States or United States nationals concerned attempts by Ecuador to annul awards against it.

In *Occidental Petroleum Corporation v. Republic of Ecuador*,[111] an ICSID annulment committee reduced a US$1.76 billion award by US$700 million (a 40 per cent reduction). At the heart of the case was Occidental's transfer to a third party of 40 per cent of its rights under a concession agreement with Ecuador for the production of oil. The transfer of rights was made without Ecuador's authorisation, which was required by the concession agreement. As a result of the unauthorised transfer, Ecuador terminated the agreement. The tribunal found termination to be a disproportionate response to Occidental's breach and therefore a violation of Ecuador's obligation to treat Occidental fairly and equitably and its obligation not to expropriate Occidental's investment. The award of US$1.76 billion represented 75 per cent of the investment, as the tribunal reduced Occidental's damages by 25 per cent in light of the unauthorised transfer. However, the tribunal found that Occidental could claim for 100 per cent of the investment even though it had purported to transfer 40 per cent because the transfer was null and void both under Ecuadorean law (which governed the concession agreement) and New York law (which governed the transfer agreement).

Echoing the arguments of the dissent, the annulment committee disagreed. It found that Occidental was only the owner of 60 per cent of the investment because both parties to the transfer agreement had fulfilled their obligations and no court, whether in Ecuador or New York, had voided the transfer. Therefore, according to the annulment committee, 40 per cent of the investment was owned by an investor that was not protected by the BIT between the United States and Ecuador. The committee found that by 'compensating a protected investor for an investment which is beneficially owned by a non-protected investor, the Tribunal has illicitly expanded the scope of its jurisdiction and has acted with an excess of powers'.[112]

109 CFPB, 'Small Business Advisory Review Panel for Potential Rulemaking on Arbitration Agreements: Outline of Proposals Under Consideration and Alternatives Considered' at 4–5 (7 October 2015), files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf.

110 Ibid. at 21.

111 *Occidental Petroleum Corp v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award (2 November 2015).

112 Ibid. at Paragraph 266.

Ecuador was less successful in the District Court of The Hague, where it sought to annul several awards rendered against it in the *Chevron v. Ecuador* arbitration. These included an award on jurisdiction and several interim measures awards. Two awards on interim measures stayed execution in the much-publicised *Lago Agrio* litigation, in which Ecuadorean plaintiffs sued Chevron for environmental damages and in which Chevron alleges that the litigation has been tainted by corruption and illegal procedures. A third award on interim measures found that Ecuador had violated the first two awards and ordered it to show cause why it should not compensate Chevron for any harm caused by this violation.

In rejecting Ecuador's action to annul these awards, the Dutch court saw no issue with interim measures directed at Ecuador's judiciary since the 'judiciary is a body that is an inextricable part of the State' and the 'state may be held liable for the conduct of that body'.[113] The Dutch court rejected Ecuador's arguments that it would have to impinge on the judiciary's independence to make it comply with the awarded interim measures: '[T]he Tribunal's order cannot be interpreted to mean that (the executive or legislative bodies of) Ecuador should breach the separation of powers at the expense of the judiciary. The order merely refers to the obligations ensuing from international law that also apply to the judiciary'.[114] Ecuador has appealed the ruling to The Hague Court of Appeals.

These two cases raise again the question of whether courts in arbitration-friendly jurisdictions may be more deferential to investment treaty awards than ICSID annulment committees.

Finally, the EU has made significant proposals for changes in investment arbitration treaties, to which the US government has not yet officially responded. Many observers view the changes, which would create a standing investment court to replace traditional arbitration tribunals, as potentially adverse to the development of international investment protection.

III OUTLOOK AND CONCLUSIONS

The past year has been a busy time for the development of arbitration law in the United States. 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.

113 District Court of The Hague, Judgment of 20 January 2016, C/09/477457/HA ZA 14–1291, at Paragraph 4.27.

114 Ibid.

Appendix 1

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James H Carter is senior counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP where he is active as counsel and as an arbitrator. He is a graduate of Yale College and Yale Law School, attended Cambridge University as a Fulbright Scholar and served as law clerk to the Hon Robert P Anderson of the US Court of Appeals for the Second Circuit. Mr Carter is chair of the board of directors of the New York International Arbitration Center and a former chair of the board of directors of the American Arbitration Association. From 2004 2006, he was president of the American Society of International Law. He is also a former chair of the American Bar Association Section of International Law and Practice, and served as chair of its committee on international commercial arbitration. Mr Carter has chaired both the international affairs council and the committee on international law of the Association of the Bar of the City of New York, as well as the international law committee of the New York State Bar Association. He has served as a member of the London Court of International Arbitration and vice president of its North American council, and is a member of the Court of Arbitration for Sport.

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